



Birnie & Birnie v Lloyd & Sage-Lloyd
Royal Court
7th November, 2014

JUDGMENT
43/2014

Contractual dispute between landlord and tenant.

Approved Text
07.11.2014

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between:

IAN BIRNIE
and
CATHERINE MARY BIRNIE

Plaintiffs

-and-

RICHARD LLOYD
and
JAIME SAGE-LLOYD

Defendants

Hearing dates: 30th September, 1st and 2nd October 2014

Judgment handed down: 7th November 2014

Before: Richard James McMahon, Esq., Deputy Bailiff

Jurats: S E F Le Poidevin Esq., D P L Hodgetts Esq., LVO and J G Hooley Esq.

The First Plaintiff represented the Plaintiffs
The First Defendant represented the Defendants

Cases, texts & legislation referred to:

The Royal Court (Reform) (Guernsey) Law, 2008

Woodbourne Trustees Limited v Generali Worldwide Insurance Company Limited [2009-10] GLR 131

BP Refinery (Westernport) Pty. Ltd. v Shire of Hastings (President &c.) (1978) 52 AJLR 20

The Landlord and Tenant Act 1985

The Judgments (Interest) (Bailiwick of Guernsey) Law, 1985

Introduction

1. This case involves a landlord and tenant contractual dispute. Ian and Catherine Birnie, the Plaintiffs, claim unpaid rent alleged to be due from Richard Lloyd and his wife, Jaime Sage-Lloyd, the Defendants, pursuant to a lease dated 14 August 2012 (hereafter referred to as “the Lease”) in respect of a residential property known as Vue de L’Eglise in the Forest (hereafter referred to as “the Premises”). That claim has been resisted by the Defendants on the basis that the Lease was not effective. Accordingly, the Defendants have counterclaimed for the return of the deposit they paid, which has been retained by the Plaintiffs, and for some other losses associated with the events around the time they were due to take up occupation of the Premises. Alternatively, the Defendants argue that the Plaintiffs are not entitled to recover the amount of unpaid rent claimed because they failed to mitigate their losses.
2. This judgment has been prepared in accordance with the provisions of section 16(5) of the Royal Court (Reform) (Guernsey) Law, 2008:

“(5) A reasoned judgment in civil proceedings in which the Jurats (and not the Bailiff alone) are sitting shall contain –

- (a) the Jurats’ findings and decisions,*
- (b) any dissenting findings or decisions made by different Jurats,*
- (c) the identity of the Jurats making dissenting findings or decisions,*
- (d) the Bailiff’s findings, decisions and directions of law and procedure, and*
- (e) the application of his findings, decisions and directions of law and procedure to the facts.*

(6) In this section “the Bailiff” means the person presiding over the proceedings.”

The Deputy Bailiff did not sum up to the Jurats in open Court but instead indicated that the Court would reserve its judgment and retired with the Jurats, as he is permitted to do under section 14(2) of the 2008 Law.

3. In this judgment, the findings of fact are the unanimous findings of the Jurats.

Procedural background

4. The Plaintiffs’ Cause was tabled on 1 March 2013 and placed on the Rôle des Causes à Plaider the following week. A Defence and Counterclaim was tabled on 5 April 2013. A Réplique and Defence to Counterclaim was tabled on 10 May 2013, following which various interlocutory hearings have taken place, the details of which are not relevant to this judgment. The trial would have taken place in May 2014, but that hearing had to be adjourned due to the ill-health of the First Plaintiff.
5. Before proceedings were commenced in this Court, the First Defendant had issued a Petty Debts Summons against the Plaintiffs claiming the same relief, albeit in a greater amount, as subsequently set out in the Defendants’ Counterclaim. That Summons was returnable on 21 February 2013. The proceedings in the Magistrate’s Court were overtaken by the Plaintiffs issuing proceedings in this Court.
6. The Plaintiffs’ claim was amended at the opening of the trial. The amount claimed as unpaid rent reduced from £29,000 to £11,600. The First Defendant did not oppose the amendments occasioned by the Plaintiffs reducing the amount claimed, but did comment that the timing meant that there was no scope for any negotiations based on the lower amounts in issue. However, the First Defendant did not seek any time to engage with the First Plaintiff in such negotiations, commenting that he did not believe that there was any prospect of reaching a settlement. This has been a case where the parties’ positions became entrenched from the very start of the proceedings.

7. The Lease pursuant to which the Plaintiffs make their claim provided for a term of approximately 13 months computed from 31 August 2012. A deposit of £2,900 had to be paid by the Defendants. The rental payments were for an initial payment of £2,995.35, with monthly payments thereafter of £2,900. The Plaintiffs received the deposit, for which they gave the Defendants credit in respect of their claim for unpaid rent, and the rent in respect of the first month (albeit the Cause pleads that they received two months' rent). However, no further rent was paid. When the First Defendant issued the Petty Debts Summons, the Plaintiffs regarded this as evincing an intention not to be bound by the terms of the Lease and as an abandonment of the Premises. Although initially claiming the rent unpaid in respect of the entirety of the term, the amendment reflected the fact that unpaid rent could only be claimed in respect of the period to the time of the issue of that Summons.
8. The Defendants admitted that the rental payments claimed by the Plaintiffs had not been paid by them, but disputed that the Lease had taken effect. This resulted from the Plaintiffs' material failures to comply with its express and/or implied terms. It was alleged, in particular, that the Plaintiffs had remained in occupation at the commencement of the term of the Lease and that the Premises had been left in an extremely unhygienic condition. The Defendants also claimed to have relied on oral representations made by the First Plaintiff, which were found to be false, which had induced them to enter into the Lease. In each case, the consequence was that they were not obliged to make the rent payments in question and, because of the ineffectiveness of the Lease, the Plaintiffs should be required to repay the deposit they had provided through the letting agents. Their Counterclaim also extended to the costs they incurred paying for some cleaning the Premises and for some costs associated with dog care. If their assertion that the Lease was not enforceable were to be rejected, they argued that the Plaintiffs should not be awarded the full amount of the unpaid rent claimed because they had allowed the Premises to sit vacant over that time and so had not mitigated their losses as they should have done.
9. In their Réplique, the Plaintiffs denied that the First Plaintiff had made the representations alleged against him and, in any event, denied that any representations were relied on because the Defendants had inspected the Premises for themselves. Further, the Plaintiffs denied that they had been in occupation or left the Premises in an unhygienic condition. They made no admissions about the Defendants' alleged losses in the Counterclaim.
10. At the trial, evidence was given by the First and Second Plaintiffs in support of their claim. They also called Jonathan Le Moignan. Evidence on behalf of the Defendants was given by the Second Defendant, Richard Hardie, Sara Bourgaize, Jill Le Tissier, the First Defendant, Gavin Bougourd and finally Sonja Sage, the mother of the Second Defendant, whose evidence was taken by live video-link.

