IN THE COURT OF APPEAL OF BELIZE AD 2016

CIVIL APPEAL NO 47 OF 2011

SANJEEV WAGHMARE Appellant

v

EL CAMPEON COMPANY LIMITED Respondent

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BEFORE

The Hon Mr Justice (now Sir) Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Douglas Mendes	Justice of Appeal

H E Elrington SC for the appellant.
F D Lumor SC for the respondent.

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24 October 2013 and 14 January 2016.

SIR MANUEL SOSA P

Introduction

[1] This appeal turns mainly, to my mind, on two exceedingly simple questions, the one relating to the presence or absence of a particular term in a tenancy agreement and the other to the ownership of certain goods said to have sustained damage whilst on the premises the subject of such agreement. It is an appeal from the judgment of Hafiz Bertram J, as she then was ("the judge"), in two consolidated claims. The first of these claims was commenced against the respondent, El Campeón Company Limited ("El Campeón") by the appellant, Sanjeev Waghmare ("Mr Waghmare"), on or about 4 January 2010, that is to say less than 24 hours after having been served, at the instance of El Campeón, with a document headed "Notice Before Forfeiture of Lease". The second was set in motion by El Campeón

against Mr Waghmare and a third party later that same month. The lingering and troubling question after the dust has settled is: would a little less rush on the part of Mr Waghmare in filing claim have resulted in avoidance of the serious problems which later confronted him in the litigation?

The background

i) Undisputed facts

[2] It is as well first to set out the undisputed facts in this, at times, needlessly confused and confusing litigation.

[3] The El Campeón Building ("the building") is a large ferro-concrete structure standing in the Commercial Free Zone in Santa Elena, Corozal District and was at all material times owned by El Campeón. (Isaac Lumor - to be referred to as such, for the avoidance of confusion, in the remainder of this judgment - has been the Managing Director of El Campeón since 2006.) Up to August 2007, the building comprised a ground floor, at the top of which there were several pillars, but no walls, supporting a laminated zinc roof. The ground floor was at all material times divided into four main units, each of which, in turn, consisted of two sub-units.

[4] One of these units, called Store No 4, became the subject of an agreement in writing which created a 13-month tenancy commencing on 1 March 2007 and ending on 31 March 2008 ("the 2007 agreement"). The 2007 agreement was signed by one Angel Rubén Velásquez Velásquez and Mr Waghmare, who were respectively described in it as "landlord" and "tenant". Below each person's signature, there appeared an impression of a common seal: in the case of the former's signature, the impression of the common seal of El Campeón, and, in the case of the latter's signature, the impression of the common seal of Malti Imports Ltd. The 2007 agreement provided for the payment of a monthly rent of US$3,750.00.

[5] Store No 4, which measures 156 feet by 25 feet, then began to be used for the purposes of a dry goods store.

[6] On a date during the course of this tenancy, viz 20 August 2007 Hurricane Dean ("the hurricane") struck Belize, causing great devastation in the Corozal District, in general, and in the Commercial Free Zone, in particular. The laminated zinc roof of the building suffered extensive damage, the result of which was the leakage of rain water through the ceiling of Store No 4 during the rainy season. The leakage problem persisted even after the carrying out of repairs by El Campeón in the course of that same year.

[7] The unit in question, leaking "roof" and all, nevertheless became the subject of a longer tenancy upon the expiration of the first on 31 March 2008. This was a 37-month tenancy commencing on 1 April 2008 and ending on 31 April 2011. The new agreement ("the 2008 agreement"), though naming Mr Velásquez as landlord, was signed by Isaac Lumor and Mr Waghmare, with an impression of the common seal of Malti Imports Ltd once again appearing below the signature of the latter. There was, however, no impression of any common seal appearing below the signature of Isaac Lumor. And the 2008 agreement provided for the payment of a monthly rent of US$7,500.00, that is to say twice the rent required to be paid under the first agreement.

[8] At some point after the hurricane had damaged the roof of the building, El Campeón, in its continuing determination to stop the leaking, resorted to the extreme measure of covering the "roof" (ie the floor of the unwalled first floor and the ceiling of the ground floor) of the ground floor with a layer of concrete. This measure, to put it as uncontroversially as possible, proved ineffectual.

[9] A limited liability company known as Vidhi Enterprise Ltd was incorporated on 11 June 2008.

[10] A sub-unit of the building, forming no part of Store No 4 and called "Store No 2B", subsequently became the subject of an agreement in writing which created a 13-month tenancy commencing on 1 March 2009 and ending on 31 March 2010 ("the 2009 agreement"). The 2009 agreement, though naming Mr Velásquez as landlord, was signed by Isaac Lumor and Mr Waghmare but, this time, no impression of a common seal appeared below either signature. The monthly rent fixed in the 2009 agreement was in the amount of US$4,000.00.

[11] Store No 2B then began to be used for the purposes of a dry goods store.

