IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

In the matter between:

Case No. 3434/11

UNITED AFRICAN MARINE INSURANCE BROKERS (PTY) LTD — Plaintiff

And

GLENRAND MIB LIMITED — Defendant

In the matter between:

Case No. 10801/09

UNITED AFRICAN MARINE INSURANCE BROKERS (PTY) LTD — Plaintiff

And

GLENRAND MIB LIMITED — Defendant

In the matter between:

Case No. 6702/11

UNITED AFRICAN MARINE INSURANCE BROKERS (PTY) LTD — Applicant

And

GLENRAND MIB LIMITED — Respondent

In the matter between:

Case No. 6703/11

UNITED AFRICAN MARINE INSURANCE BROKERS (PTY) LTD — Applicant

And

GLENRAND MIB LIMITED — First Respondent
ENFORCE SECURITY SERVICES (PTY) LIMITED — Second Respondent

ORDER

A. First Action (Case No.10801/09)

1. Judgment is granted in favour of the plaintiff against the defendant, AON South Africa (Pty) Ltd, in the sum of R973 800,00.

2. Interest on the above amount at the rate of 15.5% per annum from 1 May 2009 to date of payment.

3. Costs of suit on the attorney and client scale, such costs to include the costs of two counsel where two counsel were employed.

B. Second Action (Case No. 3434/11)

1. Damages Claim

   (a) Judgment is granted in favour of the plaintiff against the defendant, AON South Africa (Pty) Ltd, in the sum of R957 554,74.

   (b) Interest on the above amount at the rate of 15.5% per annum from 1 May 2009 to date of payment.

2. Rental Claim

   (a) Judgment is granted in favour of the plaintiff against the defendant, AON South Africa (Pty) Ltd, in the sum of R1 832 827,70.

   (b) Interest on the above amount at the rate of 15.5% per annum will be paid as follows:

      (i) on the sum of R168 764,58 from 1 June 2009 to 30 June 2009;

      (ii) on the sum of R458 166,87 from 1 July 2009 to 31 July 2009;

(iii) on the sum of R747 569,16 from 1 August 2009 to 31 August 2009;

(iv) on the sum of R1 036 971,45 from 1 September 2009 to 30 September 2009;

(v) on the sum of R1 326 373,74 from 1 October 2009 to 31 October 2009;

(vi) on the sum of R1 615 776,03 from 1 November 2009 to 30 November 2009;

(vii) on the sum of R1 832 827,70 from 1 December 2009 to date of payment.

3. The issue of costs in respect of the second action is adjourned *sine die* and, unless resolved between the parties, will be determined on a date to be arranged with the Registrar.

C. Eviction Application (Case No.6702/11)

1. The respondent, AON South Africa (Pty) Ltd, is directed to pay the costs of the application on an attorney and client scale, such costs are to include those consequent upon the employment of two counsel where two counsel were employed.

D. Spoliation Application (Case No. 6703/11)

1. The applicant, AON South Africa (Pty) Ltd is directed to pay the costs of the application on an attorney and client scale, such costs are to include those consequent upon the employment of two counsel where two counsel were employed.

SEEGOBIN J:

INTRODUCTION

[1] This is yet another dispute involving a landlord and tenant. The protagonists in this torrid tale are United African Marine Insurance Brokers (Pty) Limited ('United') and Glenrand MIB Limited ('Glenrand'). At the commencement of the trial on 10 February 2014 I was informed that any judgment granted herein in favour of United should be against AON South Africa (Pty) Ltd in the stead of Glenrand.

[2] There are four matters before me: two are actions and two are applications. They all have their origins in a single written contract of lease concluded between United as landlord and Glenrand as tenant in respect of certain immovable property. To place these matters in perspective it is perhaps convenient to set out some background.

RELEVANT BACKGROUND

[3] During February 2000 United concluded an agreement of lease with Old Mutual in respect or certain premises owned by United at 4 Sinembe Crescent, La Lucia Ridge Office Estate ('the premises'). On 1 December 2003 United and Glenrand concluded a five (5) year written agreement of lease ('the agreement') in respect of the said premises. The commencement date of the lease was 1May 2004 and the termination date was 30 April 2009.

[4] There was no dispute that Glenrand took physical occupation of the premises a month or two before the commencement date in order to attend to fitting out the premises for its specific needs. On 11 May 2009, that is after the termination date, United instituted and served an urgent eviction application against Glenrand. On

12 May 2009 Glenrand in turn instituted and served an urgent spoliation application against United. Both applications were set down for argument on 19 May 2009 before the High Court, Durban. There seems to be no dispute that a few minutes before the matters could be heard, Glenrand's counsel handed the keys to the premises to United's counsel. The net result of this is that the only issue which requires determination in the two applications before me is that of costs.

[5] On 10 December 2009 United issued its first summons against Glenrand for delivery of United's demountable partitions alternatively their value as at April 2009 in the sum of R973 800.00 ('the first action'). On 30 March 2011 United issued its second summons against Glenrand in the sum of R989 162.50 in respect of damages to the premises and in the sum of R1 832 827.70 in respect of loss of rental ('the second action'). To complete this background, it seems that on 10 May 2011 the Durban High Court granted an order transferring the eviction and spoliation applications to this court. On 3 October 2011 United applied for a consolidation of the two actions and for the issue of costs in the two applications to be determined by the same court hearing the consolidated action. That order was granted by this court on 24 April 2012.

TRIAL IN THIS COURT

[6] The trial in this matter commenced before me and proceeded in this court on 10, 12, 13 and 14 February 2014 and thereafter continued in Durban between 8–17 September 2014 when the evidence was finalised. The nature of the evidence relied upon by United comprised in the main of *viva voce* factual evidence, *viva voce* expert evidence and documentary evidence.

[7] All in all nine witnesses testified for United. They were Mr Niemesh Singh ('Singh'), Mr Eugene Ramnarayan ('Ramnarayan'), Mr Anthony Whitfield

('Whitfield'), Mr Greg Fendt ('Fendt'), Mr Balan Joseph ('Joseph'), Mr Carlos Duarte ('Duarte'), Mr Nick Turner ('Turner'), Mr Sven Arro ('Arro') and Mr Bradley Blom ('Blom').

[8] Glenrand called five witnesses and they were Mr Robin Moss ('Moss'), Mr Warren Fitzpatrick ('Fitzpatrick'), Mr Llewellyn Patrick ('Patrick'), Mr Shane Burnham ('Burnham') and Mr Mark Seymour ('Seymour').

[9] United was represented by Mr OA Moosa SC together with a junior from time to time. Glenrand was represented by Mr J King SC.

[10] Due to the voluminous nature of the evidence led in this matter, I do not intend recounting the evidence of each witness in any great detail herein. Their evidence is on record. Given the sharp factual disputes that have arisen in this matter, it is perhaps convenient to employ the following guidelines outlined by Nienaber JA in the matter of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others*[1]:

> "The technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions before it may be summarised as follows. To come to a conclusion on the disputed issues the court must make findings on *(a)* the credibility of the various factual witnesses, *(b)* their reliability, and *(c)* the probabilities. As to *(a)*, the court's findings on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the witness' candour and demeanour in witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to *(b)*, a witness' reliability will

[1] 2003(1) SA 11 SCA (paragraph [5] at 14I-15E).

depend, apart from the factors mentioned under *(a)* (ii), (iv) and (v), on (i) the opportunities he had to experience and observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to *(c)*, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another the more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities prevail (paragraph [5] at 14I-15E)."