General directions

11. The Deputy Bailiff reminded the Jurats of their respective roles: the Deputy Bailiff remains the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats were directed that they must accept his directions on the law and follow them.
12. The Deputy Bailiff directed the Jurats that the burden of proof in respect of their Cause lies on the Plaintiffs throughout. The standard of proof is the civil standard of the balance of probabilities and the Deputy Bailiff explained that to establish something on the balance of probabilities means to prove that something is more likely so than not so. Insofar as the Defendants sought to establish any fact, the burden of proof rested on them to prove it to the civil standard. If it proved necessary to do so, when considering the Defendants' Counterclaim, the Deputy Bailiff reminded the Jurats that, for the purposes of the burden of proof, they should treat the Defendants as plaintiffs and the Plaintiffs as defendants.

13. The Deputy Bailiff further directed the Jurats to have regard to the whole of the evidence presented to the Court, and to form their own judgments about the witnesses, and which evidence they treated as reliable, and which they considered was not. The Deputy Bailiff directed that the facts of the case are the Jurats' responsibility. They may take account of the arguments in the speeches they heard, but are not bound to accept them. Equally, if at any time the Deputy Bailiff appeared to express any views concerning the facts, or emphasise a particular aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them. The Deputy Bailiff summarised that position by clarifying that, when it comes to the facts of this case, it is the Jurats' judgment alone that counts.
14. The Deputy Bailiff emphasised the need for the Jurats to have regard to the cases pleaded by the parties because these formed the basis of the dispute between them. If the Jurats felt that they had heard evidence that did not concentrate on the central issues they were required to resolve, they could, save to the extent that such evidence went to the credibility of a witness, choose not to make any findings about what might be regarded as the surrounding circumstances of the case.

The facts

15. The Plaintiffs have lived at the Premises for some 11 years. The Second Plaintiff is the sole legal owner, but they treat it as their joint property, with the First Plaintiff meeting the mortgage, which is why they were both parties to the Lease. Some parts of the Premises date back 280 years, whereas others are much newer. In the 11 years of their ownership, the house has effectively doubled in size. Because the Premises are large and at a high point of the Island and so more exposed than some to the elements, the Plaintiffs employ tradesmen to carry out various maintenance tasks regularly. As a result, the Plaintiffs have accumulated a considerable amount of useful items and other equipment associated with the Premises, which they keep for use as and when the need arises. These were mostly stored in the garage, workshop and plant room at the Premises.
16. There is a swimming pool at the Premises. The Plaintiffs were in the habit of using it seasonally from April to August inclusive. They normally cleaned it thoroughly in around February ready for that year's use. Once they stopped using it and left it uncovered, debris, leaves and algae would usually be present.
17. The First Plaintiff has been in the business of developing properties for most of his adult life. He has bought, developed and sold in excess of 150 properties. He rents out properties in the United Kingdom. The Second Plaintiff works in the radiology department at the hospital.
18. The First Defendant is an English solicitor. At the relevant times, he was employed by a firm of local Advocates, although that employment ended in or around February 2013, at which time his family relocated to England. Before their return to England, the Second Defendant was working for the States of Guernsey as a social worker. In the summer of 2012, the Defendants' family consisted of two children.
19. The Plaintiffs identified a different property in Guernsey that they were interested in buying. It had ponds that could be used for their son's plan to breed carp and significantly more land, making it suitable for their son's further wish to breed alpacas. The uncertainty surrounding the effect of the works being undertaken at the Airport was such that they took the decision to offer the Premises for rent. They had not previously let a property in which they had been living. They instructed three agents, including Livingroom Limited (hereafter referred to as "Livingroom").
20. It was through Livingroom that the Defendants were introduced. In or around March 2012, the Second Defendant fell pregnant with her third child. On telling her parents about the pregnancy, they suggested that they could move over to Guernsey to assist with child care,

thereby enabling both Defendants to work and maximise their income. Accordingly, the Defendants were looking for somewhere larger to live than the property they were renting in 2012. There were very few suitable properties available on the market for them.