[12] The business conducted in Store No 4 received adverse publicity arising from the leakage problem in a Mexican newspaper published on Tuesday 29 September 2009.

[13] Isaac Lumor at some, if not all, material times collected rent in respect of both Store No 4 and Store No 2B. He began experiencing difficulty in so doing in 2009. As a result, El Campeón issued on 3 July 2009 documents headed "Notice Before Forfeiture" and requiring payment of arrears of rent which it proceeded to serve on Mr Waghmare on the next day. In respect of Store No 4, the last rent Isaac Lumor was able to collect was a sum of US$7,500.00, the payment of which was evidenced by a receipt dated 1 August 2009.

[14] On that same date, Mr Waghmare divested himself of all 100 shares thitherto held by him in Malti Imports Ltd, transferring them to a Mr Bhosle.

[15] El Campeón resorted to the service of Notice of Forfeiture again early in 2010. The new notice was issued on 4 January 2010 and served, as already indicated at para [1] above, on Mr Waghmare on the same day. It concerned unpaid rents for Store No 4 in respect of the five-month period from September 2009 to January 2010.

[16] The roof of Store No 4 was finally properly repaired by El Campeón and stopped leaking in April 2010.

[17] Although, as already stated above, no further rent was paid in respect of Store No 4 after that whose payment was evidenced by receipt dated 1 August 2009, the business then being conducted in it continued so to be conducted up to 30 April 2011, when possession of Store No 4 was finally given up..

[18] At no time during the continuance of the two tenancies in respect of Store No 4 already referred to or thereafter (up to the end of the hearing in the court below), for that matter, was there a warehouse on the first floor of the building.

ii) The claims and pleadings below

[19] In an amazing display of sheer speed, Mr Waghmare, having been served with El Campeón's Notice of Forfeiture on 4 January, managed to issue proceedings against the latter in the court below before the sun could set for the day. Claim No 2 of 2010 ("Claim No 2") was commenced, in his name only, by the filing of a Fixed Date Claim Form. (As will be recalled, he had ceased to be a shareholder in Malti Imports Ltd on 1 August 2009.) The nature of the claim was succinctly stated in the claim form as follows:

> "Claim for breach of terms and conditions in the Lease by the Landlord, causing loss and damage to Claimant." [emphasis added]

[20] A Statement of Claim also dated 4 January 2010 was filed as well. Principally, this pleading averred that Mr Waghmare himself had, as "the Lessee", suffered losses as a result of the leaking of the "roof of the store", the consequence of a breach of the terms of the lease, and the non-provision of a warehouse (by completion of "the upper flat of the building") "which the lease had provided for". This was an unambiguous averment of the breach of a term of the lease under which El Campeón had assumed the obligation to construct a warehouse on the first floor of the building. The losses in question took the form, according to the Statement of Claim, of a diminution in profits of his own business, allegedly

conducted by him in Store No 4, and damage done to his goods, the stock-in-trade of that business.

[21] El Campeón initially responded in kind. It filed a Fixed Date Claim Form of its own, dated 19 January 2010, and thus commenced Claim No 32 of 2010 ("Claim No 32"), to which it made not only Mr Waghmare but also Malti Imports Ltd a defendant. (The name of the second defendant was misstated as Malti Import Ltd.) This claim form was later amended pursuant to an order made below on 18 February 2010. By its Statement of Claim of the same date but filed on 24 February 2010, El Campeón essentially invoked the terms of the "lease" (as El Campeón called the 2008 agreement) relating to forfeiture, pleaded non-payment of rent demanded by way of the Notice of Forfeiture dated 4 January 2010 and claimed, *inter alia*, possession of Store No 4, arrears of rent, standing at US$26,000.00 on the date of the filing of the claim form, and mesne profits from such date.

[22] Mr Waghmare and Malti Imports Ltd filed a Defence in Claim No 32 which they subsequently amended, filing the Amended Defence on 19 March 2010. Both defendants averred that Malti Imports Ltd was the sole "lessee" (their term), Mr Waghmare unabashedly joining in this averment notwithstanding his existing contrary plea in Claim No 2, already adverted to at para [20], above. The defendants went on to plead release from their obligation to pay rent as a result of breaches on the part of El Campeón of (a) a term of the lease ("by agreement of the parties and by implication of law") requiring that Store No 4 should be fit for its purpose and (b) a term that "there was an upper flat which [Malti Imports Ltd] would use only as a warehouse". (It was further pleaded that the latter term was breached when "[El Campeón] failed to construct the 2nd flat as promised".) The relevant paragraph of the Amended Defence, viz that numbered 5 teems with ambiguity and equivocation, pinpointing Malti Imports Ltd, ie the "2nd Defendant", as the "lessee" but, as if (in retrospect) by a series of Freudian slips, repeatedly referring to it as being of the masculine gender, when Mr Waghmare was the sole defendant of that gender.