[11] On the subject of legal principles I should mention that in his heads of argument and in oral submissions before me, Mr Moosa indicated that the plaintiff, United, will also seek to rely on inferential reasoning and in this regard he drew my attention to the following principles discussed by Nicholas JA in *Bates & Lloyd Aviation (Pty) Ltd and Another v Aviation Insurance Co*.[2] namely:

"Inference, it was observed by Lord Wright in Caswell v Powell Duffryn Associated Collieries Limited [1939] 3 ALL ER 722 (HL) at 733, must be carefully distinguished from conjecture or speculation:

There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

From both inference and speculation must be distinguished hypothesis. This is a theory advanced in explanation of the facts in evidence as a basis for an inference. To be logically sound, it must be consistent with all the proved facts, and it must

[2] 1985(3) SA 916 (A) at 939F-940B

> not postulate facts which have not been proved. It may be advanced by a legal representative or, where the subject is a technical one, by an expert witness. The process of reasoning by inference frequently includes consideration of the various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable)."

[12] As pointed out by Mr Moosa the above test was watered down to some extent in the matter of *Hanns-Christian Hulse-Reuter & 2 Others v Joseph Godde*[3] where the court said the following:

> "While there not be rigid compliance with the standard, the inference sought to be drawn, as I have said, must at least be one which may reasonably be drawn from the facts alleged."

THE VINDICATORY CLAIM

[13] United's first claim against Glenrand is a vindicatory one. The subject matter of the claim are demountable partitions. In its pleadings United sought the return of these partitions *alternatively* their value as at the date of trial if they could not be returned; *alternatively*, their value in the event of them being destroyed or damaged or lost as at the date of the delict.

[14] Singh who is the managing director of United and who was integrally involved in United's dealings with Glenrand at all material times testified that at the time that Glenrand took occupation of the premises there were only demountable partitions within the premises; that there was sufficient demountable partitioning within the premises to allow for the configuration reflected on Annexures 'A', 'B' and 'C' to the Agreement; that the sum of R189 014,89 as

[3] 2001(4) SA 1336 (SCA) paragraph [14].

provided for in Clause 38.2 of the Agreement was clearly and expressly understood to be the agreed cost of reconfiguring the existing demountable partitioning within the premises to accord with the needs and requirements of Glenrand as set out in Annexures 'A', 'B' and 'C' to the Agreement, and, that when the premises were inspected after Glenrand had vacated, a considerable amount of demountable partitioning was missing. Whitfield testified that what was left behind was damaged.

[15] Clause 38.2 relied upon by United in this regard reads as follows:

> "The Landlord will reconfigure the premises in accordance with the attached layout plans marked Annexures 'A', 'B' and 'C'. It is recorded that these works have been costed to the mutual satisfaction of both the Landlord and Tenant in the amount of R189 014,89 (excluding VAT) which shall be for the Landlord's account. In the event of any variations being introduced by the Tenant which has the effect of increasing this cost, the incremental amount will be for the account of the Tenant."

[16] When Singh was cross-examined it was specifically put to him that Glenrand would say the following: (a) that there was a surplus of demountable partitioning which could not be used at the premises; (b) that this surplus, by agreement with Singh, was to be stored in the basement and also on the outside parking lot; (c) that Singh had asked Burnham of Wayne Bond Shopfitters for a quotation to reuse the surplus demountable partitioning in another of Singh's properties, and (d) that Singh in fact removed or arranged to have the surplus demountable partitioning removed from the premises.

[17] The above version that was put to Singh on behalf of Glenrand should be contrasted and compared with what Glenrand contended in the pleadings: *first*, nowhere in its plea, which was served on United on 15 February 2010, does Glenrand make any mention of the version that was put to Singh; and *second*, in its

response to United's request for further particulars for trial which was provided on 29 January 2014 Glenrand provided the following explanation which I set out hereunder in summary form. It contended that: (a) prior to taking occupation, Glenrand undertook the configuration of the premises using its own contractor and sub-contractors; (b) in the main, such configuration consisted of drywall partitioning and not of the demountable kind; (c) in certain areas a limited quantity of demountable partitioning was used which was left behind by the previous tenant; (d) during the course of the lease and with knowledge and consent of United the configuration of the premises was altered; (e) at the end of the lease all the partitioning, both drywall and demountable was left in position and that configuration still included the same quantity of demountable partition; (f) Glenrand did not remove any of the demountable partitions; and (g) that in the event if United could prove that Glenrand removed any demountable partitions, United was not entitled to compensation because there was no evidence that United was the owner of the demountable partitioning.

[18] When Moss testified on behalf of Glenrand, he found it extremely difficult to explain why Glenrand did not contend in its plea or in its response to the request for further particulars, that it was Singh who had removed the surplus partitioning or had arranged for it to be removed. This was a defence that surfaced for the first time in the trial. In my view, if there was any truth in this version, it was a simple matter for Glenrand to have pleaded it which it failed to do. However, the matter does not end there as Glenrand's version in court should further be assessed against a series of correspondence that passed between the parties once Glenrand had advised United that it did not wish to renew the lease.

[19] This correspondence is dealt with hereunder:

[19.1] It commenced with an email from Dixie to Singh confirming that Glenrand will not be renewing the lease which was due to terminate on 30 April 2009. On 6 April 2009 United wrote to Glenrand and recorded, *inter alia*, the following:

> "… we further confirm, that at our meeting today, you were in possession of the signed lease document, with the attached annexures, being the plans that were signed off at the commencement of the lease and these documents were in Glenrand MIB's possession at all times and our company was not requested to furnish you'll with any copies." [my emphasis]

[19.2] It was not disputed that Glenrand did not refute the above.

[19.3] On 7 April 2009, United wrote to Glenrand again and, *inter alia*, directed its attention to the plans attached to the lease and requested it to restore the premises to the same configuration as in those plans. Of particular significance is that which is set out in the second and third paragraphs of the said letter, namely:

> "… Glenrand MIB is patently aware of all the renovations that it had conducted during the course of its lease and furthermore that these renovations were conducted without the Landlord's consent. It follows therefore that it must have known that it was obliged to re-instate the premises to its original condition. For it to now rely on my unavailability to avoid its timeous fulfilment of its lease obligations is unacceptable. More importantly, you avoid explaining, in circumstances where you seek disingenuously 'to pass the buck' as it were, why, since at least the 16th March 2009, you have done nothing to take the renovations further.
>
> The Landlord will not take any responsibility for your company's dilatoriness and or tardiness. This is a simple matter: "all you need to do is to have a look at the plans attached to the lease, then have regard to the current layout of the premises,

> then engage a suitably qualified contractor to restore the premises to the same configuration as those plans, and to the same condition that the premises were in when it was handed to Glenrand MIB, regard being had to the condition of the painting, tiling and other aspects (as pointed out in my previous emails) …"
> [my emphasis]

[19.4] On 14 April 2009 United's attorneys wrote to Glenrand and in paragraph 6 of the letter recorded the following:

> "The purpose of the inspection is to establish the nature and extent of the work that you will need to complete in order to restore the premises to the state as described in annexures 'A', 'B' and 'C' to the lease." [my emphasis]

[19.5] On 15 April 2009, Glenrand's attorney wrote to United's attorney, and with reference to the letter of the 14 April 2009, recorded that he was due to consult with his client on the afternoon of 15 April 2009 and he would thereafter revert to United's attorney.