21. The Defendants viewed the Premises three times before signing the Lease on 14 August 2012. The first occasion was a formal viewing on 11 June 2012 through Livingroom with the agent present. The First Plaintiff was also present. The Second Plaintiff had comparatively little to do with the letting of the Premises. The property particulars indicated that pets would be considered.
22. The Second Defendant expressed her concerns about the smell of smoke but was assured the Premises would be cleaned before any lease commenced. There was also some discussion with the letting agent about some redecoration being undertaken before the commencement of a lease. The impact of the works at the Airport was raised. The First Plaintiff explained that there had been some noise nuisance to start with associated with the compound across the road from the Premises. The contractors had caused a 5 metre acoustic fence to be constructed in April or May 2012 to address the noise issues and to minimise the effect of dust from that compound. Vehicle reversing alarms had been disabled. Floodlighting resulting in light pollution had been removed shortly thereafter. There were still microphones in the garden of the Premises to record ongoing noise levels. He was of the opinion that the major issues associated with the compound had been resolved, or at least had been ameliorated to tolerable levels.
23. The other visits to the Premises were undertaken without a representative of Livingroom being present. The First Plaintiff discussed with the First Defendant some of the quirks of the property and how he managed them. There was discussion about, and agreement over, the Plaintiffs leaving some of the equipment, including patio furniture, associated with the swimming pool area. On these visits, the Defendants did not spend a lot of time roaming around the Premises to acquaint themselves with them, but spent most of the time socialising in the garden area. The configuration of the house suited them, so they did not feel the need to go back inside. The Defendants did not comment adversely about the living conditions of the Plaintiffs because it would be impolite of them to have done so and might have offended the Plaintiffs.
24. The Defendants paid a deposit of £2,900 to Livingroom on 23 July 2012. It was paid so that the Premises would be taken off the market so as to prevent further viewings being offered. It was a sign of the Defendants' intention to proceed with the Lease. One of Livingroom's directors, Richard Hardie, understood that the Plaintiffs and the Defendants had become friendly before the Lease was formally executed.
25. A written Lease was signed by the four parties and dated 14 August 2012. As Mr Hardie, explained, it was a standard form document modified to suit the additional terms agreed by the parties. The Plaintiffs were "the Landlord" and the Defendants were "the Tenant".
26. The Lease was for a term certain from and including 31 August 2012 and including 30 September 2013. The rent payable was a first payment of £2,995.35 to have cleared by the start of the Lease and £2,900 due in advance on the first day of each successive month. Clause 3 provided for a deposit of £2,900 to be paid before the commencement of the Term. The printed text shows that this would be deposited with "*the Landlord's Agent*". Mr Hardie confirmed that he had deleted part of this and initialled it, although the parties did not also add their initials, so that it read "*the Landlord*". He did this because the First Plaintiff told him they had attempted to place the amount deposited with the Deposit Protection Scheme in England and Wales but that the Scheme had rejected this step because it was not in connection with a property in that jurisdiction. The deposit was returnable at the expiration of the Lease less any sums the Landlord was entitled to deduct, although it was also provided that it would not be refundable but would be retained "*for the Landlord's own use and benefit*".

if the Tenant abandons the Demised Premised or otherwise determines this Lease in advance of the expiry of the Initial Term”.

27. Amongst the Tenant’s covenants was clause 4.2.6:

“use of the gym/sauna is prohibited and will be locked during the term of the tenancy UNLESS documentation is shown to the landlord providing insurance for the use of the gym/sauna at the cost and liability of the named tenant/s”.

This provision was added to the Lease because the Plaintiffs had discovered that their insurers were demanding an additional premium of around £700 in respect of the gym and sauna use in the event that the Premises were let to tenants. The arrangement, therefore, was that the gym and sauna would only be included with the tenancy if suitable insurance was sourced by the Defendants. It was common ground that such insurance cover had not been obtained by the Defendants.

28. The Tenant further covenanted “*within the last fourteen days of the Term*” to “*have the carpets cleaned by a professional company*” and to “*have the oven cleaned by a professional company*” (clauses 4.2.8 and 4.2.9) and “*not [to] keep any bird, animal, reptile, livestock or pets at the Demised Premises without the written consent of the landlord*” (clause 4.27). Although there had been discussions about the dogs the Defendants intended should be brought to the Premises by the Second Defendant’s father, it was common ground that no written consent had been obtained from the Plaintiffs.

29. Clause 6 of the Lease provided:

“The Tenant paying the rent hereby reserved and performing and observing the several covenants and conditions herein contained on the part of the Tenant to be paid performed and observed shall and may peaceably and quietly possess and enjoy the Demised Premises during the term hereby created without any lawful interruption by or from the Landlord or any person rightfully claiming by from or in trust from the Landlord.”

30. In the Lease, “The Contents” were defined as “*the fixtures and fittings belonging to the Landlord in or about the Demised Premises and shown in the photographic schedule annexed hereto*”. At the time of executing the Lease, there was no photographic schedule annexed. Indeed, the only photographic schedule that might conceivably be regarded as incorporated into the Lease were the photographs taken by Mr Hardie, albeit never provided to the Defendants until after these proceedings began.

31. On 30 August 2012, the Defendants attended at the Premises in company with Mr Hardie and one of his colleagues. The First Plaintiff, but not the Second Plaintiff, was also present. The First Plaintiff was undertaking cleaning of the Premises at the time. The Second Defendant commented about the state of the kitchen, including grime and grease in the oven. The Defendants were assured by the First Plaintiff and Mr Hardie that everything that needed to be done would be completed before the Defendants moved in the following day.

32. Mr Hardie took in excess of 150 photographs and subsequently prepared an inventory to which those photographs were attached. The inventory describes the state of the Premises and the items Mr Hardie, as the Plaintiffs’ letting agent, considered were included in the Lease. Neither of the Defendants accompanied Mr Hardie as he went about taking photographs and noting what he would put on the inventory. Instead, because the Plaintiffs had allowed them to do so, the First Defendant was moving some of their belongings into the house. This was, however, only a small amount of their things and not the more extensive amount of furniture to which the First Plaintiff referred. On that day, the Second Defendant left the Premises before the First Defendant.

