

27 pages
1978/5.

ROYAL COURT (INFERIOR NUMBER)

Before: Mr. P.L. Crill, Deputy Bailiff,
Jurat R.H. Le Cornu,
Jurat G.A. Le Breton.

Between Agathangelos John Agathangelou Plaintiff
and
The Jolly Fryer Limited Defendant
FIRST ACTION

AND

Between Agathangelos John Agathangelou Plaintiff)
and) By Original
Venus Restaurant Limited Defendant) Action

AND

Between Venus Restaurant Limited Plaintiff)
and)
Agathangelos John Agathangelou Defendant) By
SECOND ACTION Counterclaim

Advocate W.J. Bailhache for the plaintiff
Advocate R.J. Michel for Venus Restaurant Limited
Advocate D.E. Le Cornu for The Jolly Fryer Limited.

The plaintiff in this case is the owner of the property known as Venus House which borders by the east the public road known as The Bulwarks, St. Aubin. It is semi-detached and gives on to the north a public house. It runs back from the Bulwarks for some distance and borders by the south a narrow public road known as Le Quai Bisson.

/On

On the 13th May, 1974, the plaintiff executed a lease for seven years commencing on the 8th May, 1974, with the company Venus Restaurant Limited. The performance by the tenant company of its obligations under the lease was guaranteed by another company, "The Jolly Fryer Limited". The lease contained the usual clauses and in particular the following:

("The Lessee hereby covenants with the Lessor as follows".)

- "4(h) Not at any time without the written consent of the Lessor first obtained nor except in accordance with plans and specifications previously submitted in duplicate to and approved by the Lessor to alter add to or interfere with the construction of the demised premises either externally or internally nor to do or suffer in or upon the demised premises any wilful or voluntary waste or spoil PROVIDED ALWAYS that it may be a condition of any consent required under the provisions of this clause that the Lessee shall pay the costs and expenses reasonably incurred by the Lessor in relation to the granting of any such consents. "
- "4(j) To permit the Lessor and his servants or agents with or without workmen and others at all reasonable times during the term of the present Lease upon giving forty-eight hours prior notice in writing to this effect to enter into and upon the demised premises and part thereof to examine the condition of the premises and to execute any repairs to the premises which may be required the Lessor making good all damage occasioned thereby and also to view the demised premises to ensure that nothing has been done therein that constitutes a breach of any of the covenants herein contained and also to view and examine the state and condition of the demised premises and of all such breaches of covenants, decays, defects and wants of repair as shall be then and there found for which the Lessee may be liable hereunder and thereupon the Lessor may if any such breaches of covenants be found give to the Lessee notice in writing (subject to labour and materials being available) well and substantially to repair, remedy and amend the same at the Lessee's own expense within three calendar months then next following such notice within which time the Lessee will well and substantially repair, remedy and amend the same accordingly and in the case of default by the Lessee it shall be lawful for the Lessor his servants, agents and workmen at any time to enter upon the building for the purposes of abating breaches of covenant and of executing such repairs and the Lessee shall immediately repay to the Lessor the amount of the outlay and all expenses so incurred. "
- "4(k) Not to do or permit or bring in or upon the demised premises anything which may throw on the building any weight or strain in excess of that which such premises are calculated to bear with due margin for safety and in particular not to overload the floors or the electrical

installation or the other services of in or to the demised premises nor suspend any excessive weight from the ceilings or walls thereof. "

("The Lessor hereby covenants with the Lessee as follows".)

"5(c) To keep the demised premises wind and water tight and in good and substantial repair ALWAYS PROVIDED that the Lessor shall not be liable for any consequential loss suffered by the Lessee as a result of any failure on the part of the Lessor to observe the covenants herein contained. "

"6. If the demised premises shall be damaged in whole or in part the rent shall be proportionately reduced for so long as the Lessee shall be deprived of the use and enjoyment of the same or the damaged part thereof, as the case may be, always provided that such damage shall not have been occasioned by any act or omission on the part of the Lessee its servants or invitees.

In the event of the parties being unable to agree upon the amount of such reduced rental (if any) the issue shall be referred to arbitration, one arbitrator to be appointed by each party, and in the event of continuing disagreement the arbitrators shall appoint an umpire whose decision shall be final and binding upon the parties. "

"7. If the rent in respect of the said premises remains unpaid for a period of twenty-one days after the same shall have become due (whether demanded or not) or in the event of the Lessee failing to fulfil any of the obligations imposed on it by the terms of the present lease or otherwise infringing any of the conditions hereinbefore stipulated then the Lessor shall have the right to inform the Lessee in writing by notice sent to the Lessee's last known address that the present lease shall immediately be cancelled, and terminated and vacant possession of the demised premises shall forthwith be given to the Lessor without prejudice to the Lessor's right to demand compensation from the Lessee for breach of contract and for any prior breach of the Lessee's obligations herein contained. "

At that time Mr. J. Ruaro was a director of the Venus Restaurant Limited. He sold his shares to Mr. F. N. Lillicrap in 1977, but he was a party to the negotiations with the plaintiff and was involved in the subsequent building works which have given rise to these proceedings. In 1975, the defendant company carried out what the plaintiff alleges were structural alterations to the building without the consent of the plaintiff and without submitting the plans and specifications for his approval, as a result of which, the south-

east corner of the building settled causing severe structural cracks in the east and south external walls. The plaintiff was obliged to carry out external structural work in 1977. He brings this action to recover the cost of the work and some arrears of rental for the period the 1st February to the 22nd May, 1977, during which time none was paid.