[19.6] On 17 April 2009 Glenrand's attorney wrote to United's attorney and recorded, *inter alia*, that Glenrand undertakes to restore the premises as per Annexures 'A', 'B' and 'C' of the lease. This undertaking is contained in paragraph 3 of the letter in the following terms:

> "With regard to your client's threat to endeavour to realise the Guarantee, which threat we note has now been carried out in your letter addressed to Nedbank dated 16 April 2009, we have been instructed to record, as we hereby do, that our client undertakes to restore the premises as per annexures 'A', 'B' and 'C' of the lease." [my emphasis]

[20] The above correspondence demonstrates, in my view, that there was a clear intention on the part of Glenrand to restore the premises as per the Annexures to the lease agreement. This is what was within the contemplation of the parties at

the time. Surprisingly, however, when Singh testified it was suggested to him that this was a misunderstanding. Moss, on the other hand, stated under cross-examination that the instruction given to Glenrand's attorney emanated from a collective decision taken by himself, Nandalal and Dixie. Nandalal and Dixie were no doubt fully aware of the fact that the premises were to be restored as per the Annexures to the lease agreement, hence the instruction to Glenrand's attorney at the time. Not surprisingly, neither Nandalal, Dixie nor Spain for that matter were called to testify by Glenrand despite their availability to do so. The only reasonable inference that one can draw from this is that none of them would have supported Glenrand's position in court. In all the circumstances, it would seem to me that the parties were *ad idem* that at the termination of the lease the premises were required to be restored as per Annexures 'A', 'B' and 'C' to the lease. It is for precisely this reason that the undertaking was given by Glenrand's attorney on 17 April 2009.

[21] The evidence disclosed that Carters Progressive Office Design ('Carters') had been given the furnishing and fitment contract by Glenrand for the premises. Fitzpatrick testified that Carters area of expertise was in custom made furniture. Carters, however, did not have the necessary expertise for shop fitting and had to bring in a sub-contractor. The sub-contractor in question was Pelican, the supplier of the demountable partitioning, which then referred Glenrand to Pinnacle Office Concepts which in turn contacted Burnham of Wayne Bond Shop Fitters.

[22] When Moss testified, he was at pains to suggest that the word 'demolition' as it appears on the quotation from Pinnacle was a clear reference to demolishing drywall partitioning as opposed to dismantling demountable partitioning. Moss's evidence should be contrasted with that given by Fitzpatrick and Burnham. Fitzpatrick maintained that the word 'demolition' as used on the quotation was really a synonym for dismantling and that what was contemplated was the

dismantling of demountable partitioning. His recollection was that the majority of the work related to the dismantling and reconfiguration of demountable partitions. Burnham testified that he was asked for a quotation to reconfigure the demountable partitioning. While Burnham testified that he used some drywall partitioning, he maintained that the major component of the work related to the demountable partitioning being reconfigured.

[23] Burnham openly admitted that he could not remember which diagrams were shown to him in order that he might quote and that, in any event, he would have had to go on site to measure the demountable partitioning. Burnham readily conceded that he could not have been shown the sketches that appear in Glenrand's documents as being the condition of the premises as at inception. The simple reason for this is that the quotation from Pinnacle to Carters is dated 29 February 2004 and that he must have given the figure to Pinnacle to forward to Carters by or before that date in circumstances where the sketches put up by Glenrand are dated 31 March 2004 and 6 April 2004. On the probabilities it is reasonable to conclude that the only sketches that were shown to Burnham at the time were Annexures 'A', 'B' and 'C' to the lease agreement. I consider Burnham to be an honest witness whose evidence can be relied on.

[24] In light of the above it is strange why Glenrand sought to maintain that the major portion of the partitioning at the premises was of the drywall type. Fitzpatrick testified that the majority of the partitioning at the premises was of the demountable type. This was confirmed by both Burnham and Seymour. This was also evident from the sketches prepared by Seymour on his inspection on 19 May 2009. In these circumstances, it is not explicable on any reasonable basis why Glenrand would assert as at 29 January 2014 in its reply to United's request for further particulars, that the partitioning at the premises at inception consisted in the main of drywall and not demountable partitioning.

[25] As far as the alleged removal of the demountable partitioning from the premises is concerned, Moss testified that he had been advised that Fitzpatrick had concluded an agreement with Singh in terms of which the surplus demountable partitioning was to be taken away by Singh. Fitzpatrick confirmed such an agreement but stated that he was not involved in the actual removal of the demountable partitioning by Singh. He suggested that the arrangement concerning the physical removal of the partitioning was between Burnham and Singh.

[26] However, when Burnham testified he maintained that Fitzpatrick had told him about this alleged agreement with Singh but that he had no role whatsoever to play in Singh removing the demountable partitioning from the premises. He went on to state that whatever excess material was left over and could not be used was indeed taken away in a vehicle but that he had no idea whose vehicle was used. Furthermore, he could not remember whether there were in fact any demountable panels left over and went on to state that if there were any demountable panels left over, then he would not have used drywall partitions.

[27] All this should be contrasted with what was put to Singh, namely, that there was so much excess demountable partitioning left over that some of it had to be stored in the outside parking area. While Moss said that this was indeed the case, he also admitted that he himself had never seen it in the parking area but was merely informed about it. Fitzpatrick and Burnham, on the other hand, testified that no demountable partitioning had been stored in the outside parking area.

[28] On the evidence, it would seem to me, that the position adopted by Glenrand, not only on the pleadings but from what was put to Singh when he testified, is clearly untenable and not supported by some of its own witnesses. In my opinion, Moss's evidence is false. It seems to have been tendered to support

the further false notion (a) that there was a major portion of drywall partitioning at the premises at inception and only a limited amount of demountable partitioning, and (b) that there was such an excess of demountable partitioning that it had to be stored not only in the basement but also in the storeroom and in the parking lot outside.

[29] The assertion by Fitzpatrick, which was emphatically denied by Singh, that there was an arrangement for Singh to pick up demountable partitions, is clearly wrong. The reason for this is that when Fitzpatrick testified he asserted that Singh had asked Burnham for a quotation to re-use the excess demountable partitioning in other premises. Burnham on the other hand denied that any such thing had happened. It would seem to me that Fitzpatrick adopted this position in order to give credence to his evidence that he had concluded an arrangement with Singh.

[30] Turning to the alleged reason why the excess demountable partitioning could not be used, Fitzpatrick testified that when he was involved with the fitment for Glenrand at the premises, he had only been with Carters for a period of six months at that stage. Prior to that he worked for a company that designed insurance products. He conceded that this was the first time that he had worked with demountable partitioning and he accordingly relied on experts to guide him. The advice received by him was that the demountable partitioning could not be used because of a lack of components. In my view, no reliance can be placed on his evidence in this regard because *firstly*, this whole thing about an alleged lack of components was never put to Singh when he testified, and *secondly*, Burnham, who is regarded as an expert in demountable partitioning, said nothing about a shortage of components when he testified. In the circumstances, the inference is inescapable that Fitzpatrick was fabricating his evidence as he went along.

[31] As far as the loss of the demountable partitioning is concerned, witnesses conceded and it is in fact self-evident that the amount of partitioning reflected on Annexures 'A', 'B' and 'C' to the lease is far greater than that reflected on what Glenrand maintained was the state of the premises at inception. Bearing in mind that Glenrand was in possession of all the demountable partitioning at inception, it has failed to show what became of the balance. On the evidence and given the falsity of the version put up by Glenrand at the trial, it is fair to conclude that the balance of the demountable partitioning was damaged, destroyed, lost or spirited away. With regard to the partitioning that remained on the premises, the photographs taken by Whitfield depict the damage to the partitioning. Seymour's photographs which are panoramic in effect show no real detail and consequently are of little value. The photographs taken by Whitfield show the damage and are accordingly far more reliable.

[32] As far as the reasonableness or otherwise of United's claim for the demountable partitioning that was either taken away, damaged or destroyed is concerned, I accept Fendt's evidence. Using the Bureau for Economic Research (BER) Building Cost Index, Fendt was able to show that as at April 2009 the fair and reasonable value of the demountable partitioning was in fact in excess of that claimed by United because of an anomaly at the time when prices had temporarily come down. Seymour did not take issue with this. It was thus Fendt's uncontradicted evidence that as at April 2009 the value of the demountable partitioning would be an amount of R1 003 918,00 which was far higher than the quote obtained by United in September 2005 in the sum of R973 800,00. This is the quotation on which United based its claim.