33. Mr Hardie made four general notes at the start of the inventory. He referred to “*Carpets not professionally cleaned throughout*”, “*Walls not cleaned throughout*”, “*Exterior buildings not cleaned and not fully cleared – as seen in photos*” and “*Swimming pool not cleaned – as seen in photos*”. The inventory then covers the interior of the house, but not the outbuildings, commenting about the state of the walls, carpets and floors and listing what might be regarded as the fixtures. By way of examples: in the Dining Room, this included “*1 x Rifle – as seen in photo*”, “*72 x brass decorations*” and “*1 x Persian style rug*”; in the Family Room, it included “*1 x television unit*”; in the Conservatory, it included “*7 x assorted scales*” and “*3 x potted plants*”; in Bedroom 5, it included “*Storage area filled with headboard and duvets and miscellaneous planks of wood*”; and in Bedroom 2, it included “*1 x oak chest of drawers*”. Mr Hardie was a bit concerned that day that the Premises would not be in the type of condition Livingroom would expect them to be in and recalled that the First Defendant had expressed his concerns that so much had been left behind. However, Mr Hardie was unaware of what discussions had taken place between the parties about what items would remain at the Premises during the term of the Lease. Mr Hardie further confirmed that it is usual now for properties being let to be professionally cleaned before a tenancy commences.
34. Mr Hardie also confirmed that Livingroom had made a payment in respect of the rent due because it was believed that this had been received from the Defendants. This subsequently proved not to have been the case. The First Defendant confirmed that he had not made any rent payment, but intended to make a bank transfer for the rent due on 31 August 2012.
35. The Plaintiffs explained that, once the commencement date for the Lease was settled, they began moving their belongings out. Being a large house, this was a big job. They cleared each room as they went. They engaged removers for certain aspects, but carried out some of the packing themselves. The Second Plaintiff cleaned when she got in from work, but the bulk of what was done was carried out by the First Plaintiff. They moved to a rental property at Vazon Bay from approximately the third week of August 2012.
36. They did not engage professional cleaners to assist them. Instead, they made use of their own commercial-standard steam cleaner for the carpets. Because they had dogs, they used sugar soap when cleaning, eg, skirting boards. The First Plaintiff acknowledged that he was cleaning the last rooms when the Defendants attended with Mr Hardie on 30 August 2012. This included the kitchen. They said they had not cleaned the swimming pool because they regarded the season for its use as having concluded. In relation to gardening, their gardener was due to attend to carry out general upkeep after the end of August. The Second Plaintiff went to the Premises on the evening of 30 August 2012 and did not thereafter return until early September.
37. The Plaintiffs concede that they did not attempt to clear the Premises of everything save for the small amount of fixtures that are mentioned on Mr Hardie’s inventory. The First Plaintiff explained that he felt it was important to leave the various items of equipment for the Defendants’ use or to have them readily available in the event that they were needed for use during the tenancy. The photographs taken show the number of items left in the outbuildings, including bicycles and a kayak. The First Plaintiff referred to the vast collection of outdoor Christmas decorations that they had acquired and which were also left at the Premises. Contrary to the First Plaintiff’s assertions, none of these items was left at the Defendant’s request.
38. The Plaintiffs further concede that lots of files were left in the office. This was a room accessed by the various workmen who attended the property on their behalf as well as by them. The First Plaintiff explained that these files contained documents relating to the work that had been carried out on the Premises before and during their ownership. Accordingly, they were regarded by him as material that necessarily needed to be left at the Premises. However, nothing had been expressly agreed between the parties about this.

39. The photographs also show metal trestles and ladders, which the Plaintiffs made use of to cut the lengthy hedges surrounding the Premises. Although the First Plaintiff considered these were essential for him or the Plaintiffs' contractors to carry out this work, they were not expressly included in the terms of the Lease and the Defendants indicated they had different plans for how to manage the gardening they would be required to undertake.
40. On the morning of 31 August 2012, the Defendants, along with their son, went to the Premises at approximately 6.45 am. The First Plaintiff was at the Premises. There was a fire burning debris in the garden, so the Second Defendant stayed in the car. There were black bin sacks outside the house. Dog faeces could be seen on the gravel path. Having pointed out that the Plaintiffs' belongings remained in the garage, the Defendants left after 10 or 15 minutes and returned to the property from which they were moving.
41. The Defendants returned to the Premises about 30 minutes later, this time without their son, who remained with the Second Defendant's mother, who had arrived in Guernsey prior to the planned move to the Premises to help with the move itself. (The Second Defendant's father had remained in the United Kingdom, ready to join the family, and bring the dogs with him, once the move had taken place.) The black rubbish sacks were still outside. On this occasion they went into the house, inspecting every room. The Premises were, in their view, no cleaner than they had been the previous day. The Second Defendant was concerned about the rifle still being on the wall. They spent about one hour at the Premises and the Second Defendant formed the provisional view that they would not be able to move in because of the number of days it would have taken to clean the house adequately for occupation. The First Defendant was concerned about where they would move to because the removal firm he had booked was only available on 31 August 2012 and not the following day and it had no storage facilities available.
42. The First Defendant returned to the Premises that morning with his mother-in-law, who wished to see for herself what was upsetting her daughter so much. The First Plaintiff was at the Premises. He said he was there to move the black bin sacks. An altercation between him and Mrs Sage took place. Contrary to the Plaintiff's assertion that they shook hands before Mrs Sage launched into him, poking him in the chest, Mrs Sage's evidence that the First Plaintiff refused to shake hands is preferred because it is consistent with what followed. Mrs Sage acknowledges that, because the Second Defendant was pregnant and upset at the condition of the Premises, she said words to the First Plaintiff to the effect of "*if anything happens to her or the baby I will hold you partly responsible*". The First Plaintiff was then abusive to Mrs Sage. He accepted that he swore at her on a number of occasions and said that it was nothing to do with her because she was not renting the property. The First Plaintiff also said to her that he did not deal with women. He was dismissive of the concerns about the property that she raised with him, eg, over the state of the garden. The First Defendant and Mrs Sage considered the First Plaintiff's attitude to be aggressive. He did not calm down and showed no intention of discussing any solution to their concerns. The First Plaintiff told Mrs Sage that "*if you don't get off my f...ing property, I won't be responsible for my actions*". The First Defendant and Mrs Sage left and returned to where the Defendants were then living. Mrs Sage reported the matter to the Police, but requested that no further action be taken because she was worried that there would be consequences for the family if the First Plaintiff were alerted to this.
43. The Defendants and Mrs Sage discussed how best to proceed. Because of the ending of their lease on the property they were leaving, they decided to continue with moving out and would put their belongings into the garage at the Premises because it would be easier to move them again and also to inspect the interior of the house than if they were inside. The Second Defendant and Mrs Sage went to see Mr Hardie. They explained there was no way the Defendants' family could move in. Mr Hardie's view was that the Lease had commenced and they had moved in, so a solution needed to be found to rectify the situation. He would advise

the First Plaintiff to engage Easy Clean to do the cleaning required. It was unclear at the time who would take responsibility for paying for that cleaning.