The defendant company (which it will be convenient hereafter to call the defendant) acted through its principal shareholders, Mr. Kuaro, Mr. J. Biggs and, later, Mr. Lillicrap. It denies carrying out any structural alterations or that the work it admitted doing caused any danger or disturbance to the property. It alleged that the property was old and in poor condition and that the plaintiff had himself been obliged to carry out remedial works before 1975, which had been made necessary by the activities in the public road "Le Quai Bisson" of the Resources Recovery Board, then called the Sewerage Board. The plaintiff had approved of the proposed work. The plaintiff had failed in his obligations under Clause 5(c) of the lease. The defendant had been deprived of the use of the premises between the 1st February and 22nd May, 1977, and as a result had lost its trade during that time. The defendant cross-acted for this loss; for the cost of making good interior furnishings damaged in the course of the plaintiff's work in 1977; general damages and the amount of the civil engineer's bill which the defendant claims it incurred by agreement with the plaintiff to prepare a plan to stabilise the property after the defects became apparent in 1976.

The defendant in the first action, the Jolly Fryer Limited, was allowed to withdraw from the hearing since it would not be until a finding of liability was made against the second defendant, the Venus Restaurant Limited and that company defaulted in satisfying the judgement, that the Jolly Fryer Limited could be involved as guarantor. It adopted the defences raised by the Venus Restaurant

Limited.

In opening, Advocate W. J. Bailhache for the plaintiff submitted that there were three matters to be decided by the Court. They were:

- (1) Did the plaintiff give his approval for the work in 1975?
- (2) Were structural alterations carried out to the property? and
- (3) Did the work cause the property to deteriorate and new cracks in the fabric to appear?

If the answers were in the affirmative, the plaintiff was entitled to rescind the lease and claim damages. Mr. Michel for the defendant agreed that those were the issues we had to try. We now consider the evidence.

Mr. Agathangelou, the plaintiff, said that he had been away from Jersey between November, 1974, and the 27th January, 1975. He remembered the dates because he had been in London to see about his daughter's future. He came back for two days in January to fetch some of her belongings and returned to London when his daughter was married on the 3rd March. On the 27th January, he was approached by Mr. Biggs and Mr. Ruaro, who handed a piece of paper to him to sign. It read as follows:

" Venus Restaurant.
The Bulwarks.
ST. AUBIN.

28th January.1975.

I hereby give permission for the lease holders Jack Biggs and Eric Ruaro to move the side entrance door 3ft towards the main road.

The work to be carried out under proper supervision and in accordance with I.D.C. regulations.

The work to be done, the cost, and responsibility to be undertaken by the lease holders.

Signed..... "

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He decided to show it to Mr. Gould, his Advocate, whom he always consulted. According to Mr. Biggs, the reason why the plaintiff took the paper away with him, which he agreed he did, was that the plaintiff was not able to read English. At the conclusion of the case, we asked Mr. Agathangelou to read to us from a judgement of this Court chosen at random, and he showed beyond doubt that he could read English fluently.

Mr. Biggs and Mr. Ruaro were certain that Mr. Agathangelou gave oral consent not only to the fact of carrying out the alterations, but also to the actual plans submitted by them which had been prepared by Mr. Whittaker, an architect. However, Mr. Gould's recollection is different. He remembers Mr. Agathangelou going to see him on the 27th January. If a plan had been produced, he would have asked for the advice of an engineer or architect before advising his client. On the face of the memorandum, it seemed that structural works might be involved and, accordingly, Mr. Gould wrote to the Venus Restaurant Limited on the 14th February, as follows:

" Mr. A. J. Agathangelou has referred to us the Memorandum, which it has been suggested he should sign in regard to the proposed alterations to the Venus Restaurant, St. Aubin.

The Memorandum is not in the correct form, as the Lease in regard to these premises was entered into between Mr. Agathangelou and your company and not the private individuals whose names appear thereon.

The relevant provisions of the Lease are contained in Clause 4(h), which is in the following terms:

" (h) Not at any time without the written consent of the Lessor first obtained nor except in accordance with plans and specifications previously submitted in duplicate to and approved by the Lessor to alter add to or interfere with the construction of the demised premises either externally or internally, nor to do or suffer in or upon the demised premises any wilful or voluntary waste or spoil PROVIDED ALWAYS that it may be a condition of any consent required under the provisions of this clause that the Lessee shall pay the costs and expenses reasonably incurred by the Lessor in relation to the granting of any such consents. "

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Would you, therefore, kindly submit plans and specifications showing the work involved, whereupon we shall be glad to advise Mr. Agathangelou further. "

Mr. Gould did not see Mr. Biggs, but told his secretary that if he telephoned he was to be asked to submit plans. He was able to say that Mr. Agathangelou saw him on the 27th January, because that was the day on which the present Law Officers had been sworn in. His client was inclined to go to "the lawyer" if he had any matter requiring a decision.

Mr. Gould's evidence was supported by that of his secretary, Mrs. C. Bernadini. She said that after Mr. Gould had replied to the letter of the 14th February, 1978, he dictated a note of instructions. It was as follows:

"Mr. Gould would prefer not to enter into telephone conversations about the matter but if you just reply to his letter it will be dealt with very quickly. Mr. Agathangelou asked L.M.G. to advise him and he has done just that. "

Later Mr. Ruaro came into the office and said he was a partner in the Restaurant. She gave him the message. She almost threw the paper away but, thinking it might be needed she kept it, dated it and wrote a note on the bottom which read -

"evidence of conversation between myself
& Mr. Ruaro (Mr. Biggs partner) "

She thought that Mr. Biggs had telephoned subsequently and that she had repeated Mr. Gould's message to him. She did not know if Mr. Biggs had called to see Mr. Gould; appointments were made by the receptionist. Mr. Biggs said that, in fact, he had seen Mr. Gould and that he had been told that he could go ahead.

Mr. Ruaro said that as he lived in the building, he and Mr. Agathangelou had discussed the plans on more than one occasion. Mr. Agathangelou had taken the plans away to discuss them with his son-in-law who was an architect. Mr. Agathangelou had returned the plans before they were submitted to the I.D.C. on the 28th January, 1978.

which was the date given to us by the Chief Executive Officer of the Committee, when the plans were received at the Planning Office. That date appears on the top right hand corner of the application form.