[23] El Campeón, having, as already noted above, initially responded by filing its own claim form, next further responded by filing, on 21 April 2010, its Defence in Claim No 2. (A note appearing immediately above the heading "Defence" indicates that both claims had been consolidated by an order made by the judge on 18 February 2010.) El Campeón averred, as it had previously done in its Statement of Claim, that it had let Store No 4 to both Mr Waghmare and Malti Imports Ltd.

[24] El Campeón quoted Clause 2 of "the Lease", ie the 2008 agreement and averred in regard to its closing sentence, viz:

> "The Tenant shall occupy and use the ground floor of the premises as a store and the upper floor as a whole warehouse only …"

that –

> "[t]hough the Store Lease Agreement made reference to the upper floor as warehouse, it was the agreement of the parties that when the upper floor is constructed, it will be leased to [Mr Waghmare]."

Later in the Defence, it was averred that Mr Waghmare having been told, upon taking possession of Store No 4, "that the warehouse would be constructed at some time in the future", it was "therefore understood and agreed … that the warehouse was not, at the commencement of the Lease, available as part of the demised premises".

[25] In reply to the first of the principal allegations contained in the Statement of Claim and already referred to at para [20], above (that as to the leaking store "roof"), El Campeón pleaded, first, that, pursuant to agreement (collateral, it is to be inferred, to the 2008 agreement), it had paid Mr Waghmare the sum of US$8,000.00 in order that he might himself have the necessary repairs done. (On grounds of fairness, I treat para 5 of the Defence as a response not only to para 7 of the Statement of Claim – which is all it professes to be – but also, in tandem with para 6 of the Defence, to para 8 of the Statement of Claim.) El Campeón pleaded, secondly, that the allegation was not admitted and, alternatively, that, if it were to be proven, the pertinent breach was waived.

[26] In answer to the second of these principal allegations made in the Statement of Claim, that of non-provision of the warehouse, El Campeón pleaded that the pertinent paragraph, that numbered 10, was not admitted.

[27] Also filed by El Campeón on 21 April 2010 was its Reply to the Defence of Mr Waghmare in Claim No 32. Of particular note in this Reply was the averment, echoing that made earlier both in the Amended Statement of Claim in Claim No 32 and in the Defence filed in Claim No 2, that Store No 4 had been let to both Mr Waghmare and Malti Imports Ltd. Similarly noteworthy was the reference to what had previously been pleaded, in the Defence just mentioned, simply as an agreement but was now, with greater precision, called a "verbal agreement" for "the Defendant" to see to the repair of the "leaks" with funds provided by El Campeón. Of interest also, and worthy of reproduction here, was the pleading with

respect to the averment of the defendants that non-provision of a warehouse constituted breach of a term of the 2008 agreement. It read:

> "The Defendant was at all material times aware that the warehouse was not in existence at the date of commencement of the Lease but that it would be constructed at sometime in the future. The Defendant did not make investments with the belief that the warehouse was already available. The warehouse was not leased as part of the demised premises."

In addition, the Reply controverted the pleading of the defendants that they had become entitled to withhold rent from El Campeón.

Cause of confused and confusing state of litigation

[28] Before going on to deal with the judgment below, one may briefly go back to the considered description, given at para [2] above, of the litigation at first instance as confused and confusing. That is a description to no small degree earned by the respective performances of counsel. The case, unquestionably, was far from complex. But it was confused, and hence confusing, because of an acute and manifest lack of preparation and organisation. One keeps in mind the main purpose of this judgment and will not stray from it. It must suffice to quote a couple of representative passages from the trial transcript to illustrate the point.

[29] In the first passage, to be found at pages 76-77 of that transcript, there appear the following (at times nonplussing) exchanges, arising during Mrs McSweeney McKoy's cross-examination of Mr Waghmare concerning the vital topic of the last rent payment:

> "Q. Now, Mr Waghmare, you agree that no rent was paid or there was no attempts (*sic*) to pay rent since December 2009, is that correct?
>
> A. No.
>
> Q. When was the last date rent was paid?
>
> A. I paid the rent which they agree that they will give me discount –
>
> Q. When? When was the last rent paid?
>
> THE COURT: When was the last day rent paid?
>
> WITNESS: I have a receipt. Can I see it?
>
> THE COURT: Yeah, yeah. Yu (*sic*) have it in disclosure already?
>
> WITNESS: Yes.

THE COURT: What part of the disclosure, Mr Elrington, the last receipt for rent? That one is in the agreed bundle, the disclosure?

MRS McKOY: I'm not certain, My Lady.

MR ELRINGTON: I have to rely on him, My Lady.

MRS McKOY: Perhaps I should rephrase, My Lady and ask the witness to look at the evidence of Mr Lumor instead."