[33] While on a factual level, United sought to demonstrate that there is no veracity whatsoever in the position adopted by Glenrand, from a legal point of view the position is more clearer. This is because of the following:

[33.1] First, it should be borne in mind that United's first claim is a vindicatory one: it is not one requiring restoration of the premises. In my view, Glenrand misconstrued the first claim altogether as it was at pains to constantly point out that as a matter of fact the premises were not configured as per Annexures 'A', 'B' and 'C' to the lease as at 1 May 2004. United's position was clear from the outset: it maintained that there was sufficient demountable partitioning on the premises to reconfigure as per Annexures 'A', 'B' and 'C' but that such partitioning had either disappeared or were destroyed at the hands of Glenrand.

[33.2] Second, Clause 38.2 of the Agreement provides that "this Agreement constitutes the entire contract between the parties with regard to the matters dealt with in this agreement and no representations, terms, conditions or warranties not contained in this agreement shall be binding on the parties." The effect of this clause is that no evidence of anything that happened prior to 1 December 2003 is of any relevance in the matter.

[33.3] Third, it is apparent from all the evidence presented by Glenrand that it was asserting a subsequent variation of the Agreement in terms of which the parties agreed to substitute Annexures 'A', 'B' and 'C' with something else. However, the Agreement contains a non-variation and cancellation provision in Clause 38.3 which provides that 'no agreement varying, adding to, deleting from or cancelling this agreement and no waiver of any right under this agreement shall be effective unless reduced to writing and signed by or on behalf of the parties." As it turns out, no signed variation to the Agreement ever came about.

[34] In all the circumstances, I accordingly conclude that United must succeed on the first claim. The date of the delict would be the 30 April 2009 or 1 May 2009, at the latest.

UNITED'S SECOND CLAIM

[35] United's second claim is one for damages and rental arising from Glenrand's alleged failure to maintain the premises and to restore them to United at the end of the lease in the same condition as they were in at the date of commencement of the lease. It will be convenient in this judgment to deal with United's second claim under two separate sub-headings, namely damages and rental.

DAMAGES

[36] United's position form the outset was not to hold Glenrand liable for fair wear and tear but rather for damage that Glenrand allegedly caused to the premises. These damages, according to United, occurred both *inside* and outside of the premises.

[37] There are certain clauses in the lease which are relevant to the issue of damages as they set out the reciprocal obligations of the landlord and tenant in this regard. It is convenient at this point to set these clauses out hereunder.

[38] Clause 18 deals with services and maintenance of the interior of the premises and reads as follows:

> "18. SERVICES AND MAINTENANCE OF INTERIOR

18.1 The TENANT acknowledges that the premises including, all sewerage and drainage systems are in a thoroughly good state of repair, and the LANDLORD shall not be obliged to render any service of any nature in respect of the premises; the TENANT will be obliged to make its own arrangements in respect of the rendering of services to the premises.

18.2 Neither the LANDLORD or its directors, agents or employees shall be liable for-

18.2.1 the receipt or non-receipt or delivery or non-delivery of goods, postal matter or correspondence;

18.2.2 anything which the TENANT or any employee, client, licensee, customer or invitee of the TENANT may have deposited or left in the premises or in any part of the buildings.

18.3 All goods brought by the TENANT onto the premises shall be placed there at the sole risk of the TENANT.

18.4 The LANDLORD shall not at any time be obliged to maintain, repair or redecorate the premises; the TENANT shall be responsible for all maintenance or repairs and redecoration of the premises at all times, including damage to the building caused by the TENANT or its employees, clients, licensees, customers or invitees, and the TENANT will at its own cost:

18.4.1 keep all floors in good condition and replace from time to time any damaged or missing tiles, wood blocks, timber strips or other flooring material including carpeting;

18.4.2 secure properly all ceilings and make good and repair any damaged or defective areas;

18.4.3 keep all paintwork clean and redecorate in a proper workmanlike manner and with good quality paint, at regular intervals or whenever the paintwork shows signs of deterioration. The TENANT shall not be entitled to paint the interior of the premises so as to substantially alter the colour of any existing paintwork unless the consent to do so is first obtained from the LANDLORD in writing;

18.4.4 replace any glass which has been broken or cracked with glass of a suitable type and thickness and in compliance with local authority requirements;

18.4.5 maintain all internal finishes in a clean condition and make good or replace any damaged or defective items;

18.4.6 keep all sanitary fittings and plumbing installations in good order and replace any damaged or faulty installations;

18.4.7 keep all doors and fittings, windows and fittings and all other interior fittings, etc. in good working order and replace any which may be damaged or broken;

18.4.8 maintain the whole of the electrical system in the premises in good order and condition and in compliance with municipal regulations;

18.4.9 maintain all mechanical equipment and air-conditioning plant and installation in good order and condition;

18.4.10 keep the premises clean and free from vermin to the satisfaction of any public authority having jurisdiction over the premises in the fields of public health and hygiene;

18.4.11 ensure that only standard toilet paper will be used in the toilets and the TENANT will be responsible for any blockages to the sewer pipes attributable to the misuse of the system;

18.4.12 should the building have shared services, the tenant shall pay to the landlord operating costs equal to the floor area the tenant occupies, over and above the rental charges.

18.5 The TENANT shall keep the area of the building adjacent to the premises clean and tidy and free from refuse and shall not permit persons to loiter in such area.

18.6 Upon the expiry or earlier termination of this lease, for whatever reason, the TENANT shall return the premises to the LANDLORD in the same good order and condition as the premises were in at the commencement date.

18.7 In the event of the premises not being returned to the LANDLORD in the same good order and condition as aforesaid the TENANT shall remain liable for the rental in terms of this agreement until such time as the premises have been placed in good order and condition. The delivery of the keys of the premises to the LANDLORD shall not be a bar to any claim by the LANDLORD in terms hereof.”

[39] Clause 19 deals with the exterior of the building and reads as follows:

> "19. EXTERIOR OF BUILDING
>
> The TENANT undertakes and it shall be its duty to notify the LANDLORD in writing of any defects in the exterior of the building which become apparent to it during the period of this lease, the maintenance of which shall be for the Landlord's account. In any event the LANDLORD shall not be responsible for any damage to the property caused by the TENANT, but shall be liable by reason of any defect in the premises other than that caused by the Tenant."

[40] United's claim for damages is based on Annexure 'B' to its particulars of claim in the second action. Due to certain observations and concessions made by its own witnesses in the course of the trial, United undertook to prepare an amended Annexure 'B'. This was duly done and attached to its heads of argument. It is evident from Annexure 'B' that United claims damages in respect of the very items that are covered by Clause 18, *supra*, namely floors and carpeting, ceilings, paintwork, glass, sanitary fittings and plumbing, doors and fittings, windows and fittings, the electrical system and all mechanical fitment and air-conditioning plant and installations. In terms of Clause 18 Glenrand had agreed to be responsible for all maintenance, repairs and re-decoration of the premises including any damage caused by it as tenant.

[41] I intend dealing with United's claims in the sequence they appear on Annexure 'B'.

GARDEN SERVICES

[42] There was no dispute that at all material times the witness Ramnarayan worked for an entity known as Livewire. Livewire was a one-stop service provider to Glenrand. Livewire was described by Singh and conceded by its owner Patrick as being a 'jack of all trades'. Patrick testified that he was in no position to dispute

what Ramnarayan had testified about regarding what had happened at the premises during the relevant period.

[43] Ramnarayan testified that he was instructed not to bother with the gardening from the beginning of April 2004. His evidence in this regard was consistent with that of Singh's concerning the state of the gardens at the premises. Singh's evidence was to the effect that Glenrand was responsible for maintaining the gardens and for removing all the refuse but that it failed to do so. Ramnarayan confirmed this but went on to state that on Nundalal's instructions the "gardening was put on hold".