The form contained the following section:

"See Note (b) DECLARATION TO BE SIGNED BY THE OWNER

- 1. The foregoing application is made with my authority. 2. *The plans correspond with my requirements.

Date Signature

* May be deleted where inappropriate, e.g. where plans are prepared for a developer other than the owner. "

Note (b) is as follows:

"(b) Applications will be accepted only from the owner, or an authorised agent of the owner, who may be a legal adviser, architect, or other representative of the owner, or a prospective developer applying with the owner's consent. The application form must in any event be signed on Page 3 by the owner as being submitted with his knowledge and being in accordance with his requirements, (where the latter is relevant.) In special cases when it is not possible to obtain an owner's signature an explanatory letter should be submitted by a responsible representative.

In place of a signature under the words "the plans correspond with my requirements" appear the words "see letter - 27.1.75". The application is in the name of Marquis (KSW) Designs Ltd., a company under whose name Mr. W. Whittaker practices as an architect. The letter referred to of the 27.1.75. is written on paper with the company's address and reads:

" Venus Restaurant, The Bulwarks, St. Aubin.

The plans submitted by Marquis (KSW) Designs Ltd., on behalf of the Venus Restaurant Ltd., are confirmed to be to the approval of the Patron.

Signed pp Venus Restaurant Ltd.

L. E. Ruaro. "

The use of the word "patron" is misleading; it could mean the owner of the property or of the restaurant premises. It was accepted by the I.D.C. Mr. Ruaro said he signed the letter at the request of Mr. Whittaker, after a discussion with Mr. Agathangelou. Mr. Biggs said that he was under the impression that, apart from his visit to Mr. Gould's office, Mr. Agathangelou had agreed to the work being done. At any rate, modifications were needed to the plan so that, instead of moving the door in the eastern wall some three feet to the east, it was enlarged only some nine to twelve inches. The plan was approved by the I.D.C. on the 14th March. Mr. Agathangelou said that when he returned to Jersey on the 17th March, all the work had been carried out. He went away to Cyprus for a month in October 1975, and when he came back, he noted that the first floor front room (facing the Bulwarks) had been changed into a coffee room. The particulars of the structural alterations alleged that, not only had the door in the south side been widened, but the doorway and shop window in the east side (facing the Bulwarks) had been replaced and that the first floor had been so converted. At the end of 1975, the plaintiff caused three tell-tales or glass ties to be placed across cracks he noticed had appeared in the east and south walls. The plaintiff appeared to accept the position of the alterations until, he says, the building was threatened with collapse in the Autumn of 1976, when, as a result of the structural work of the defendant company, and its negligent performance, the south east corner moved outwards and downwards.

We return to the plans for a moment. It seems to us that the reasons for the alterations were well expressed in Mr. Whittaker's firm's letter to the I.D.C. of the 23rd January, 1975. It reads as follows:

" Enclosed please find an application for certain minor modifications to the now named Venus Restaurant, The Bulwarks, St. Aubin.

The proposed work which needs to be completed for the coming season, is caused by a desire of the present Patron, to

improve the standard of this eating house, ie to raise it from a licenced cafe to a medium priced restaurant, with excellent facility and service for the customer, something at present lacking in St. Aubin. Our client has total experience in running restaurants, and the proposals mostly are minor internal re-arrangements, none of which involve a change of use.

Two items directly requiring urgent consideration are:

1. The entrance to the restaurant which is at present facing the Harbour. Not only is this entrance in a very poor physical condition, but due to the shape of the building, entry from this position inhibits custom as the public, generally English, prefer to enter discreetly.
2. It is proposed to gain entry from the private road at the side of the building, slightly moving the position of an existing doorway, and generally improving its appearance. The present front windows and door to be replaced by a simple hardwood window, set within the existing structure.

No other external changes are proposed for the season, but a general improvement programme is the desire of the Patron balanced against economy.

You will note that the kitchen facilities are extended to provide a still-room, and staff access to the kitchen from the restaurant has been greatly improved.

The air conditioning at present in the frontage, will be moved to the side at the rear of the restaurant, providing better ventilation to the rear, and avoiding kitchen heat and odours penetrating the restaurant.

The existing terrible gas entry which was in the restaurant itself, is being moved to a position not accessible to the public. All existing surfaces within the restaurant are being changed to produce a more homogenous design.

Access to the building to upper floors by others, will occur via an existing entrance and staircase at the rear of the building, thus the public will be totally segregated.

The total number of seated customers is being reduced to a more practical number, and coat and toilet facilities improved.

We trust the above will assist in rapid progress through the Committee, of what are very minor basic changes. "

We think that a certain amount of internal work was carried out before the I.D.C. gave its formal approval and, probably an unauthorised change in the east window, to the extent of adding two vertical mullions. It was the latter which occasioned some criticism by the building inspector, which prompted a further letter written by Mr. Whittaker's firm on 7th April, 1975, to the I.D.C. as follows:

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" It has been brought to our notice that Mr. Pierson, Building Inspector, recently made observations on site, regarding the new window facing the harbour. We have no doubt a report has been placed before you, and our clients have requested we write to you with explanations regarding, what would appear to be a minor deviation from the approved plans.

It was never the intention to remove the existing heavy timber window sub-frame, as in our opinion the structure of the building would have been adversely affected. As you are aware, all the buildings fronting the harbour have suffered in time by the effects of the tide. Any structural alteration to the property could have resulted in a major re-building problem which at this time our clients do not wish, as they only hold a lease on the property. The costs of a major re-build of the frontage would so have increased costs of the alterations, as to prove totally unviable.

The new window recently installed, is similar in principle to the one shown on our drawing, except that two mullions have been included to reduce the glass pane size. Our clients considered it would be more economic to replace, should some drunk decide to throw bricks.

In view of the need to open the restaurant as soon as possible, the projected sides to the window have been left off, but at a later date they will be added to complete the window to our design. The two mullions will be decorated in a dark colour to reduce their impact. We are certain that when completed, the result will be totally satisfactory.