44. In the meantime, the First Plaintiff had contacted his friend and near neighbour, Jonathan Le Moignan. Mr Le Moignan visited the Premises and was shown round the house by the First Plaintiff. He did not think it was 100% immaculately clean but noted that it had been prepared for the new tenants. From his own experience, he knows that cobwebs in old houses can form quickly after previous cobwebs have been cleaned away. He and the First Plaintiff then left the Premises. Later in the day, he went back there because the Plaintiffs' dog, Dexter, had escaped from the First Plaintiff's vehicle, which had been parked at Mr Le Moignan's house, and had returned to the Premises.
45. The Defendants had employed Kinetic to move their belongings to the Premises. Gavin Bougourd explained that his firm had been used for previous moves by the Defendants without any difficulties being encountered. They were at the Premises during the late morning and into the afternoon to offload using two 3½ tonne vehicles. They noticed that the handful of rooms at the property they went into were very untidy and unclean. He commented, in particular, that the kitchen floor was sticky. He had rarely before seen a property in such a poor state of readiness for the people he was moving in during his 18 years in the business. They did not move any of the Defendants' belongings into the house but stored them instead in the garage.
46. The Defendants also attended at the Premises during the time the removal firm was moving their belongings. They took some of their belongings there in their own horse box, which they then left at the Premises. The First Defendant contacted Easy Clean to ascertain whether immediate cleaning could be undertaken at the Premises that day. Jill Le Tissier, the owner, attended the Premises. She considered the property was extremely dirty and that it would take the full weekend following to clean it to an acceptable standard. She noted a layer of dirt on the pelmets and that the carpets needed cleaning. She spotted dog hair, or fur, on the granite wall near the back door. She added that the pool needed cleaning. She was present for between 30 and 60 minutes. She left her staff there cleaning a few rooms that would at least provide somewhere for the Defendants to use. She expected Easy Clean to return the following day to continue cleaning, but the First Defendant contacted her later on that day to tell her that Easy Clean's services were no longer required. Easy Clean's invoice of £168.75 was settled by the First Defendant in September 2012.
47. Neither of the Defendants addressed any of their concerns directly to the Plaintiffs after the initial meetings with the First Plaintiff on the morning of 31 August 2012. Because of the altercation with the First Plaintiff that morning, they did not wish to have any further discussions with the First Plaintiff. They dealt instead with Mr Hardie as the Plaintiffs' letting agent. He had suggested the solution of engaging cleaners, which they had then pursued. However, because of the state of the Premises and the indications from Ms Le Tissier of the amount of cleaning that needed to be undertaken, the Defendants and their family decided they could not stay at the Premises, so left and returned to the property they were just about to move from. They spent the night there and were fortunate the following day to learn through other agents about a different rental property into which they could move. Accordingly, they only returned to the Premises on 1 September 2012 to remove their belongings from there and to take photographs.
48. When they attended the Premises on 1 September 2012, they took with them a friend, Sara Bourgaize. Mrs Bourgaize had been telephoned by the Second Defendant the previous day but was otherwise occupied and so could not see the Defendants that day. The Second Defendant then telephoned again early on 1 September 2012 and it was Mrs Bourgaize who suggesting looking at the Premises. When they went, Mrs Bourgaize and their gardener also attended. They spent a couple of hours at the Premises and both Mrs Bourgaize and the Second Defendant took photographs, which were produced to the Court and commented upon

extensively by the First Plaintiff. Mrs Bourgaize noted that on entering the house, there was a dreadful, overpowering smell, with filth, such as grease and cobwebs, everywhere. The worst room was the one in which the wall unit with the TV on it was situated. She commented particularly on seeing personal items of the Plaintiffs on a noticeboard in the kitchen.

49. Having decided that they would not be taking the Premises, the First Defendant sent an e-mail to Mr Hardie informing him of their decision at the start of the day on 3 September 2012. The keys were returned to the letting agent later that day. The Second Defendant's father was also informed of the change of their plans so that he did not bring across the dogs, which were left with friends in the United Kingdom for which payment was made by the Second Defendant's parents. The First Defendant subsequently e-mailed Mr Hardie requesting that the deposit paid be returned to him. Mr Hardie's response took the position that the Defendants had been provided with the keys and had moved items into the Premises, so the Lease had commenced. Because the Defendants had then chosen not to live at the Premises and had returned the key, the issue of the deposit was a legal matter between the Plaintiffs and the Defendants.
50. At the beginning of 2013, the Plaintiffs commenced proceedings against the States of Guernsey and Lagan Construction Limited. There was media coverage of this claim, which alleged an actionable nuisance arising from the work carried out at the compound near the Premises. As part of the claim, the Plaintiffs have pleaded that they and their son "*have been forced to move into temporary rental accommodation*". Those proceedings are ongoing and so there have been no factual findings in relation to this and the other allegations made by the Plaintiffs.
51. As a result of the Plaintiffs commencing those other proceedings, the First Defendant made contact with the First Plaintiff again, requesting the return of the deposit. The First Plaintiff declined to do so, with the consequence that the First Defendant issued the Petty Debt Summons seeking its return, together with additional costs and pet care. The total amount claimed was £4,468.75. When the Magistrate's Court convened on 21 February 2013, the Plaintiffs' Advocate indicated that proceedings would be issued for unpaid rent in the Royal Court and that the Petty Debts action was, therefore, to be defended. In those circumstances, the Judge adjourned the Petty Debts action but directed that it should be transferred to the Royal Court in the event that the Plaintiffs did issue the proceedings indicated. That is what has happened.
52. The Jurats do not consider it necessary to make further findings of fact about any events after that time. They have also not made findings in respect of all the evidence given by and on behalf of the parties in relation to what they regard as peripheral events during the course of the negotiations for the Lease and what has happened since the very early days of September 2012. These matters do not affect the issues for the Court's determination.

The issues

53. As previously stated, the Defendants' primary contention is that they are not obliged to pay any amount as claimed by the Plaintiffs because their obligations under the Lease simply did not arise. They have raised two bases supporting that contention. The first is that the Lease was breached by the Plaintiffs entitling the Defendants to repudiate it. In that regard, they rely on clause 6 of the Lease, by virtue of which they were entitled to vacant possession of the Premises, and/or on an implied term "*that the Premises would be fit for human habitation*". In the alternative, the Defendants have referred to what was said by the First Plaintiff prior to them executing the Lease about the works associated with the Airport, which has been shown by the action the Plaintiffs commenced against the States and Lagan Construction Limited to have been false, claiming that they had relied on this misrepresentation inducing them to enter into the Lease. As a result, they are entitled to rescind the Lease.