[44] If Glenrand was not responsible for the garden, it seems strange that Seymour, who had no instructions to comment on the exterior of the building, records in his report that the areas immediately adjacent to the building were not overgrown or unkempt. He stated that he was specifically asked by Glenrand to comment about this. Of course, he did not provide any photographs to support the observations he made.

[45] In terms of Clause 18.4 of the Agreement, *supra*, Glenrand was required to keep the area adjacent to the building clean and tidy. In my view, this is wide enough to keeping the limited garden clean and tidy. In any event, the subsequent conduct of the parties confirms that this is how they understood the agreement. If this was not the case it begs the question as to why Livewire's duties were to maintain the garden as well but failed to do so.

[46] As far as the claim under this head is concerned, while Whitfield took the view that Glenrand was not liable for this, Singh, on the other hand, differed with Whitfield in this regard. It would seem to me that notwithstanding Whitfield's views in this regard, under the agreement Glenrand is liable. On behalf of

Glenrand, it was submitted that Singh had abandoned this part of his claim under cross-examination. I disagree. In my view, Singh did not effectively abandon the claim. It was out of sheer irritation that he mentioned that he could take the loss if that is what Glenrand wanted. He maintained, however, that these were expenses that he was forced to incur because of Glenrand's failure in this regard. I hold that this is a valid claim for which Glenrand is liable. The amount claimed is the sum of R8 100,00 for which Glenrand is liable.

UMBRELLA COVERS AND BUCKLES

[47] Glenrand's position was that the umbrellas in the courtyard were sourced and paid for by itself as part of the configuration of the premises and that they were part of the premises when the lease commenced. It maintained that since this was part of the exterior of the premises, United bore the responsibility of maintaining it.

[48] The photographs taken by Whitfield show that the umbrellas which had been installed as an alternative to the awning in the courtyard, caused damage to the paving in the courtyard. Both Singh and Whitfield testified that no contractor was interested in undertaking this work and that it was cheaper to reinforce the umbrellas than try to remove them. Whitfield further testified that if the umbrellas were removed and an attempt was made to match the paving, this might well have resulted in a contrast of colours and this would result in the entire paving having to be redone. Fendt did not comment on the reasonableness of this cost. In view of the nature of the damage caused in the courtyard as depicted in the photographs, I consider the costs incurred by United to be fair and reasonable in the circumstances. The amount claimed by United is the sum of R18 730,00 for which Glenrand is liable.

THE FEES OF TOWER BRIDGE, ARCHITECT AND QUANTITY SURVEYOR

[49] There was no dispute that United had engaged Tower Bridge towards the end of the lease to provide a preliminary report in regard to the state of the premises. This report is dated 21 April 2004 and it is common cause that it was furnished to Glenrand. It was submitted on behalf of Glenrand that there was no need on the part of United to incur these expense for purposes of restoring the premises under the lease. However, Glenrand's expert, Seymour, testified that he had regard to the report by Tower Bridge and that he effectively commented on it. In the circumstances, it hardly lies in the mouth of Glenrand to contend that the report was not useful and did not serve any purpose.

[50] Singh testified that United had incurred the expenses associated with Tower Bridge and that United had in fact paid these. Singh's evidence was supported by relevant vouchers which were never disputed by Glenrand. Singh further testified that inasmuch as he has the invoice for Tower Bridge's first account for R2000,00 the proof of payment has been lost. I accept his evidence that the amount was indeed paid. In my view, the sum of R12000,00 claimed by United in respect of Tower Bridge is reasonable and United is accordingly entitled to be compensated in that amount.

[51] As far as the architects fees are concerned, Whitfield testified with regard to the extent and reasonableness of his fees. His evidence was not challenged at all. Whitfield's fees amounted to R45 750,00 in total. I hold this was a necessary and reasonable expense for which Glenrand is liable.

[52] As far as the claim for the quantity surveyor's fees are concerned, Fendt provided evidence on the extent and reasonableness of his fees. His evidence too was not challenged. I accordingly hold that United is entitled to be compensated in the amounts of R45 750,00 and R44 843,88 in respect of the architect's and quantity surveyor's fees incurred by it.

REPAIRS TO DAMAGED CEILINGS AND RESTORING KITCHEN AREA

[53] The main controversy surrounding this claim was whether the replacement of the entire ceiling grid was justified or whether it sufficed if only the damaged sections were replaced. Glenrand adopted the position that the damaged section could easily have been replaced and not the entire ceiling grid.

[54] According to United the work entailed installing a new grid with tees and replacing existing ceiling tiles. Fendt testified that this is precisely what was done. This aspect of the claim is directly related to the issue of reconfigurement which arose in the first claim. I have already found that Glenrand was obliged to reconfigure in accordance with Annexures 'A', 'B' and 'C' to the lease and not according to the drawings produced by its experts. This being the case United was obliged to replace the entire ceiling grid which United did. Seymour had in fact conceded that if all the partitioning reflected on his sketches of 19 May 2009 had to be reconfigured back to Annexures 'A', 'B' and 'C' to the lease, there would be considerable damage to the ceiling grid.

[55] Fendt's evidence concerning the reasonableness of the cost was not challenged. I accordingly find that the expenses of R337 000,00 incurred by United were necessary expenses and are reasonable in the circumstances.

AIR-CONDITIONING

[56] This claim relates to servicing and installation of new controllers. Glenrand adopted the position that the greater part of the expenses relating to the air-conditioning concerned the replacement of the entire control system which Coastal Cooling (on behalf of United) found to be in order and operational on 28 May 2009. According to Glenrand, it was a simple issue of replacing the thermostat controls and servicing the units.

[57] Insofar as the servicing is concerned, Moss was unable to say when the contract with National Air-Conditioning Solutions was terminated. What was apparent from the evidence, however, was that the above entity was involved in servicing the units every second month during the currency of the lease. The evidence established that over the last year of the lease only two services were undertaken by Aaron's Air-conditioning, one was in March 2008 and the other in February 2009. Through Blom's report and his evidence, United established that when Glenrand vacated the premises there were no filters for the air-conditioning on the first and second floors. Additionally, the filters on the third floor were terribly blocked up. The air-conditioning expert, Arro, testified that the costs for servicing were reasonable in the circumstances.

[58] Turning to the issue of the controllers, Glenrand's evidence, from the various emails sent, was that there was a problem with the air-conditioning merely with regard to hot and cold air. The expert Arro opined that this was a common problem in that coolness is a subjective issue and staff in open-plan offices tend to keep interfering with the controls in order to suit their own personal comfort. He suggested that one solution would be to place the controls in the ceilings to avoid such interference. National Air-Conditioning Solutions had provided Glenrand with a quotation to house the controls in York boxes. United was also in

possession of a document supplied by Glenrand in which it sets out its running costs of maintaining the air-conditioning at the premises and which includes the items which appear on the quotation supplied by National Air-Conditioning Solutions.

[59] When Singh was cross-examined it was put to him on behalf of Glenrand that the quote which was allegedly sent to him was not responded to by him. The inference is inescapable that it was Glenrand that commissioned the York boxes that were found in the ceiling by Blom. Blom's supervisor, Turner, photographed these boxes. The above inference is supported further by the fact that there is no documented evidence after this point about any more complaints concerning hot and cold air.

[60] Moss's evidence that the controllers remained exposed on the walls at all times has to be rejected as being untrue. Seymour's evidence about where the air-conditioning controllers were to be found at the premises also falls to be rejected. Seymour made it very clear in his evidence that he did not look at the air-conditioning at the premises. If he did not look at the air-conditioning, why he would have looked at controllers defies logic. In any event no mention of all this is to be found in his report. The only inference is that he was trying to bolster Glenrand's case in this regard.

[61] Glenrand has not provided any plausible explanation as to why United would go and place controllers in the ceilings. In my view, United's claim for the cost of controllers is a legitimate one. Arro confirmed that the costs were reasonable subject to his difficulty with the mark-up employed by Coastal Cooling Systems concerning issues of labour and travel. United has, quite fairly, adjusted its claim accordingly. The total adjusted claim is for R40 700,00.