The thing about this entire uninformed exchange is that it was all centred on a receipt bearing a date which quite obviously was not the actual date of payment. (The evidence of Isaac Lumor on the time of payment was undisputed, if imprecise: payment of the rent for the month of August 2009 was made sometime after the "bouncing", on a date unknown in December 2009, of the pertinent post-dated cheque.)

[30] The second passage concerns Mr H E Elrington SC's evident ignorance, temporary or otherwise, as to the time when possession of Store No 4 was finally given up and occurs during his cross-examination of Isaac Lumor. It reads as follows:

"Q. Eventually you found a contractor who solved the problem.

A. Solved the problem, not to get the problem worse.

Q. Good. So, today you don't have the problem again?

A. Thank God.

Q. But by that time, Mr [Waghmare] had already moved out.

A. No. Mr [Waghmare] stayed there for a year without paying rent at the business.

Q. No, no. I said when you got the contractor that solved the problem he had already gone?

A. No, [Mr Waghmare] was there.

Q. You solved it while he was there?

A. Exactly.

Q. So, it was in April of 2010 that the problem was solved?

A. Yes.

THE COURT: And when [Mr Waghmare] moved out?

Q. April 2011?

A. He moved out 30th April, 2011."

The trial transcript reveals that Mr Waghmare had earlier testified, to essentially the same effect, as to the occurrence of both these key events.

iii) The judgment given below

[31] Following a trial which took place before her over four days, viz 3, 4, 7 and 19 October 2011 (with hearings in the courtroom on the first, second and fourth days and a visit to Store No 4 on the third), the judge gave a reserved judgment on 30 November 2011. She initially approached the matter on the basis that there were 11 issues before her, viz:

"1) [w]hether [Mr Waghmare] is a proper party to the claim for rent;

2) [w]hether El Campe[ó]n breached the lease by not providing the warehouse;

3) [w]hether El Campe[ó]n had a duty to make the building wind and water tight;

4) [w]hether El Campe[ó]n had a duty to make the building fit for the purpose for which it was let;

5) [w]hether El Campe[ó]n is entitled to rent and mesne profits;

6) [w]hether [Mr Waghmare] is entitled to pecuniary loss of US$1,606,322.90;

7) [w]hether [Mr Waghmare] is entitled to damages for the non-availability of the [w]arehouse and if so, what damages;

8) [w]hether [Mr Waghmare] is entitled to damages for loss in business for three years because of the failure to provide [a] warehouse;

9) [w]hether [Mr Waghmare] is entitled to damages for stock in containers that he could not accept;

10) [w]hether [Mr Waghmare] is entitled to damages for loss in sales;

11) [w]hether [Mr Waghmare] is entitled to damages for the stock that was damaged by rain water and, if so, what damages."

[32] The judge resolved or otherwise dealt with these issues by finding/holding as follows. On issue 1), Mr Waghmare was a proper party to the claim of El Campeón for rent. On issue 2), the latter breached the lease by not providing a warehouse. On issue 3), "the issue of wind and water tight is not material in this case" since it is the roof that has caused all the leaks". On issue 4), El Campeón had a duty to make the building fit for the purpose for which it was let. On issue 5), El Campeón was entitled to rent and mesne profits in the total amount of US$136,000.00. On issue 6), Mr Waghmare was not entitled to pecuniary losses in the amount of US$1,606,322.90. On issue 7), Mr Waghmare was entitled to damages for the "unavailability" of a warehouse, viz "50% of the rent and mesne profits of USD$136,000.00 (*sic*) owing to El Campeón as damages". On issue 8), Mr Waghmare was not entitled to damages for loss in business for three years because of the failure to provide a warehouse. On issue 9), Mr Waghmare was not entitled to damages for stock in containers that he could not accept. On issue 10), Mr Waghmare was not entitled to damages for loss in sales. On issue 11), Mr Waghmare was entitled to damages in the amount of US$68,000.00 for the stock that was damaged by rain water, viz 48 bags of clothing. Thus, in the final analysis, the judge determined the claims on the basis of 10, rather than 11, issues.

[33] The orders of the judge were as follows:

> "1. A Declaration is granted that El Campe[ó]n has breached the covenant of the Lease to repair the roof.
>
> 2. A Declaration is granted that el Campe[ó]n has breached the lease by not providing the warehouse.
>
> 3. Rent and mesne profits owing to el Campe[ó]n by [Mr Waghmare] after set-off of damages for the unavailability of the [w]arehouse is USD$68,000.00 (*sic*).
>
> 4. [Mr Waghmare] is awarded the said rent of USD$68,000.00 (*sic*) owing to El Campe[ó]n as damages for the damaged clothing.
>
> 5. Each party to bear its (*sic*) own cost (*sic*)."

The grounds of appeal

[34] Advanced on behalf of Mr Waghmare by Mr Elrington in his appeal are seven grounds (Nos 6 and 9 being excluded) complaining that the judge erred and was wrong in law –

> "1. … in failing to award damages to [Mr Waghmare] for breach of the lease to let to [him] a building that was fit for its purpose.