With regard to the new entrance doors, it was decided not to substantially move its position, as to do so would have created structural problems; in view of the discovered condition of the existing external walls which whilst perfectly satisfactory, could not stand re-distribution of loadings.

We trust that the above will prove acceptable to you, and Mr. Pierson, and we would stress that it was never our clients intention to wilfully diverge from the approved drawings, and wish us to tender their apologies for acting in this small way, without first consulting the appropriate authority. "

Application was made to the Licensing Bench by the defendant's Advocates on the 3rd March, 1975, for the approval of the plans. The Bench approved the plans on the 20th March, 1975.

We have quoted the correspondence from the architect in full, first to indicate what, at that time, he believed his clients intended to do and, secondly, because it shows, together with the application to the Licensing Bench that, when Mr. Agathangelou said that all the work had been completed on his return to Jersey on the

17th March, his recollection may have been at fault.

A great deal of evidence was led to suggest that the plaintiff acquiesced in the alterations, particularly because he dined in the restaurant at least twice in the summer of 1975. We do not place much importance on this evidence. It shows only that the plaintiff certainly knew of the alterations after they were done. That is not to say, however, that he accepted the consequent damage which, according to him, the alterations caused and which manifested itself very much later; the signs of which were cracks in the external south and east walls. There is no doubt that by October, 1976, the property was in a serious and dangerous condition. What we have to determine is first whether the works carried out to the order of the defendant company in 1975 were responsible for that condition? Secondly, if they were, did the plaintiff take all reasonable steps to mitigate his loss? In essence, the plaintiff has to prove that load bearing parts of the structure were interfered with by the defendant and that, as a result, distress was caused to the property. If he is to succeed he must prove nothing less.

In the course of the trial, it became clear that the plaintiff's complaints could be reduced to two. First that the defendant cut out some load bearing parts of the fabric to widen the door in the south wall, and at the same time failed to support adjacent load bearing parts which had had their support thus removed. Secondly, that it pulled out an old timber ~~part~~^{frame} attached to or placed against a big horizontal beam and which formed an outer frame to the east ground floor window and which was also load bearing, particularly being connected to a brick pier in the south-east corner.

The plaintiff called Mr. K. R. Todman who had practised in Jersey as an architect for some three years. He had prepared plans for some non-structural alterations to the premises carried out in

1968 by the plaintiff. He had also been called in by the plaintiff, who had received £50.00 compensation from the Sewerage Board, as it then was, in 1969, to look at some new rendering with which the plaintiff had covered the exterior walls on the building. He had not supervised that work. Mr. Todman advised the Parish of St. Brelade in licensing matters as regards the structure of licensed premises. On the 19th November, 1976, he made a report to the parish on the condition of the premises Venus Restaurant. He obtained copies of a report prepared by Mr. Rothwell, a civil engineer, who was called by the defendant. When he examined the property, Mr. Todman noticed some structural settlement in the south-east corner.

Since we were referred to a number of photographs which were used by all the witnesses, it will be convenient to mention them now. Before doing so, we should remark that in cases of this sort, counsel should try to agree the documents and photographs in advance, so that the Court has only one agreed bundle to consider instead of a quantity of loose and seemingly unconnected letters, plans and photographs. Such lack of co-ordinated preparation, which was unhappily apparent in this case, hampers the Court unnecessarily and we hope that members of the Bar will note and act upon these comments.

In this case there were four sets of photographs. The first, which we have labelled 'A' was a collection of small coloured prints taken by Mr. Regal, or upon his instructions, at the time his firm was working on the premises in 1977, and which showed the interior and some of the exterior of the exposed building. The second, which we have labelled 'B' and which was attached to 'A', was a number of black and white prints of the exterior of the property, taken at the time of an examination by Mr. H. Hannam, in 1976. The third was a collection of large coloured prints which we have labelled 'C', and taken by Mr. Lillicrap in 1977, at the time the interior of the

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building had been exposed by the remedial work being carried out by Mr. Regal's firm, which had been entrusted with this task by the plaintiff. The fourth and last set of photographs, which in the event was not referred to very much and which we have labelled 'D', was extracted on our directions from the files of the Resources Recovery Board and had been taken in 1968, or 1969, by Mr. D. Reynolds, a surveyor, who was called by the defendant. He had taken them at the time he examined the property on the instructions of the Sewerage Board.

Mr. Todman examined a number of photographs in 'B' bundle and referred us to two cracks which were not there in 1968, and to three others which were there, but which had widened in the mean time. He considered the standard of the buildings works as shown in the photographs in bundle 'A' as shoddy. He did not think he could have worked from the architect's drawing which did not contain sufficient information as one would have expected from a proper specification. If the first floor room had been used by twelve to twenty people as a coffee room, that would have caused increased loading upon the walls. When he had seen the property in 1968, that area had been used as a living room. He agreed that before he had prepared the plans for Mr. Agathangelou in 1966, the Sewerage Board had dug trenches in the Quai Bissou and the Bulwarks. He had seen nothing in 1969 which he considered indicated that the building had suffered severe structural damage. He would have expected it to have settled into its foundations a long time ago, as it was built on reclaimed land, but he accepted that the sea could have caused some damage some years previously. He did not think that the drought in 1976 could have affected the foundations. If the load bearing piers in the south and east walls had remained unaffected, he would not have expected damage to occur, nor would the removal of the outer frame in the east wall by itself have caused damage.

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The defendant's counterclaim included a claim that the plaintiff had not kept the premises wind and water tight and had let the roof deteriorate. Mr. J. J. Brown, a builder, gave evidence that he had repaired the roof in 1976. It had been a minor job.

Mr. H. Hannam, M.I.C.E., is a civil engineer of considerable experience. In December 1976, he examined the area including the property. His brief was to ascertain whether the plan had a ~~suitable~~ ^{sustainable} claim against the Resources Recovery Board. He had with him a letter by Mr. Rothwell to the Constable of St. Brelade of the 1st October, 1976. It is in the following terms:

"We confirm that we examined the building as instructed by Mr. Todman, with particular reference to the structural conditions indicated by cracking in the walls at first floor level on the southern corner of the building.