ELECTRICAL

[62] Joseph testified that the priority was to fix the external lighting. This is the work that he focused on from the outset. It is clear on his evidence that the external fittings were damaged beyond repair. According to him, when globes were replaced, no sealant was used as a result of which water got in and the fittings corroded. With regard to the internal work done by him he testified about the state of the wiring as he found it. The wires were simply cut and locally insulated and left live. His evidence in this regard was on all-fours with that of Ramnarayan.

[63] Joseph explained the difficulty of removing the hood in the kitchen and of sorting out the distribution board in the kitchen area. Glenrand's position was that the issue relating to the outside lights could be ignored altogether as this was not part of its responsibility. As far as the kitchen is concerned it took the view that the kitchen was part of the premises at the commencement of the lease and accordingly it was not responsible for its demolition and the re-instatement of that space.

[64] Glenrand's submissions in this regard are devoid of substance for the following reasons: *firstly*, Annexures 'A', 'B' and 'C' to the lease do not show any kitchen; *secondly*, in its email dated 9 April 2009 it raised no argument concerning the restoration of the kitchen; and *thirdly*, it is clear from the photographs that this area had not been restored.

[65] Joseph pointed out that in regard to the down lighters which were to be replaced in the entrance are, he installed only 53 light fittings and 22 were kept by the client. United's claim in this regard has been adjusted accordingly as appears from amended Annexure 'B'.

[66] In my view, no reliance can be placed on Patrick's evidence that all the globes had been replaced. He was not even in a position to say when his photographs were taken. We know from the evidence of Seymour that his photographs were taken on 19 May 2009. His photographs however, show that all the globes could not have been replaced. After testifying that all the globes had been changed Patrick went on to state that all the fluorescent tubes had been changed and not the recessed down-lighters in the entrance area of the building which required scaffolding because it was of triple volume. Patrick's last invoice dated 13 April 2010 was precisely for this. This is yet another indication that Patrick was not a reliable witness.

[67] When Whitfield inspected the building he made a note of all the light bulbs that were off. Glenrand's suggestion that all the globes had been replaced must be rejected. The expert Duarte confirmed that the costs in this regard were reasonable. I see no reason why Glenrand should not be liable for the same. This claim amounts to R83 956,07.

EXTERNAL PAINTING

[68] As with other aspects affecting the exterior of the building, Glenrand adopted the attitude that it was not responsible for painting the exterior and that United was not entitled to any compensation for this. As far as the cost of removing the Glenrand sign is concerned, it submitted that this would depend on the court's interpretation of Clause 38.1 which, in its view, afforded Glenrand the 'naming rights to the building and the right to erect signage on the building'.

[69] While normally United would be responsible for the external painting, in this case Singh testified that the cost here involved the removal of the main sign on the roof of the building. These costs were for the hire of the scaffolding and for

repainting the area from where the sign was removed. He further testified that a whole section of the building had to be repainted for the sake of consistency.

[70] As far as the removal of the Glenrand sign is concerned, when Singh testified it was put to him that the meaning of Clause 38.1 of the Agreement was that what Singh had done was to give permanent naming rights to the building to Glenrand. [my emphasis] This, in my view, was a preposterous suggestion bearing in mind that the lease was for a limited duration only. Why any owner would want his building to bear the name of another company permanently defies logic. In any event when Moss testified for Glenrand, he maintained that this was not Glenrand's position. He testified that the naming was only co-existent with the lease. This, in my view, accorded with Ramnarayan's evidence. He testified that he was instructed to remove the signs. Patrick too accepted that the signs had to be removed. In his report to Glenrand on 18 May 2004 he stated that the signs had to be removed.

[71] In the circumstances, there can be no dispute whatsoever that there was an obligation on the part of Glenrand to ensure that the sign from the roof was removed. This would have entailed that they paint the area where the sign was removed from. They failed to do so. Patrick confirmed Ramnarayan's evidence that they did not do so because they did not want to incur the cost of hiring scaffolding.

[72] In my view, United was constrained to remove the sign and to repaint the area. It is thus entitled to recover these costs. Fendt testified that the costs were reasonable. The total cost under this head is R112 392,00 for which Glenrand is liable.

REMOVAL OF SAFE LEFT ON-SITE

[73] Moss accepted that there were one or more safes left on-site. Singh testified that the safe left behind by Glenrand had to be removed. It was never suggested to Singh that there was no safe on site. Fendt did not comment on the reasonableness of the cost which amounted to R5 250,00. I see no reason why Glenrand should not compensate United for this.

MISSING ALUMINIUM DOORS

[74] Whitfield testified that the missing aluminium doors had to be replaced. Fendt confirmed the reasonableness of the claim. Glenrand's submission was that the premises were configured as per the later drawings and these doors were not in the premises at the commencement of the lease. This submission is devoid of substance. The premises were always required to be configured in terms of Annexures 'A', 'B' and 'C' to the lease. The cost of the doors amounted to R54 216,00 for which Glenrand is liable.

CARPETING ON THE FLOOR

[75] On the issue of re-carpeting, Glenrand accepted that it was clear from the photographs that in the areas where the dry wall partitions had been removed, the repair work was shoddy. It submitted, however, that this did not justify the replacement of all the carpets but only the replacement of those tiles which are directly affected. It contended that due to age, the existing old carpet tiles might not match the shade of the new carpet tiles and this can never justify the entire replacement of the carpets. In this regard it relied on Clause 18.4.1 of the lease which obliged it to "replace from time to time any damaged or missing tiles …"

[76] Ramnarayan testified on how missing carpet tiles were replaced and that when he ran short of carpet tiles he was instructed to simply leave it unattended to. He also testified that there were tea and coffee stains on the carpets. Whitfield testified on the unacceptability of this and of inconsistency in an A-grade open-plan office and demonstrated this graphically with reference to his photographs. Seymour's photographs show the areas that were left unattended as well as the poor condition of the carpets. I did not hear Seymour to dispute that the carpets had to be changed.

[77] The essential dispute was whether what is seen in the photographs is damage or fair wear and tear. Whitfield testified that this was damage. Seymour, on the other hand, first suggested that there was damage but he later changed his mind to say that it was fair wear and tear. Seymour conceded, however, that all this could have been avoided inexpensively by the use of carpet protectors.

[78] Singh testified that the reason why he was only charging for two floors was because his new tenant wanted different carpets on the ground floor and that they were paying for it. He therefore did not consider it fair to hold Glenrand liable for that floor and accordingly reduced his claim to two floors only.

[79] The expert Fendt dealt with this in his report and explained why the cost is reasonable. Given the extensive nature of the damage to the carpets and the fact that in replacing only those that were damaged would result in inconsistency in an open office space such as this, I am of the view that United was justified in replacing all the carpet tiles on the two floors. In my view, United has succeeded in proving the need for the replacement and the reasonable cost associated with the replacement. The total amount claimed under this head is R132 023,33.

INTERNAL PAINTING AND COPING

[80] The dispute here was whether there was a need to repaint the interior of the premises. Seymour sought to rely on the report furnished by Tower Bridge which made it quite clear that there was extremely poor workmanship in the plastering and repainting of altered areas. In Seymour's own report he makes the observation that as at 19 May 2009 the interior had already been freshly repainted. This is in circumstances where he testified that workmen were still busy painting on the day of his visit which is the day when the keys were handed back to United shortly before 11h30. His own photographs show the workmen still busy painting.

[81] On the issue of repainting it is worth noting that Tower Bridge was of the view that what appeared at first glance to have been repair work done in an efficient manner, turned out, after inspection, to be work done in a sub-standard and unprofessional manner.