2. … in failing to award as damages to [Mr Waghmare] for the said breach … a sum that would have restored him to the position he would have been in if [El Campeón] had not breach (*sic*) the contract …

3. … in failing to award such damages to [Mr Waghmare], for breach of the contract to let the warehouse to [him] as would have restored [him] to the position that he would have been in, had [El Campeón] not breach (*sic*) its contract by failing to provide [him] with the said warehouse.

4. … when she held that notwithstanding the breach of the contract by [El Campeón], by not providing [Mr Waghmare] with the warehouse and not providing [him] with a building that was fit for its purpose, and by repeatedly failing to remedy the breach, [Mr Waghmare] was bound in law to pay to [El Campeón] the full rent reserved for the entire period he was in possession and or occupant (*sic*) of the building minus the warehouse.

5. in not awarding damages to [Mr Waghmare] for [El Campeón's] breach of Duty (*sic*) to provide [him] for the contract period a building that was fit for its purpose that would have restored [Mr Waghmare] to the [position that he would have been in had [El Campeón] not breached the contract.

6. …

7. … in failing to award to [Mr Waghmare] as damages the sums actually paid by [him] to [El Campeón] throughout the term of the lease for a warehouse he never got even though it was specifically rented to him under the terms of the lease and even though the monthly rent of the old lease was doubled to include the monthly rent of the warehouse.

8. … in failing to award [Mr Waghmare] his Cost (*sic*) in the Claim (*sic*).

9 …"

Ground 6 complains that the judge "erred in law in not properly assessing and awarding to [Mr Waghmare] the damages that flowed directly and as a natural consequence of the breaches of contract she found as a fact that [El Campeón] had committed". And ground 9 is to the effect that the judge "failed to judge the issues fairly between [Mr Waghmare] and [El Campeón] and [that] [her decision]

is bias (*sic*) ex facie and as a result [Mr Waghmare] was denied a fair trial". (I have, for convenience, numbered the grounds, which were, in fact, lettered by counsel.)

The grounds of the Respondent's Notice

[35] In a Respondent's Notice filed by El Campeón on 6 January 2012 and seeking that the judgment be varied so as to include an order that –

> "[Mr Waghmare] is not entitled to damages for the unavailability of the warehouse and the damaged clothing …",

there are set out by Mr F D Lumor SC six grounds, the first five of which claim that the judge erred as follows:

> "1. … in awarding [Mr Waghmare] the sum of USD$68,000.00 (*sic*) as general damages for the unavailability of the warehouse.
>
> 2. … in interrupting the cross-examination of [Mr Waghmare] and allowed (*sic*) to give viva voce evidence in addition to his witness statement.
>
> 3. … in awarding general damages to [Mr Waghmare], [he] having failed to plead the general or special damages; and [he] also having failed to give any evidence of the special and general damages in his witness statement.
>
> 4. … in allowing questions to be asked "based on what you observed at the locus" when no evidence was led to establish what was observed at the locus.
>
> 5. … in failing to conduct the trial in accordance with the Supreme Court Civil Procedure Rules; and fairly."

Ground 6 is that the judge "[paid] little or no regard to the evidence that [Mr Waghmare] like the other tenants in the Plaza leased only the store since the upper warehouse was not constructed at the date of the lease".

Discussion of the grounds of appeal

<u>i) Grounds 3,4 ,6 and 7</u>

[36] Examination of the wording of grounds 3, 4, 6 and 7 readily reveals that all four presuppose, and rely upon, the soundness of the proposition that El Campeón breached a term of the 2008 agreement "by failing to provide [Mr Waghmare] with

[a] warehouse" (the language of ground 3). This proposition predicates, in turn, the presence in the 2008 agreement of a term under which El Campeón had an obligation to provide Mr Waghmare with a warehouse. The only clause of the 2008 agreement to which Mr Waghmare could possibly turn in his efforts to show the presence of such a term is Clause 2 headed "Demised Premises", the simple reason for this being that that happens to be the sole clause of that agreement in which the word warehouse so much as appears. But Clause 2 simply reads:

> "The Landlord LETS AND THE TENANT TAKES ALL THAT STORE NO # 4 (including the group (*sic*) and Upper Floors) with the fittings therein TOGETHER with the use for the Tenant and his servants and customers in common with the Landlord and the lavatory and the courtyard and other amenities on the ground floor (called the "premises"). The Tenant shall occupy and use the ground floor of the premises as a store and the upper floor as a whole warehouse only."

The last sentence does no more, as regards "the upper floor", than require Mr Waghmare to occupy and use the same as a "whole warehouse", whatever that unfamiliar qualified term may mean. Such sentence certainly creates no express obligation on the part of El Campeón to construct, or otherwise bring into existence, a warehouse where (as is common ground) none was, on the date of the signing of the agreement in question, to be found. (And the pleadings do not raise the issue of an implied term.)