It was our opinion that these cracks have been present in the building for some considerable time and have recently re-appeared through the new wall decorations due to seasonal movement of the ground on which the walls and the building are supported. The cracks were originally caused by bulging of the corner of the building in a south-westerly direction and this could have been the result of disturbance of the foundations due either to vibration of traffic or work on public services adjacent to the corner of the building, but in our opinion it is not possible to be specific as to the cause.

We examined the damaged area internally and noted that the bulging was in the vicinity of the support of the old timber window beam in the front wall of the building. This beam is sound in the areas that are visible and supported in two positions near to the middle of its span by old cast iron posts which initially were at each side of a central door opening which has since been filled in. These posts lean slightly towards the west but we could not find any evidence of the beam pulling out of its eastern support adjoining the Tenby Hotel, and it is our opinion that this distortion is also due to small foundation settlements over many years. We were informed that the end of the timber beam nearest to the damaged corner, had been resupported on a new internal brick pier at the time of the alteration to the building approximately two years ago and we were satisfied that the beam takes its support on this pier rather than in the damaged wall.

We also noted a fine crack extending vertically through the full height of the external finishings of the west gable at a point approximately 15 ft. from the damaged corner. This crack is close to the side entrance to the restaurant and continues upwards alongside window openings serving the

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upper floors. Corresponding cracks were also noted at the upper floor levels inside the building where partition walls join the outside gable wall and these cracks have undoubtedly been present for a number of years. These cracks are also consistent with slight settlement on the southern corner of the building.

It is our opinion that the damage is not sufficient to indicate imminent structural failure with consequent risk to the occupants of the building but we would recommend that a bearing plate should be fixed externally to the west gable with a tie bar passing through this wall to be attached to the inside face of the timber beam at first floor level. This precaution would ensure that further seasonal movements of the ground, or settlement due to vibration, will not cause the corner of the building to bulge more. We would also recommend at some time during this autumn or early next year, when convenient to the Parish and the owners of the building, that the foundations of the corner of this building should be examined in greater detail and, if necessary, underpinned with a concrete pad to minimise future movement of the wall. "

It should be noted that Mr. Rothwell's points of the compass are wrong. In paragraph 2 "south-west" should be "south-east", and in paragraph 3 "west" should read "south" and "eastern" "northern". As a result of what he found, Mr. Hannam recommended certain remedial works. He could not attribute the damage to the works of the Resources Recovery Board because, firstly, he would have expected the effects of settlement to have become apparent immediately, and, secondly, the work had been carried out both in the Quai Bisson and in the Bulwarks at safe distances away. He did not agree with Mr. Rothwell's report which suggested small foundation settlements over many years. Traffic vibration, because the building was on loose sand, would have been infinitesimal and he had seen no signs of cracks in adjacent buildings, for example the Tenby Hotel, which was as we have noted, attached to the north party wall of the Venus Restaurant. The nature of the sub-soil was such that he could not agree also with Mr. Rothwell's opinion that the cracks had been present before and had re-appeared due to seasonal movements. By this, Mr. Rothwell meant that tidal water would seep in from the adjacent harbour wall and moisten the soil and when it receded, as it did for some time during neap tides, that,

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and the dry weather in 1976, could have accounted for an exceptional drying out of the soil. Water could also have accumulated under the buildings from the effect of the rainfall coming off the steep rock face behind the property. Mr. Hannam accepted that even if soil shrinkage had contributed to the settlement, it had done so to a very small degree. He listed a number of alterations which he took from the Architect's plan as being structural. These were (in addition to the south door and the east window), a new fireplace, which meant that new quoins would be inserted into the walls, some screen blockwork, some cutting into the south wall by the bar and the removal of some plaster from the interior of the south wall, thus lessening the binding effect it had upon the wall's stability. As regards Mr. Reynolds' reports, he would have preferred the cracks to have been measured. Tell-tales were not sufficiently accurate. He could not, however, say that settlement had not occurred earlier at the time of Mr. Reynolds' report of the 4th December, 1969. to which we shall refer later, but if it did, it would have been infinitesimal.

Mr. Regal, called by the plaintiff, had been a builder in Jersey for some thirty years. All the photographs we have called bundle 'A' showed the east end of the lintel above the new entrance in the south wall. That entrance, he said, had been extended as much as fifteen inches towards the east. Also, it had been deepened to allow for the fire regulations, which required the doors to open outwards. Above the lintel there was a beam which ran from west to east and supported the first floor. According to this witness, this had consisted of two pieces of timber side by side, both of which had been shortened by being cut at their east ends at the time the alterations had been carried out in 1975. A void had been left above the doorway, which was bad building practice. It had been filled in with an old railway

line and was not properly grouted in. Both the method of doing this and the leaving of an overhang above the door, was bad building practice and indicated sub-standard work. In his opinion, the work had been very quickly done and entailed a lot of risk. He had noticed evidence of a new door to the left of the door. (Looking at the door from the outside, this should have been on the right.) The timbers which had been cut in the south wall extended to within two feet of this pier. Cutting the timbers since they were not supported on the pier would weaken the structure. When he had examined the window in the east wall, he did not see any horizontal frame joining the tops of the two old vertical frames. What he saw there and in the south wall, he said, could not have been attributed to something that had happened ten years before. The condition of the building so disturbed him that he had photographs taken. The whole of the bearing surface of the beam in the east wall above the east window was in a bad condition. This much appeared so to us from the photographs.

We have already referred sufficiently to the evidence of the defendant on the issue of consent to the alterations. We turn, therefore, to those parts of the defendant's evidence which are relevant to the works themselves and the relatively minor issue of the use of the first floor rooms and the condition of the roof.