54. Although there had been comments made by the First Defendant about whether there had even been a valid lease or not, the Deputy Bailiff pointed out to the Jurats that this was not part of the case pleaded by the Defendants. Rather than defending the action on the basis that the terms of the Lease had not even been agreed, the Defence and Counterclaim proceeded on the basis that such an agreement had been made between the parties. Accordingly, the Jurats were not to question whether or not there was a valid lease.
55. The Deputy Bailiff directed the Jurats that, if they found that the Defendants had established that there had been a repudiatory breach of the Lease, they did not need to go on to consider whether there had been an operative misrepresentation. The consequence of finding there had been a repudiatory breach accepted by the Defendants would be that the Plaintiffs' claim fell to be dismissed and the Jurats would need then to consider the Defendants' Counterclaim. The repudiation of the Lease would necessarily mean that the performance of its terms by the Defendants also needed to be undone in order to put the parties back into the position in which they had found themselves before entering the Lease, ie, the deposit paid would have to be returned. It would then be a matter for the Jurats to decide whether the other damages claimed for the costs of cleaning and dog care had been shown by the Defendants to flow from the events surrounding the repudiation of the Lease and, if so, whether the Jurats were satisfied that there was evidence supporting either or both of those claims. The Deputy Bailiff further directed the Jurats that, although the First Defendant had appeared to abandon the Defendants' claim for damages in respect of the costs of dog care, the Counterclaim itself had not been amended, so ultimately the decision as to whether to award damages, and if so in what amount, fell to them.
56. Similarly, it would only be if the Jurats concluded that the Lease was effective and continuing as at the start of September 2012 that they would need to consider the alternative defence raised by the Defendants, which related to the lack of mitigation. This might amount to a full defence or it might amount to a partial defence, reducing the amount of damages to be awarded to the Plaintiffs for the Defendants' acknowledged breach of contract (in those circumstances) in not paying the rent due under the Lease. If the Jurats concluded that the Defendants had failed to establish their primary defence, their Counterclaim would also necessarily have to be dismissed.

Directions on repudiatory breach

57. Turning to the provisions of the Lease on which the Defendants rely, clause 6 itself does not refer expressly to "*vacant possession*", but rather that the Defendants "*shall and may peaceably and quietly possess and enjoy the Demised Premises during the term hereby created without any lawful interruption by or from the*" Plaintiffs. The Deputy Bailiff directed the Jurats that, in any event, "*vacant possession*" as a matter of law can extend beyond the Premises merely being empty and unoccupied and might extend to whether they are capable of being occupied. Further, because one of the fundamental aspects of a lease is that the lessor is giving to the lessee exclusive possession, another way of considering this provision would be to ascertain whether, at the commencement of the term of the Lease, there had been exclusive possession given.
58. The Deputy Bailiff reminded the Jurats of the approach to take to the submission of the Defendants that there has been implied into the Lease a term that the Premises would be fit for human habitation. The relevant principles upon which terms may be implied into a contract drawn from the law of England and Wales have been cited with approval by Deputy Bailiff Collas (as he then was) in *Woodbourne Trustees Limited v Generali Worldwide Insurance Company Limited* [2009-10] GLR 131. This included the summary given by the Privy Council in *BP Refinery (Westernport) Pty. Ltd. v Shire of Hastings (President &c.)* (1978) 52 AJLR 20:

“... for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give

business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that ‘it goes without saying’; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.”

Accordingly, the Deputy Bailiff directed the Jurats to decide factually whether these conditions had been satisfied in relation to the implied term pleaded by the Defendants.

59. The interpretation to be given to a contract is, however, a matter of law rather than a question of fact. Accordingly, the Deputy Bailiff had to consider what the implied term “*that the Premises would be fit for human habitation*” could properly encompass so as to direct the Jurats what it meant to enable them to determine factually whether it had been breached.

60. In the absence of any guidance in Guernsey law, the Deputy Bailiff noted that section 10 of the Landlord and Tenant Act 1985 provides that:

“In determining for the purposes of this Act whether a house is unfit for human habitation, regard shall be had to its condition in respect of the following matters –

*repair,
stability,
freedom from damp,
internal arrangement,
natural lighting,
ventilation,
water supply,
drainage and sanitary conveniences,
facilities for preparation and cooking of food and for the disposal of waste water;*

and the house shall be regarded as unfit for human habitation if, and only if, it is so far defective in one or more of those matters that it is not reasonably suitable for occupation in that condition.”

61. Whilst he accepted the First Defendant’s submission that the Court is not obliged to give effect to the terms of a UK Act of Parliament, what the Deputy Bailiff particularly recognised is that this section appears in the Act under the heading “*Implied terms as to fitness for human habitation*” and that the types of matters that have to be defective are those relating to the actual use of the premises as a residence. If the structure is inadequate for humans to live in it, or it does not have the basic cooking and sanitary facilities required to be used as such, then the implied term will lead to the conclusion that the property in question is unfit for human habitation. There is nothing about the overall cleanliness of the house.

62. In the light of that approach, the Deputy Bailiff decided that an implied term relating to a house being fit for human habitation should, as a matter of Guernsey law, be given a meaning broadly consistent as being limited to matters that are fundamental to the use envisaged. It extends only to matters that are essential for a building to be capable of occupancy by humans as a residence. He directed the Jurats that if they found that the term “*that the Premises would be fit for human habitation*” was implied into the Lease, they could proceed to consider the matters set out in section 10 of the 1985 Act or anything else that might be viewed at a similar level as something that a person simply could not do without in order to occupy a building as a domestic residence. However, the implied term could not, as a matter of law, extend to the general cleanliness of a building for the reason that some people may be content to live in different degrees of squalor, with the further consequence that cleanliness did not go to the fitness of premises for their intended use, whereas structural and other essential services being defective did affect the usability of a property for occupation by humans.