[37] For reasons which are altogether elusive, El Campeón chose, as has already been pointed out above, to deal with this aspect of Mr Waghmare's claim on the basis that, apart from Mr Waghmare having fully known that there was no warehouse in the building at the time of the signing of the 2008 agreement, its intention was in fact to build a warehouse but it never represented to Mr Waghmare that it would finish doing so by any given date. But the 2008 agreement is before the Court, as it was before the court below, and no amount of shying away from reliance on its terms on the part of El Campeón can be left to have the grotesque effect of, as it were, forcing this Court to close its eyes to such terms. The long and short of the matter, as far as this supposed term requiring the construction, or provision otherwise, of a warehouse is concerned, is that the 2008 agreement contained Clauses 13 and 15, whose provisions were, respectively, as follows:

> "13. ENTIRE AGREEMENT: This agreement constitute (*sic*) the entire agreement between the Landlord and Tenant and supersedes all prior understanding, negotiations, agreements or discussions whether oral or written.

15. AMENDMENT: This agreement may not be modified or amended except by an instrument in writing signed by the Landlord and Tenant."

These two clauses, as I see it, stare one in the face, speak clearly for themselves and must, unless this appeal is to be turned into a farce, be seen and heard. They shut the door to any resort on the part of either party to the 2008 agreement to anything that might have been said or written outside of its four corners regarding the provision of a warehouse whether before or after the signing of it, save for a later instrument that had been signed by both such parties. But there has been no evidence in this case that such an instrument was ever brought into being. There has only been a bare claim that the 2008 agreement itself contained a term which imposed on El Campeón the obligation to provide a warehouse for the use of Mr Waghmare. Precisely whereabouts in the 2008 agreement such term was to be found was left, as far as I am concerned, to the imagination of the courts. In my view, there was no term in the 2008 agreement placing El Campeón under a legal obligation to provide Mr Waghmare with a warehouse, whether on the first floor of, or elsewhere in, the building. It follows, to my mind, that there was no such breach of that agreement as he has alleged and that the proposition in question underlying grounds 3, 4, 6, and 7 is unsound, in consequence of which grounds 3 and 7 must utterly fail. To grounds 4 and 6, which, unlike the other two in the group under discussion here, also rest on the proposition that Store No 4 was not fit for its purpose, I shall return later.

[38] Before leaving this topic, I would note a salient pithy comment by the judge in the course of the cross-examination of Mr Waghmare that "[v]erbal is still contract." One has no way of knowing what, if any, role the principle that a contract may be entered into orally as well as by an instrument in writing played in the decision reached below. In my respectful view, however, given Clauses 13 and 15 and the conspicuous absence of any pertinent pleading of an implied contractual term, such principle has no role whatever to play in the present case.

ii) Grounds 1, 2 and 5

[39] Like the group of grounds just considered above, grounds 1, 2 and 5 also stand or fall on the strength or otherwise of a central proposition which undergirds all three. In this case, the proposition is that the alleged losses for which compensation is sought were, in fact, those of Mr Waghmare. The point of departure here must be the judgment below, at para 13 of which the judge seemingly hits the nail on the head in unequivocally finding that -

> "… [T]he totality of the evidence shows that El Campeón was doing business with [Mr Waghmare] in his personal capacity although the business was in the name of Malti Imports Ltd."

The judge there seems poised to draw what would have been a critically important distinction between the taking of the tenancy and the carrying on of the business in Store No 4. The judge, however, then goes on to say, in the same paragraph:

> "[Mr Waghmare] executed the lease [undoubtedly a reference to the signing of the 2008 agreement] and does business either in his own name or in the name of Malti."

In the result, a clear-cut distinction (between Mr Waghmare, as mere tenant, and Malti Imports Ltd, as sole business owner) is not, in fact, drawn. But evidential support for the latter part of this last-quoted observation is, with respect, impossible to find. And there is in the instant appeal, unsurprisingly, a corresponding contention on the part of Mr F D Lumor. As he forcefully puts it, in the course of his written submissions in opposition to pertinent grounds of Mr Waghmare's appeal:

> "Though Malti Import (*sic*) Limited, private limited liability company was not joined as party in Claim No 2 of 2010, yet the [judge] received and accepted as evidence financial records of Malti as proof of personal losses of [Mr Waghmare]. None of the records show any loss by [Mr Waghmare] in his personal capacity. Even if [Mr Waghmare] is shareholder and director of a body corporate, the properties of the limited liability company is (*sic*) not his personal property."