Mr. Buaro helped to fit the east window. He and Mr. Biggs had had the frame made by a carpenter. The whole job took some four hours and he did not disturb the existing frame in situ. Afterwards, he had painted the interior with black paint. This is certainly apparent in photographs 'C 2' and 'C 3', and was noticeable in the piece of upright or vertical support that was shown to us. In 1974, he remembered telling him that the balcony was not safe. He felt that this was not fair as he and his partner had paid £20,000 for the lease. He had noticed the cracks in the front and south walls in 1974.

He had no qualifications as a builder, nor any experience as one. He had noticed that there was a cavity by the right of the door in the south wall; it went right up. The wall looked in quite good condition. The architect lived nearby and came in pretty often and whenever he was asked to do so, if they had a building problem. He did not think about the cracks during 1975. In any case, the architect had been happy with the work. As regards the acceptance of the work by the plaintiff, he remembered his dining at the restaurant on two occasions afterwards. He was able to ascertain the dates by using the restaurant diary. He denied that it had been written up subsequently. On the second occasion, Mr. Agathangelou had been dining with Advocate Gould and had introduced him to the witness. This suggestion was not put to Mr. Gould. He had not used the first floor as an extension of the restaurant. It had housed his Hi-Fi equipment and had had a private bar, but this was only for the use of his friends.

Mr. Biggs had asked the Architect to draw up some plans in consultation with Mr. Ruaro. He thought that he may have discussed them with the plaintiff, but he had no conscious memory of doing so. He believed that the plaintiff knew of the alterations to be carried out to the door, because he had complained that by moving the entrance from the front, trade would be adversely affected. Mr. Biggs was not a builder by trade, but in the course of some thirteen years in Jersey, had carried out a number of alterations to premises. Before the work had been started, Mr. Agathangelou had been consulted and had insisted that it be undertaken by a builder. He felt, however, that they could do the job with the assistance of Mr. Whittaker. When the plaster had been stripped off the inner surface of the south wall, he had noticed that there appeared to have been windows and doors between the door and the east wall. Mr. Whittaker advised that the door should not be widened the original three feet. Mr. Biggs explained how when he had

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cut the lintel of the existing door, he underpinned the lintel with two Acrow-props. He also called in Mr. Whittaker and Mr. ^{Richard} ~~Richard~~, who advised him to put up a flying shore. He did not think that the beam or lintel went as far as a pier which he found near the south-east corner. The bricks came out easily. Because the door had to be set in more deeply to comply with the Fire Chief's requirements, he built another pier in concrete blocks behind the existing pier, that is to say to the north of it. He placed another Acrow-prop in the bar area near that pier. He also placed a timber baulk across the Quai Bisson in the shape of two scaffold planks, each some eight inches by four inches, and made them secure by hammering them into place. The south end of the baulk rested on the wall of the opposite building and the north end on the south wall of the Venus Restaurant. It was about fifteen feet high. He had not used wedges and it was accordingly suggested to him, but denied, that the hammering would have placed a strain on the south wall which contribute to its settlement and to the condition in which it was found by Mr. Todman and others in 1976. Where the old railway line had been inserted and concrete poured in, was where there had been a space and, therefore, what was done could not have weakened the structure, but, if anything, would have strengthened it. There had not been any tell-tales on the building in 1975. As regards the front, he recalled he thought that the beam had been distorted for many years. He had helped to carry in the new frame and they had not removed the existing one. By this he meant the one which we have already mentioned and part of which, one of the uprights, was produced to us. Far from not knowing that the work was being done until it was finished, Mr. Agathangelou had been living on the premises for the last four weeks of the work. It had finished on the 31st March. However, he agreed that the application for a variation in the appearance of the window, as was evidenced by the matters in Mr. Whittaker's firm's letter of

the 7th April, was made before the new frame was put in. Thus it seems to us that there are indeed some discrepancies between the witnesses as to when the whole external work was finished, but we do not think this is important in the context of all the circumstances. He confirmed that Mr. Whittaker was often on the site. He did not remember cutting through the piece of timber in the south wall, apart from the beam. He had personally demolished the old brick pier before building up the concrete one. From this we took it to mean that, in fact, part of the pier to the east of the door was in fact demolished. But Mr. Biggs was adamant that the beam did not rest on the old pier. When he had finished, the beam was supported on the new concrete pier. The plaintiff never complained about the work. He, the witness, had not, in fact, been told that anything was wrong until the Autumn of 1976, when Mr. Todman prepared his report. Although he had agreed for remedial work to be carried out by the plaintiff without any admission of liability, and it was agreed that the work could be started in January, 1977, it was not until March or later that in fact the work began. As regards clause 4(j) of the lease, which required forty-eight hours notice to be given to the tenant before any work was started, that notice was waived by a letter from his Advocates of the 16th March, 1977, to the plaintiff's advisers. Mr. Lillicrap confirmed that the notice had been waived. He had come to Jersey in January, 1977. When he acquired a share in the business, he enquired about the state of the building and was told that it was faulty. He was on site when Mr. Regal's firm started the remedial work. Apart from taking the photographs we have labelled as bundle 'C', he kept a diary. Although he was not a builder, he had been involved in building operations before. In photograph 'C 2', one can see the cross beam in place. He had kept a vertical piece of the east window frame and

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said that he had paid a lot of attention to it.

Mr. D. P. Reynolds is a member of the Faculty of Architects and Surveyors. In 1968, he had been employed by Messrs. Woodward and Partners, who were quantity surveyors. At the request of the Sewerage Board, his firm had been asked to examine all properties to a depth of some twenty to fifty feet away from where work was due to be carried out by the Board in the public roads. He was ninety-nine per cent sure that he had prepared the reports shown to him. In doing so, he had not attempted to attribute the cause of damage if the second report showed any to have occurred. The two reports were dated the 26th January, 1968, and the 3rd December, 1969, respectively. In addition, Mr. Reynolds wrote to the Chief Engineer of the Board on the 1st May, 1968, and again on the 4th December, 1969. He took the photographs we have labelled 'D', but he was unable to tell us why he did so at the time. In his first report, we need mention only three matters. First, in the opening paragraph, he says:

"Severe settlement is noticeable on the stairs and landings and is prominent in many of the rooms."