63. If the Jurats concluded that there had been a breach of any term of the Lease, in respect of that breach they would then need to consider whether alone, or taken in conjunction with any other breach found, it was so serious, or fundamental, that it went to the root of the contract between the parties. If it did, then the Jurats needed to proceed to decide whether the Defendants had acted to accept the breach or breaches and exercise their entitlement to bring about the ending of the contract. If they did so, the Jurats could also conclude that the Defendants were no longer bound by their obligations under the Lease.

Discussion

64. The Jurats felt that the evidence given on behalf of the Defendants' case was more convincing than that given on behalf of the Plaintiffs' case. They formed the impression that the First Plaintiff is someone who has been accustomed to getting his own way. He presented as someone with rather an overbearing and condescending manner. He made many derogatory remarks about the Defendants with which the Jurats disagreed. They felt his approach was unnecessarily confrontational, almost as if he were spoiling for a fight whether his line of questioning had any relevance or not, which therefore supported their conclusion that he reacted on 31 August 2012 in the manner the First Defendant and Mrs Sage said he did. The situation that morning was potentially capable of a sensible resolution, but the attitude of the First Plaintiff meant that this quickly became impossible.
65. Looking at matters in the round, the Jurats find that the Plaintiffs did not approach the imminent start of the tenancy of the Defendants with sufficient urgency. It was not sensible for them to have been carrying out so much of the work necessary to prepare the Premises for the Defendants to occupy so near to the start of the tenancy. With the benefit of hindsight, it was short-sighted of them not to have vacated the Premises some days earlier and engaged professional cleaners to run through the entire property to bring it up to an acceptable standard. The express Tenant's covenant to have the carpets cleaned professionally in the final fortnight of the Term gives rise to the suggestion that a similar level of cleanliness could be expected by the Defendants at the commencement of the Term. It may not have provided a complete answer to the problems experienced by the Defendants, but the Jurats take the view it would have gone a long way towards solving the issues in an amicable fashion.
66. Although the Jurats were concerned that the form of Lease executed was incomplete, eg, because it did not have a complete inventory attached to it, in the light of the Deputy Bailiff's directions, they have proceeded on the basis that there was a valid agreement between the parties under which the Defendants had committed to leasing the Premises with effect from 31 August 2012 at the rent specified. From the evidence, the Jurats have concluded, however, that the parties had not agreed that the Plaintiffs could leave on the Premises the items that they actually left, save for those in respect of which agreement had been reached. In particular, the absence of agreement extended to the contents of the office and the contents of the garage. There had also been no explicit agreement about including the rifle as part of the contents of the Premises. The First Plaintiff had a personal shotgun certificate issued by the Chief Officer of Police in respect of this deactivated weapon. The Jurats find that the Plaintiffs failed to take adequate steps to ensure that it was appropriate to leave the rifle in situ at the Premises and failed to secure the agreement of the Defendants to it being left there, despite it appearing on Mr Hardie's inventory.
67. The sauna and gym area were not included within the terms of the Lease because the Defendants had not produced evidence of suitable insurance cover. Accordingly, anything left in those areas was, on 31 August 2012, a matter for the Plaintiffs and not the Defendants. Apart from those areas, the terms of the Lease were such that the Defendants were entitled, as from the very commencement of the Term on 31 August 2012, to exclusive possession of the Premises.

68. The Jurats take the view that, when the Defendants arrived at the Premises on 31 August 2012, they were entitled to find that all of the Plaintiffs' belongings had been removed, save for the handful of items about which there had been discussions and about which there was evidence that the Jurats found acceptable demonstrating agreement to those items being left at the Premises. Within the house itself, in addition to those items listed on the inventory which can properly be regarded as fixtures and fittings, and so included as "The Contents", the Jurats find that there was agreement about the large unit housing the television set in what Mr Hardie and others called the Family Room.
69. There was also agreement that a small amount of patio furniture associated with the area around the swimming pool should be left. However, there had been no agreement that the scuba gear or the kayak should be left. Further, there was no agreement between the parties that the metal trestles and other equipment used for hedge-cutting would remain at the Premises. In summary, the Jurats find that there was insufficient evidence that any agreement existed whereby the Plaintiffs were entitled to leave at the Premises the other items that they did. When all of these additional items are taken into account and combined with the content of the office and the garage, the Jurats are satisfied that there was a considerable amount of the Plaintiffs' belongings at the Premises that should, by that time, have been removed.
70. In accordance with the terms of the Lease, on 31 August 2012, Mrs Sage actually had as much, if not more, right to be at the Premises than the First Plaintiff. It was, by then, the Defendants who were entitled to decide who to invite to the Premises and the Jurats find that the First Plaintiff should have realised that and not responded in the abusive manner he did. Whilst the Jurats accept that someone needed to be present to hand over the keys to the Premises, that was in principle the extent of the involvement of anyone from the Plaintiffs' side that day. As a consequence, the First Plaintiff should not have been undertaking further removal work at all, or doing anything else, eg, burning rubbish, that day because the Premises needed to be available for the Defendants to enjoy in accordance with clause 6 of the Lease. Whether the First Plaintiff had actually spent all night at the Premises, as the Defendants suspected, or arrived before the Defendants' early arrival on 31 August does not affect that conclusion.
71. The hostility of the First Plaintiff towards Mrs Sage is, in the opinion of the Jurats, a relevant factor to take into account. It aggravated the breach of clause 6 of the Lease and set the unfortunate tone for what happened next. The Jurats consider the demand made by the First Plaintiff for the First Defendant to remove Mrs Sage from the Premises, together with the assertion made by the First Defendant that he would change the locks at the Premises, as being further evidence that the First Plaintiff had not satisfied the requirements of clause 6 of the Lease on 31 August 2012. The Jurats also felt that the Defendants were entitled, as a result of these actions, to believe that the First Plaintiff did not intend to satisfy those requirements.
72. By reference to the conditions to be satisfied before a term is implied into an agreement, the Jurats are satisfied the term "*that the Premises would be fit for human habitation*" was implied into the Lease. It is clear to them that, when a property is offered to be let for use as a residence, it is implicit that it must be fit for use for that purpose. Such a provision would, in their view, go without saying and there is nothing express in the terms of the Lease contradicting it but rather some of the provisions support the conclusion the term necessarily had to be implied.
73. But for the constraints placed on them by the Deputy Bailiff's direction as to how to interpret this implied term, the Jurats would have concluded that, on 31 August 2012, this term had also been breached by the Plaintiffs. The Jurats are of the opinion that the condition of the Premises that day was unacceptable. From the evidence given by persons who had no reason to attend and tell anything other than the truth, the Jurats are satisfied that the interior of the house had not been cleaned to an acceptable standard for the incoming tenants. They noted