[82] This item also involved redoing the coping tiles damaged by Glenrand as testified to by Ramnarayan. This damage is evident on the photographs taken by Whitfield. Whitfield testified about this damage which was accepted by Seymour as well. Fendt found the costs associated with replacing the damaged tiles to be reasonable. His only reservation was that United had effected an improvement by using a cant brick. He was of the view that Glenrand should not be liable for this and sought to reduce Glenrand's liability accordingly. The total cost under this head is R60 093,46 for which Glenrand is liable.

KEYS MISSING AND RE-SETTING

[83] Both Singh and Whitfield testified about the missing keys to the building and what it would cost to replace them. Moss was unable to confirm whether all

the keys had been handed over or not. Fendt did not report on the cost in this regard. However, in his evidence he stated that he used the supplier regularly and found their costs to be reasonable. The amount claimed under this head is the sum of R2 500,00 for which Glenrand is liable.

TOTAL DAMAGES

[84] The total amount of damages for which Glenrand is liable amounts to R957 554,74. I am satisfied on the evidence that the amount claimed is fair and reasonable. The various heads of damages are set out in the amended Annexure 'B'. For the sake of convenience I intend attaching a copy of this schedule to the judgment.

SOME OBSERVATIONS REGARDING UNITED'S CLAIMS FOR DAMAGES AND GLENRAND'S WITNESSES

[85] At the outset I make the observation that none of the witnesses called by Glenrand were impressive. Seymour in particular was an arrogant and abrasive witness who clearly forgot his role as an expert. From the moment that Seymour stepped into the witness stand he made it obvious that he was not really interested in United's claims. He showed himself to be openly biased in favour of Glenrand. For the reasons that follow I am of the view that no serious reliance can be placed on his evidence:

[85.1] he only inspected the premises for a short while on the morning of 19 May 2009, the day on which the keys were returned to United at court;

[85.2] he stated that he could not have spent more than 2-3 hours at the premises;

[85.3] his brief was to examine the reasonableness of the Tower Bridge report;

[85.4] he quite evidently did no measuring on site;

[85.5] his evidence was that all he had time for was to take photographs and to determine the extent of the partitions in the premises;

[85.6] insofar as the ceilings were concerned, he did not personally count or look for the 17 square meters referred to in the Tower Bridge report but found it acceptable;

[85.7] when he was taken through Whitfield's report and photographs, he accepted almost everything that Whitfield said needed to be repaired;

[85.8] despite the uncontradicted testimony of Joseph concerning the state of the kitchen area with grime and stuff, Seymour did not see unacceptable deterioration to what must have been about 60 square meters of ceiling in the kitchen area;

[85.9] he admittedly has a strong background in loss adjustment in the insurance industry and it is common experience that insurer's look to pay the very minimum they can. This no doubt must have an impact on and affect Seymour's objectivity as pointed out by Fendt.

[86] I have already made credibility findings against Fitzpatrick and Moss in the first action. On the damages claim Moss was just as hopeless as a witness. He was of no value to the court whatsoever. He was constrained to admit that his evidence was hearsay.

[87] Patrick of Livewire was a most unhelpful and unreliable witness. He openly admitted that all the complaints raised by United were not attended to by Livewire because Livewire was simply not instructed to do so. A telling admission on his part is that they were in an extreme hurry to complete the job and that his main focus was to fit out Glenrand's new offices in River Horse Valley. This no doubt accounts for the shoddy workmanship at the premises and the failure on the part of Glenrand to comply fully with its obligations in terms of the agreement.

LOSS OF RENTAL

[88] The claim for loss of rental must be assessed in light of the correspondence that flowed between the parties and their conduct shortly prior to and after termination of the lease. There was no dispute that Glenrand confirmed by way of email dated 31 October 2008 that it had no intention of renewing the lease. Singh wrote back within a week acknowledging the confirmation and pointing out that all repairs and restoration had to be completed before 30 April 2009. Attempts were thereafter made by the parties to meet at the end of February 2009 and the beginning of March 2009. On 16 March 2009 Singh wrote to Nundalal and recorded that the inspection undertaken was provisional and that a final inspection would follow once Glenrand had moved its furniture out. Furthermore, that the kitchen area had to be re-instated to offices, that the aluminium panels had to be replaced on two sides of the building, that the tiles in the foyer had to be replaced and that the doors had to be replaced. There was neither a response nor a refutation on the part of Glenrand to this email.

[89] Moss accepted that there was a problem with the new premises which is why Nundalal enquired about staying on. On the 3 April 2009 Singh wrote to Nundalal complaining that no work had commenced at the premises. This email was met with silence on the part of Glenrand. On the same day Singh wrote to Nundalal again and recorded that Glenrand had received advice that it did not have to restore the premises. This email too was met with silence.

[90] On 6 April 2009 Nundalal wrote to Singh saying that the kitchen was being restored. Strangely, this was not even done at the time that Glenrand eventually vacated the premises. On the same day Singh wrote to Nundalal and Dixie and recorded that the building was altered considerably and further recorded that Glenrand was in possession of the original plans. On 7 April 2009 Singh again wrote to Nundalal and set out a provisional list of repairs. There was no refutation on the part of Glenrand to this. On 7 April 2009 Singh wrote to Nundalal and copies Moss, Dixie and Glenrand's attorneys and specifically referred to the original plans. On the same day he, Singh, again writes to Nundalal expressing his frustration at Glenrand's reticence. Still on the same day, Singh wrote to Nundalal and again referred him to the terms of the lease agreement. He further informed Nundalal that he now intended taking the legal route, which is what happened.

[91] Relying on the provisions of Clause 18.7 of the agreement, Glenrand maintained that it was allowed to remain on the premises. Clause 18.7 provides that:

> "18.7 In the event of the premises not being returned to the LANDLORD in the same good order or condition as aforesaid the TENANT shall remain liable for the rental in terms of this Agreement until such time as the premises have been placed in good order and condition. The delivery of the keys of the premises to the LANDLORD shall not be a bar to any claim by the LANDLORD in terms hereof."

[92] Glenrand would have the above clause interpreted in a manner which allowed it to remain in occupation with impunity. In my view, all that the Clause says is that Glenrand will continue to be liable for rental. It does not give Glenrand the right to remain in continued occupation of the premises. One has only to test Glenrand's proposition to realise just how absurd it is. We know from the evidence that it took Singh 12 months to restore the premises. We also know from the evidence of some of the experts who testified that a reasonable time would be in the region of seven months and three weeks. On Glenrand's interpretation it would mean that it was entitled to remain in occupation for about another eight months. This interpretation is not only absurd, it makes no business sense whatsoever.

[93] In any event, it would seem to me that the matter is governed by the provisions of Clause 13.3 of the Agreement which provides as follows:

> "13.3 If any alternations or additions are made by the TENANT, the TENANT SHALL, prior to the expiry of this lease, unless the LADLORD otherwise agrees in writing (in which case any alterations or improvements shall become the LANDLORD'S properly) remove them and reinstate the premises to the condition in which they were before the additions and/or alterations were effected." [my emphasis]

[94] In my view, Clause 13.3 makes it abundantly clear that any alternations must be removed and the premises reinstated before the lease expires. On the interpretation which Glenrand seeks to place on Clause 18.7, the provisions of Clause 13.3 would be rendered nugatory.

[95] The evidence established that Glenrand effected substantial alterations to the premises. This was all recorded in the correspondence and never once refuted by Glenrand or on its behalf. In Glenrand's response to admissions sought for

trial, it maintained that it varied the agreement with United. How it was able to do so without reducing it to writing is beyond me.