Second, he describes two cracks at ground floor level on the east side. They are as follows:

"Severe about 1' 10" long across top right hand corner of decorative recessed panel to left of shop window. Severe down junction of right hand side of this panel with timber frame."

Thirdly there are seven cracks apparent in the fabric on first floor level on the east side. The letter of the 1st May, 1968, was as follows:

" Acting on your instructions we today visited the above named property to investigate a complaint by the proprietor, Mr. Agathangelo that settlement has taken place as a result of drainage works executed in the vicinity.

The particular crack referred to is on the East elevation and is mentioned in our report of the 26th January 1968. It is described as a severe crack and appears in the second and third paragraphs under "East Elevation" on page 1.

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As a result of today's inspection we are of the opinion that this crack has widened, though it is not possible to state conclusively that this is as a result of drainage works or that it is natural settlement. The existence of a defect at this point prior to works commencing indicates movement has taken place in the past and is a feature of the area.

However in the circumstances we consider it advisable to fix "tell-tales" in order that any further movement may be recorded. "

Thus at that time, there was some evidence that the building was deteriorating. In his last letter of the 4th December, 1969, Mr. Reynolds refers to complaints by the plaintiff about some defects which had either appeared or become more severe since the previous report. He says:

" We now have pleasure in enclosing two copies of our report on the above named property.

During our inspection, Mr. Agathangelos, the occupier, and we believe, owner, pointed out three defects which he alleges have either appeared or increased in severity since our last report. These were as follows:-

- (1) A gap between the right hand side of the door frame of the right hand door in the south wall, and an adjacent decorative tiled panel.
- (2) Internally a gap exists between the top landing and the south wall.
- (3) A crack down the junction between the left hand timber frame of the left hand ground floor window in the east elevation, which continues across the top right hand corner of the decorated plain face rendered, recessed panel.
- (4) A series of cracks which run vertically up from the left hand end of the balcony at first floor.

The defects mentioned in (1) and (2) above were not apparent on either the 26th January 1968 or 1st May 1968. Those defects mentioned in (3) and (4) above, were both apparent previously but in our opinion, are now more severe.

The crack which runs from the left hand end of the balcony and is noted on page 1 of our original report of the 26th January 1968 under "First Floor Area" is now more prominent and a small network of new cracks has developed around it.

In conclusion we would mention that this property is undergoing extensive renovation at the present time and now bears little resemblance to its former state. However we are of the opinion that the above mentioned defects have been caused by settlement of the south gable wall. As mentioned in our letter

of the 1st May 1968, it is not possible to state conclusively that the recent movement is a result of the drainage works carried out in the area, but we are in no doubt that movement has taken place since our original report of the 26th January 1968.

If we can be of any further assistance to you please do not hesitate to contact us. "

We attach considerable significance to the penultimate paragraph. Taken together, the reports support the contentions of the defendant that the property was old and that, assuming that we accept that the alterations carried out by them did not cause the settlement noticed by the two engineers and Mr. Todman in 1976, or aggravate the existing condition. It follows that the damage to the property had occurred before the alterations were commenced and only showed itself as a matter of coincidence in 1976. The renovations mentioned in Mr. Reynolds's letter of the 4th December, 1969, contradict Mr. Todman's evidence which, at the time it was given, led us to suppose that the alterations carried out under his directions at that time were not substantial. Mr. Reynolds said also that the building to the south of the Quai Bisson showed signs of stress and still did so today. He believed that the Venus Restaurant and that building were settling into the Quai Bisson. However, in cross examination he conceded that he thought it unlikely that, as regards the Venus Restaurant, that settlement was severe in 1968 at least. He asserted also that while he had taken no sample of the sub-soil, the collapse of the building could have been connected with the cracking of the sub-soil. If there had been any bulging of the south-east corner at the time of his reports, he would have noticed it.

Mr. Whittaker, an architect with twenty years' experience in the Island, summarised the steps he had taken to have the plans passed by the I.D.C. He regarded what was to be done as no more than a simple job and basically an interior decorative exercise. The only work that could have affected bearing walls was the alteration

to the door in the south gable on the Quai Bisson. He realised, however, upon seeing the variable quality of the wall, once the internal plaster had been removed, that the less it was disturbed the better. If the plans had been followed so that the door would have been widened three feet, he would have consulted an engineer. He kept a watching brief on the whole job. As regards the east window, he had not intended to disturb the structure at all and it had not been. He had made it clear that when the window frame was removed, nothing else was to be touched. When the new window frame had been inserted, the old surrounding frame and beam looked exactly as depicted in photograph 'C 2'. He had personally told Mr. Biggs where he had wanted the Acrow-props placed in the south wall. As the building showed signs of settlement in the south-east corner before the work had started, he had called in Mr. Rothwell and they had decided that the south facade should be propped up. He attributed the cracks in the building, and hence the settlement in the south-east corner, to movement in the adjacent ground, the drought, traffic and the breaking open of the two public roads. It was absolute rubbish to suggest that the works he had seen carried out by the defendant in 1975, could have been responsible. Indeed a new crack had appeared even after the remedial work of Mr. Regal's firm. If the building settled after 1975, that was no more than a coincidence. The cause of that settlement had occurred prior to the works. He was certain that there had been no lintel beyond the east side of the south door. Mr. Biggs had demolished a non-load bearing pier. The structure around the door showed no obvious weakness. The timber prop was really designed to keep the granite facade of the wall together and was not a proper flying shore. As regards the preliminary matters of the plans and letter of the 27th January, to the I.D.C., he had discussed the plans with his clients, but had not shown them

to the plaintiff, but he recalled his wandering in and out of the premises at the time he had been talking about them with Mr. Ruaro and Mr. Biggs. He did not know why the letter of the 27th January, had not been signed by the plaintiff.