[40] Mr Waghmare did, in fact, testify below that he was, at the time of the filing of his claim, a businessman operating from El Campeón Plaza at the Commercial Free Zone. But, when granted permission, overly generously in my view, by the judge to do at the trial itself that which he should have done ahead of it, he proceeded to produce, from amongst the documents he had previously disclosed, material clearly relating to a business, or businesses, owned by Malti Imports Ltd and Vidhi Enterprise Ltd, rather than by him. Thus, to take but one example, there were several documents headed "Monthly Import/Sales Report" in the large majority of which the spaces reserved for "Name of Company" were filled in with the name "Malti Imports Ltd", a powerful indication that these were reports of a limited liability company rather than of some individual, strangely unnamed, who was carrying on business under the business name "Malti Imports". Interestingly, upon the production by Mr Waghmare of another document headed "Loss due to not providing warehouse because of which have to use half space of the store in

the warehouse cuting (*sic*) our business in half", the remark of the judge was: "It's Malti Imports Limited"; and, significantly, Mr Waghmere shortly thereafter insouciantly acknowledged authorship of the document.

[41] But the position as to ownership of the business conducted in Store No 4, and hence ownership of the stock-in–trade of such business, was put as explicitly as possible after Mr Waghmare had completed his giving of additional evidence. Cross-examination began with the following exchange:

> "Q. Mr Waghmare, are you certifying to the court that all the documents in S.W. 1, S.W. 2 and S.W. 3 [ie all documents tendered and admitted in evidence in proof of loss and damage in Claim No 2] concern the business of Malti Imports?
>
> A. Yes." [emphasis added]

Later on in cross-examination, there was the following further pertinent exchange:

> "Q. …Is it your evidence, Mr Waghmare, that the merchandise of Malti including (*sic*) shoes, hand bags and other items?
>
> A. In the inventory, we don't have, some of them –
>
> Q. Could you answer yes or no, please?
>
> A. No." [emphasis added]

The premise of the first question in this second quotation, viz that the ownership of such merchandise was in Malti Imports Ltd was obviously accepted (predictably, in the light of the just-noted answer to the opening question of the cross-examination) by Mr Waghmare.

[42] Then, in the lengthy re-examination which Mr Elrington was permitted to conduct, icing was put on the cake, so to speak, for El Campeón by the following exchange:

> "Q. So your business is selling goods that is [*sic*] free of duty?
>
> A. Free of duty?
>
> Q. That's the business of Malti?
>
> A. Yes.
>
> …

Q. So, you have said to the court that Malti's business was selling duty free goods only at the Free Zone. You didn't do any business anywhere else, only at the Free Zone.

A. Only at the Free Zone because that's how it's registered on the Free Zone." [emphasis added]

Plainly, Mr Waghmare was, in the court below, whilst fully recognising that the business in question legally belonged to Malti Imports Ltd, loosely speaking of it as if it were his own.

[43] But this glaring and recurring discrepancy obviously failed to make an impact on the decision of the judge ultimately to award damages to Mr Waghmare at least for damage to merchandise, viz clothing. One recalls, of course, in this regard the quotation from the judgment set out at para [39], above, which shows the judge speaking of Mr Waghmare as doing business either in his own name or in that of "Malti". But, alas, the evidence that Mr Waghmare, as distinct from Malti Imports Ltd, was himself carrying on business in Store No 4 appears nowhere in the trial transcript. All the evidence points to the conclusion that, whilst Mr Waghmare entered into the tenancy of Store No 4 in his own name, as the judge indeed found, it was Malti Imports Ltd which conducted business in it. This conclusion is somewhat reinforced, in my view, by the revelation which fell from the lips of Mr Waghmare well into his re-examination, when, with regard to the 2009 agreement, the following exchange occurred:

"Q. Can you think of anything else that you reasonably could have done to save your business, anything else as an experienced business man that you reasonably could have done to save your business?

A. Only if I get a warehouse or place to rent it so I could work it out.

Q. And you tried and failed to get –

A I tried the shops and the warehouse but there was none of available. In fact, they had one shop which I took afterwards from them for my Vidhi Enterprise Company.

Q. Say that?

A. For Vidhi Enterprise, I rented from them."

Mr Waghmare's reason, whatever it may have been, for taking the tenancy created by the 2009 agreement in his own name and then, under an arrangement whose

details were best known to him, letting into possession for the purpose of there carrying on business a company in which he held shares may have well operated in his mind in the case of the 2008 agreement as well. (The judge proceeded, it seems, on the basis that Mr Waghmare owned the company itself: page 114, trial transcript.)

[44] The further conclusion is that the proposition that the losses for which compensation was sought in Claim No 2 were the losses of Mr Waghmare cannot be made out on the evidence. Grounds 1, 2 and 5 therefore fail as well.

[45] This brings me, then, back to grounds 4 and 6, which, as already made clear, must fail, at least in part, in the light of the unsoundness of the proposition that it was a term of the 2008 agreement that El Campeón was to provide Mr Waghmare with a warehouse on the first floor of the building. Given the further conclusion just stated above, the retrogression from partial to total failure of these two grounds is inevitable.

iii) Grounds 8 and 9

[46] It is convenient next briefly to refer to ground 9, which complains that the judge did not fairly judge the issues in the claims, that the trial was unfair and that the decision was biased *ex facie*. At the hearing, Mr Elrington had nothing at all to say on this ground; and Mr F D Lumor, evincing deliberate restraint, limited himself to remarking that –

> "the judge went beyond the call of duty to assist not only [Mr Waghmare] but his counsel to put his stock [*sic*] in order to prove his case."