[96] Even if one were to accept Glenrand's contention that all it did was install fixtures and fittings, then Clause 13.6 of the Agreement also requires their removal before termination of the Agreement. Clause 13.6 provides:

> "13.6 The TENANT may at any time install any fixtures, fittings and equipment in the premises for the purposes of carrying on the TENANT'S normal business, which the prior written consent of the LANDLORD, which consent shall not be withheld unreasonably, and shall, prior to the termination of this lease, if so required by the LANDLORD, remove any such fixtures and fittings, provided that the TENANT shall repair any damage caused by the installation or removal of such fixtures, fittings and equipment."

[97] From all the established facts, it is reasonable to infer (i) that Glenrand had a serious problem in getting timeous occupation of its new premises at River Horse Valley; (ii) that Glenrand knew full well what its obligations were under the Agreement; (iii) that the premises had to be restored by 30 April 2009; (iiii) that Glenrand continued to trade because it needed to; (iv) that it did not accept the new rental proposal by United to stay on temporarily after 30 April 2009; (v) that it thus failed and refused to fulfil its obligations to restore timeously, and that it only vacated because an application to evict it was launched by United and Glenrand then attempted to do a rushed and shoddy job of restoring the premises.

[98] Clause 18.7 of the Agreement entitles United to continue to hold Glenrand responsible for rental for so long as it reasonably takes to restore the premises. It further provides that notwithstanding the return of the keys by Glenrand at the High Court in Durban on 19 May 2009, it continued to be liable for rental for so long as it reasonably took to restore the premises. In my view, this is the only

logical and reasonable interpretation to be applied to Clause 18.7 and not the contrived meaning which Glenrand seeks to place on it.

[99] As far as the reasonableness of the period for restoration is concerned, Singh testified that it took him about 12 months to restore. He was, however, prepared to accept what his experts said would be a reasonable time if he did not project manage the job himself. Fendt's evidence, which was not materially challenged, was that a period of seven months and three weeks was a reasonable time. This is the period I intend accepting as being reasonable in the circumstances.

[100] In all the circumstances, I accordingly conclude that Glenrand is liable to United for further rental for a period of seven months and three weeks because of its failure to restore the premises prior to the expiry of the lease.

COSTS OF THE TWO ACTIONS

[101] Clause 29 of the Agreement stipulates the scale of the costs to be awarded to the landlord in any legal proceedings against the tenant. Even if this was not prescribed in the Agreement, the conduct of Glenrand prior to the litigation and in the course thereof would have justified a punitive award. In my view, this matter should never have reached the point that it did. It was easily capable of being resolved. From the concessions made by Singh when he testified, and the correspondence addressed by him to Glenrand from time to time, I did not get the impression that he was being unreasonable. In my view, it is Glenrand that adopted an arrogant, high-handed and intransigent attitude. It is this conduct that forced the litigation herein.

[102] Having regard to the nature of the matter, the sheer volume of the papers and the complexity of the issues involved, I see no reason why United should not be entitled to the costs of two counsel where two were employed.

[103] While Glenrand had no objection to costs being awarded in the first action in the event of United's success therein, in respect of the second action for damages and rental, it urged the court not to make an award of costs due to certain facts and circumstances which prevail in this regard. I accordingly only intend giving judgment on the capital claims on which United is successful and reserve the issue of costs in the second action.

INTEREST AND VAT

[104] After argument in this matter, the parties made further written submissions regarding the issue of interest and VAT. I do not wish to labour these issues herein. As far as the issue of interest is concerned I believe that United would be entitled to *mora* interest at the rate of 15.5% per annum. This is the rate that applied when the litigation started. It is well established that the rate remains constant throughout [see: *Crooke's Brothers Ltd v Regional Lands Commission, Mpumulanga & Others* 2013(2) SA 259 (SCA) at 271]. I do not believe that Glenrand would be severely prejudiced by this rate of interest. This rate will be reflective in the awards made at the end of this judgment.

[105] As far as the issue of VAT is concerned the parties were at odds as to what the correct position in law was. Whatever the position may be, when Singh testified he said that all amounts claimed by him excluded VAT as he had already claimed the VAT from SARS. I have had regard to the submissions made by counsel on both sides. I am not satisfied that United has made out a case for the

addition of VAT to its claims. The issue of VAT is a matter that Singh and United should take up with SARS if and when that issue arises.

THE EVICTION AND SPOLIATION APPLICATIONS

[106] The only issue that arises in these two applications is the question of costs.

[107] As far as the eviction application is concerned it is clear that this turned on the interpretation to be applied to Clauses 13.3, 13.6 and 18.7 of the Agreement. I have already found that the interpretation favoured by United is the correct one. In my view, Glenrand had no right to continue to occupy the premises with impunity. It did so unlawfully. United was entitled to bring the eviction application and accordingly is entitled to the costs thereof. These costs are to be paid on an attorney and client scale and will include the costs of two counsel where two counsel were employed.

[108] As far as the spoliation application is concerned, in the normal course such an application is determined without regard to the merits of the matter. The present application was different from the normal ones in two respects: *first*, Glenrand sought relief over and beyond mere restoration: it effectively sought an interdict as well; *second*, if a court is confronted with both a spoliation application and an application on the merits at one and the same time, it can refuse the spoliation application if it is going to grant the application on the merits. This is what happened in the present matter [see: *Street Pole Ads Durban (Pty) Ltd v eThekwini Municipality* 2008(5) SA 290 (SCA) at 295 A-G].

[109] In the circumstances, I am of the view that United is entitled to the costs of the spoliation application on the same scale and on the same basis as those set out above.

ORDER

[110] In all the circumstances, I make the following order:

A. First Action (Case No.10801/09)

1. Judgment is granted in favour of the plaintiff against the defendant, AON South Africa (Pty) Ltd, in the sum of R973 800,00.
2. Interest on the above amount at the rate of 15.5% per annum from 1 May 2009 to date of payment.
3. Costs of suit on the attorney and client scale, such costs to include the costs of two counsel where two counsel were employed.

B. Second Action (Case No. 3434/11)

1. Damages Claim
   (a) Judgment is granted in favour of the plaintiff against the defendant, AON South Africa (Pty) Ltd, in the sum of R957 554,74.
   (b) Interest on the above amount at the rate of 15.5% per annum from 1 May 2009 to date of payment.

2. Rental Claim
   (a) Judgment is granted in favour of the plaintiff against the defendant, AON South Africa (Pty) Ltd, in the sum of R1 832 827,70.
   (b) Interest on the above amount at the rate of 15.5% per annum will be paid as follows:
      (i) on the sum of R168 764,58 from 1 June 2009 to 30 June 2009;
      (ii) on the sum of R458 166,87 from 1 July 2009 to 31 July 2009;
      (iii) on the sum of R747 569,16 from 1 August 2009 to 31 August 2009;
      (iv) on the sum of R1 036 971,45 from 1 September 2009 to 30 September 2009;
      (v) on the sum of R1 326 373,74 from 1 October 2009 to 31 October 2009;
      (vi) on the sum of R1 615 776,03 from 1 November 2009 to 30 November 2009;
      (vii) on the sum of R1 832 827,70 from 1 December 2009 to date of payment.

3. The issue of costs in respect of the second action is adjourned *sine die* and, unless resolved between the parties, will be determined on a date to be arranged with the Registrar.

C. Eviction Application (Case No.6702/11)

1. The respondent, AON South Africa (Pty) Ltd, is directed to pay the costs of the application on an attorney and client scale, such costs are to include those consequent upon the employment of two counsel where two counsel were employed.

D. Spoliation Application (Case No. 6703/11)

1. The applicant, AON South Africa (Pty) Ltd is directed to pay the costs of the application on an attorney and client scale, such costs are to include those consequent upon the employment of two counsel where two counsel were employed.

Date of Hearing	:	19 September 2014
Date of Judgment	:	12 December 2014
Counsel for Plaintiff	:	OA Moosa SC C Edy
Instructed by	:	Pather & Pather Attorneys
Counsel for Defendant	:	J King SC
Instructed by	:	Goodrickes Attorneys