The last witness for the defendant was Mr. Rothwell, a Chartered Engineer and a M.I.C.E. He had practised as a structural engineer in the Island for some considerable time. When he reported to the Constable of St. Brelade on the 1st October, 1976, he did not consider the property to be in imminent danger of collapse. He explained to us what he meant by "seasonal movement" in his letter which we have quoted earlier. He had been trying to describe the effect that water movement could have on soil; the flow of water, in the present case probably the tide, tended to wash away small particles and allowed small cavities to appear under the foundations. In his opinion that, together with the vibration of traffic, and possibly the works carried out by the public services, caused the building to settle. In 1975, if he had suspected cavities under the foundations in the south-east corner, he would have dug trial holes to find out the composition of the soil. If the works in 1975, had caused movement, he would not have expected to see the incidence of movement near the south doorway to have spread round to the east side of the building. When he had advised Mr. Whittaker about shoring, he had not been concerned about the stability of the building. His advice was offered because he felt it was sensible to shore as a precaution. He had not seen Mr. Reynolds' reports before, but he would have expected that as some of the cracks showed earlier damage, they could have got worse and shown in the same place if they had been latent. As regards the east window, he would not have expected the timber sub-frame (that is to say the part which the plaintiff alleges was taken out), to have contributed to the stability of the building. Thus even if it had been taken out,

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that would have made no difference. He did not know where the beam above the horizontal part of the sub-frame rested. He summed up his opinion by saying that the building had moved progressively over the years. It had been built on a vulnerable piece of ground, which was made by infilling behind the quay. The bulge manifested itself as a build-up over the years. In cross examination, he said that he would not have expected the scaffolding beams put up by Mr. Biggs, which was referred to as a flying shore, although strictly speaking it was not, to have caused bulging in the south-east corner. However, he did not agree with Mr. Whittaker that there was only a surface defect to be guarded against in the south gable. When he inspected the site in 1975, at the time of the works, he had looked inside and seen that some of the partitions attached to the interior of the south wall had separated. There had been movement of the building before he had seen this. The cracks he noticed on that occasion were of some age. He considered it quite reasonable to support the timber beam above the lintel with Acrows, because it extended further along to the east beyond the lintel. He rejected a suggestion that because he had done work for the tenants in the past, he would be less likely to blame them. If the method used to prop up the south wall had caused damage, he would have expected it to have been localised and not become apparent some twelve feet away; not even if it were only six feet away. He did not accept that there would have been a sudden deterioration, nor the four matters that were clearly put to him by Mr. Bailhache as causing the settlement. These were the use of the first floor, the cutting of the beam in the south wall, the removal of the east horizontal sub-frame and the removal of the lintel over the old door in the south wall.

So much for the evidence. We now return to the pleadings. The plaintiff asks first for an order for £13,785.51, being the cost of the remedial work by Mr. Regal's firm. There was some dispute

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whether it was necessary to carry out such a large amount of work, but that matter will not fall to be decided unless and until the defendant is found liable. Second, the plaintiff claims £1,040 for the loss of rental from the 1st February, 1977, to the 22nd May, 1977, (or part thereof). Third, the plaintiff asks for a declaration that the defendant is in breach of its covenants under clauses 4(a), 4(h) and/or 4(k) of the lease and that, accordingly, he is entitled to notify the defendant that the lease be cancelled. The defendant counterclaims for the loss of profits during the closure of the premises in 1977; the cost of making good the interior and Mr. Rothwell's fees; it also claims damages. As we have said, we are not called upon to determine quantum, but only to decide where the loss lies. It will be convenient to keep to the three questions posed by Mr. Bailhache at the beginning of the case. We take first the question whether the works carried out by the defendant were of a structural nature. On the evidence of the defendant's witnesses alone, we have no doubt that they were. Second, did the defendant obtain the plaintiff's consent to those works in accordance with the requirements of clause 4(h)? We are satisfied that it did not. Third, did the works cause the damage complained of by the plaintiff? This had not been an easy matter to answer. There is no doubt that the defendant was taking a risk in carrying out work to the structure of an old building that showed signs of deterioration as evidenced by the cracks in the facade. However, it took professional advice before doing so and, while we have found that the works were indeed structural, they were, in our opinion, only marginally so. It is difficult to be sure what happened precisely around the door in the south wall and where exactly the lintel and beam were situated, but the fact is that the door was widened a relatively small amount. While it is true that the defendant had to take reasonable and proper care when

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carrying out the works, we are satisfied that they did do so and that the plaintiff has not succeeded in proving that the damage to the property, which became apparent some months later, was more probably than not due to those works. It is impossible for us to say even on a balance of probabilities that these works and those alone were the effective cause of the damage. Because of this finding, it would not have been reasonable for the tenant company to continue to pay rent to the plaintiff while deprived of the premises through no fault of their own and, accordingly, the provisions of clause 6 of the lease should now apply. As regards the use of the first floor, we are not prepared to hold that the use to which it was put by the tenant company as a private room for the guests of Mr. Ruaro, and we accept the evidence of the defendant company on this point, can be said to have contributed to the damage to the fabric.

This leaves over the question of whether the breach of clause 4(h) is of sufficient gravity to enable the plaintiff to cancel the lease. We do not think that it is and, therefore, the plaintiff is not entitled to the declaration. We make no decision on the counter-claim, but will be prepared to hear counsel if the parties cannot agree.

The question of the plaintiff mitigating his loss does not arise.

Because we have found that the defendant did not obtain the consent of the plaintiff to the works, Mr. Agathangelou was prevented from obtaining independent advice as to the proposals. Had he done so, we have no doubt that a report would have been prepared on the premises. We think the matter of damages for the failure of the defendant to obtain the prior consent of the plaintiff may be met by an order that the defendant will pay one third of the plaintiff's costs.