For completeness, it should be noted that a document handed by Mr Elrington to the Court at the hearing and headed "Submission on behalf of Claimant (*sic*)" was similarly silent as to ground 9. I would, for my part, categorically deprecate this approach. It is a strong thing to make an allegation, direct or indirect, of bias against a judge, let alone to suggest that that bias was such as to render an entire trial unfair. If, as seems to be the case here, it was decided not to pursue ground 9, counsel at the very least ought expressly to have so informed the Court and abandoned it. To have left it hanging over the head of the judge was to go beyond the pale. In my own view, there is nothing in the record, or in any of the other materials before the Court, to support this unfortunate allegation of bias on the part of the judge. Lest it was not in fact meant to be abandoned, I formally reject it as a ground not shown to have the slightest merit.

[47] Like the rest of Mr Waghmare's grounds, ground 8, impugning the judge's order as to costs, is, in my view, quite unable to succeed. There were no winners

in the court below. In Claim No 2, Mr Waghmare was awarded US$68,000.00, far less than he had claimed. (As is clear at this point, he should, in my view, have been awarded nothing.) He had no reason to be other than a disappointed litigant. In Claim No 32, El Campeón was awarded the same sum, viz US$68,000.00. (I consider that, as I have sought to demonstrate above, it should have been awarded twice that amount, that is to say US$136,000.00.) It had no reason to be less disappointed than Mr Waghmare. The two awards cancelled out each other. Both parties had engaged in failed litigation. There was no basis for an award of costs in favour of Mr Waghmare. Nothing that has emerged in the present appeal puts him on a stronger footing in terms of costs below.

Discussion (so far as necessary) of the Respondent's Notice and its grounds

[48] I come now to the Respondent's Notice filed by El Campeón. It follows from the conclusions already set out above that I would grant the prayer of El Campeón that the judgment be varied so as to include an order to the effect that Mr Waghmare is not entitled to damages for the supposed non-provision of a warehouse and water damage to clothing forming part of the stock-in-trade in Store No 4. Ineluctably, the reasoning which I have adopted above leads to the further conclusion that the judge did, indeed, err in awarding damages to Mr Waghmare for El Campeón's non-provision of a warehouse to him. Ground 1 of the Respondent's Notice thus succeeds, in my opinion, given the absence of a term in the 2008 agreement requiring El Campeón to provide a warehouse. Claims Nos 2 and 32 having been consolidated below, it would be unacceptably artificial to ignore in the context of the Respondent's Notice the firm conclusion one has reached in seeking to resolve Mr Waghmare's appeal, viz that neither the business in question nor the goods comprising its stock-in-trade belonged to him. Therefore, one is left with no alternative but to conclude that he is not entitled to damages for the supposedly water-damaged clothing either.

[49] Discussion of the remaining grounds of the Respondent's Notice is, in these circumstances, unnecessary.

Resolution

[50] I would dismiss the appeal of Mr Waghmare with costs, to be agreed or taxed, and grant the prayer contained in the Respondent's Notice for variation of the judgment in the terms already noted above. As a necessary consequence of such grant, I would (a) set aside the order of the judge that "rent and mesne profits owing to El Campeón after set-off of damages for the unavailability of the warehouse is USD$68,000.00 (*sic*)" and substitute therefor an order that Mr Waghmare pay El Campeón damages in respect of unpaid rent and mesne profits

in the sum of US$136,000.00 and (b) set aside the order that "Mr Waghmare is awarded the said rent of USD$68,000.00 owing to el Campeón as damages for the damaged clothing". I would affirm the remaining orders of the judge, including that as to costs, which was not challenged under the Respondent's Notice. I would further order (a) that the above order as to costs of the appeal (to include costs in connection with the Respondent's Notice) be provisional in the first instance but become final after 10 clear working days from the date of delivery of this judgment, unless either party shall file application for a contrary order within such period of 10 days and (b) that, in the event of the filing of such an application, the matter of costs be determined on the basis of written submissions to be filed and delivered in 14 days from the filing of the application.

Apology

[51] It only remains for me to extend my very sincere apologies to the parties for the long delay in preparing this judgment, for which I am alone responsible and which I can only explain as the regretted result of extreme pressure of work.

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SIR MANUEL SOSA P

MORRISON JA

[52] I have had the advantage of reading in draft the judgment prepared by the learned President in this matter. I agree with it and there is nothing that I can usefully add.

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MORRISON JA

MENDES JA

[53] I have had the pleasure of reading, in draft, the judgment of the President, with which I fully agree and have nothing to add.

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MENDES JA