that Mr Hardie had indicated that professional cleaning has now become the norm and that the terms of the Lease required the Defendants *inter alia* to have the carpets professionally cleaned just before the end of the Term. In short, the level of preparedness of the Premises on 31 August 2012 was such that the property was not fit for the rental purpose for which it had been let. However, having regard to the matters the Deputy Bailiff directed them they were required to consider, the Jurats have concluded that the Premises were structurally fit for occupation as a house and that it had all the necessary amenities so that it could not be said to be unfit for human habitation by reference to those requirements. Accordingly, the Jurats are unable to find that there has been a breach of the implied term “*that the Premises would be fit for human habitation*”.

74. Ordinarily, the problems experienced by the Defendants on 31 August 2012 would be capable of resolution through sensible discussion between the parties. For example, had the First Plaintiff acknowledged that the Premises were not capable of being occupied by the Defendants that day and offered satisfactory terms under which their occupancy would have commenced a few days later, during which time the Premises would have been vacated to the extent required and cleaned to the standard properly expected, the Defendants may well have been obliged to continue with the Lease or face the consequences. However, events on the morning of 31 August 2012 can, in the Jurats’ opinion, be taken into account as to whether there was any realistic prospect of that level of engagement occurring and being fruitful.
75. The Jurats are satisfied that the First Plaintiff had no intention of compromising on the position he took that day and has taken since. As far as the First Plaintiff was concerned, the Premises were left in an adequate condition and any shortcomings were for the Defendants to deal with. Moreover, the First Plaintiff has appeared genuinely bemused that the Defendants would not welcome having left at the Premises all the useful items the Plaintiffs had left there. In regard to both matters, the Jurats find that the Plaintiffs’ stance is unreasonable and wrong. As has just been explained, the Plaintiffs had an obligation to vacate the Premises so that they were ready for the Defendants to occupy on 31 August 2012. The Plaintiffs failed to comply with that obligation. When coupled with the obligation of the Plaintiffs, and particularly the First Plaintiff as the principal person involved, to be prepared to address any concerns raised by the Defendants in a sensible and co-operative fashion, the Jurats have concluded that the Defendants were entitled to regard the Plaintiffs’ breach as incapable of being rectified in the manner it would normally have been. Instead, the First Plaintiff’s behaviour aggravated the situation to an extent that no resolution of the Defendants’ concerns was, or was likely to be, possible.
76. In those circumstances, the Jurats find that the breach of the Lease by the Plaintiffs was sufficiently serious and not capable of being resolved within an acceptable timeframe so as to justify the Defendants accepting it and choosing to repudiate the Lease there and then, bringing both parties’ obligations to an end.
77. The Jurats further find, insofar as it is relevant, that the Defendants did not effectively take possession of the Premises on 31 August 2012. They were provided with the keys (and, in that context, the Jurats do not accept the First Defendant’s suggestion that the retention of a key by the Plaintiffs meant that the Defendants had not potentially been given exclusive possession of the Premises) and did move their belongings on to the Premises that day. However, the Jurats reach the conclusion that the circumstances were such that this was the only option available to them. Their hands were forced and, had there been some other practical solution, the Jurats are satisfied that the Defendants would have taken that option rather than leave any of their belongings at the Premises on the day in question. The Jurats also regard the fact that the Defendants and their family slept elsewhere that night as indicative of their intention not to take possession. Once they had removed all their belongings, the keys to the Premises were returned to Livingroom at the earliest opportunity.

78. The Jurats consider that the expenses incurred by the Defendants in engaging Easy Clean to attempt to clean the Premises on 31 August 2012 arose directly from the situation in which they found themselves that day when having to decide whether to waive the Plaintiffs' breach and take up occupation under the terms of the Lease. Consequently, the amount paid of £168.75 is, in the Jurats' opinion, sufficiently closely related to the events on that day to be recoverable by the Defendants as the damages flowing from those events. However, the Defendants adduced insufficient evidence in relation to the alleged costs that they have incurred in respect of the dog care included in their Counterclaim and so the Jurats cannot find that part of the Counterclaim established. Accordingly, the recoverable amount attributable to the Counterclaim will be the return of the deposit of £2,900, which follows from the finding that the Lease was repudiated at the outset and so treated as not taking effect, plus the cleaning costs.

Other matters

79. In the light of the Jurats' conclusions on the first basis on which the Defendants resisted the Plaintiffs' action for unpaid rent, there has been no need to proceed to consider whether the alleged representations amounted to an operative misrepresentation. Because of the currency of the Plaintiffs' other proceedings against the States of Guernsey and Lagan Construction Limited, the Court does not consider that it would be appropriate to make any findings in relation to these allegations. They are matters best resolved once they have been addressed in those proceedings. However, the Jurats formed the impression, especially in the light of Mrs Sage's evidence, that the Defendants had not actually relied on anything said by the First Plaintiff about the Airport works and, as a result, had there been any misrepresentation, it had not induced the Defendants to enter the Lease.

80. Similarly, because the Jurats are satisfied that the Plaintiffs have not sustained any losses at all, the question of whether they failed to mitigate any losses has become otiose.

Conclusions

81. In the light of those findings, the Court dismisses the Plaintiffs' claim for unpaid rent under the Lease. The Defendants' obligation to pay the rent claimed does not arise because the Lease was properly repudiated by them as a consequence of the Plaintiffs' fundamental breach of it.

82. In relation to the Counterclaim, for the reasons given, the Court awards the Defendants damages in the sum of £3,068.75 in total.

83. The Court will now invite further submissions on the Defendants' claim for interest under section 1 of the Judgments (Interest) (Bailiwick of Guernsey) Law, 1985 and the question of the costs of these proceedings.