IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 CD 00107

BETWEEN	**LEIGHTON CHIN-HING**	**CLAIMANT**
A N D	**WISYNCO GROUP LIMITED**	**DEFENDANT**

Mrs. Georgia Henlin Gibson and Marc Jones instructed by Henlin Gibson Henlin for the claimant

Ms. Malica Wong instructed by Myers Fletcher and Gordon for the defendant

Heard: 7 December, 2012 and 11 and 14 February, 2013

WHETHER DEFENDANT DEMONSTRATED NECESSARY READINESS AND WILLINGNESS TO ARBITRATE – WHETHER CLAIM FOR RENT FALLS WITHIN THE AMBIT OF THE ARBITRATION CLAUSE – OR WHETHER CLAIM FOR RENT SUBJECT TO ARBITRATION – WHETHER UPON TERMINATION OF FIXED LEASE CLAIMANT IS ENTITLED TO CLAIM FOR RENT OR DAMAGES

SINCLAIR-HAYNES J

[1] Leighton Chin-Hing (claimant), is the owner of property which was leased to Wisynco Group Limited (defendant/applicant) for a fixed period of five (5) years with the option to renew for a further five (5) years. The defendant agreed to pay an annual rent of US $30,000.00. Rental was payable in advance on the 1st day of each month in equal installments of US$2500.00 together with General Consumption Tax.

[2] The premises were to be utilized as a recording studio. The defendant proceeded to convert the premises into a recording studio but was served with stop notices by the relevant authorities. It was therefore prevented from continuing its conversion of the building. Consequently the defendant has terminated the lease on the ground that the premises are unfit for the purpose.

[3] The claimant however claims that the defendant has damaged the premises, wrongfully terminated the lease and has not paid rent since 1 December 2011. On the 4 September 2012, the claimant instituted proceedings against the defendant. He claimed *inter alia* damages which he alleges arise from the destruction of the leased premises and the sum of US$122,693.73 together with GCT at 17% which sum represents rental from 1 December 2011 to 31 March 2015. The claim form and particulars were served on the defendant on the 5 September 2012. On the 19 September 2012 the defendant filed an acknowledgment of service and on the 29 October 2012, he applied to have the proceedings stayed pending arbitration. The defendant's application for a stay of proceedings is met with stout resistance.

[4] Mrs. Gibson-Henlin contends that the defendant's application is merely a strategy to delay the just disposal of the matter. According to her, he has no genuine desire to go to arbitration because he had ignored the claimant's several requests to attend arbitration. She further resists the application on the ground that the claim is for rent which is outside of the arbitration clause.

[5] Ms. Wong contends that there is no basis for the claimant's assertion that the defendant was unwilling to arbitrate. She contends that the claim falls within the scope of the arbitration clause.

WHETHER THE PROCEEDINGS SHOULD BE STAYED

[6] Section 5 of the Arbitration Act empowers the court to grant a stay of proceedings pending arbitration. Section 5 reads:

> "5. *If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, applying to the Court to stay the proceedings, and the Court or a Judge thereof, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."*

[7] Mrs. Gibson-Henlin submits that the defendant's request for a stay of the proceedings should be refused because of its unwillingness or lack of readiness to do all things necessary for the proper conduct of the arbitration. She submits that the defendant must demonstrate its readiness and willingness at the time the claim commenced and not only at the time that it filed its application. She submits that in assessing readiness and willingness, the court must examine the conduct of the applicant/defendant leading up to the commencement of the claim. It is her submission that the defendant ignored the claimant's efforts to arbitrate or to subject itself to any alternate dispute mechanism.

[8] It is her further submission that the defendant had the opportunity to demonstrate that it was ready and willing to arbitrate up to the filing of the claim. The defendant had a further period of forty-two days after service of the claim form and particulars of claim to insist on arbitration. Instead it waited until the final and penultimate days to respond and to file its application. It is significant, she submits, that the claimant's first request was on the 4 January 2012 and the second was on the 27 April 2012.

[9] Further, she submits that the defendant's letter of the 10 May 2012 in response did not indicate any willingness to be bound by the bargain to attend arbitration. It denied the claimant's claim. The defendant's application was filed

almost one year after the claimant's first request and the first response from the defendant. The delay in making its application together with the defendant's attitude, show a lack of genuine interest in attending arbitration. The court must take the defendant's conduct into consideration. The filing of the application is merely to delay the just disposal of the matter.

RULING

[10] Regarding Mrs. Gibson-Henlin's submission that the claimant has failed to demonstrate that it was ready and willing to arbitrate,

[11] Has the defendant demonstrated the necessary willingness to arbitrate? Or, is his application a mere ploy designed to delay the matter as alleged by Mrs. Gibson-Henlin?

Halsbury's Laws of England third edition Volume 2 (Simonds Edition) at paragraph 59 states:

> *"**Applicant ready and willing to arbitrate**. The applicant must satisfy the court not only that he is, but also that he was at the commencement of the proceedings, ready and willing to do everything necessary for the proper conduct of the arbitration (b). He must also file an affidavit to this effect in support of his application for a stay (c), and unless the court is satisfied on the point, the application to stay must be dismissed.*

[12] It is necessary to set out the contents of the defendant's letter of 10 May 2012; it reads:

> *"While it is correct that we would wish to amicably resolve issues with Mr. Leighton Chin-Hing ("Lessor"), we refute the contentions and claims in your said letter some of which are specifically addressed in detail below:*
>
> 1. *We and the Lessor entered into a written Lease Agreement the stated agreed purpose of which was use as Studio and Offices.*
> 2. *We have read clause 2.8 of the Lease Agreement and do not agree that same imposed any obligation on us. In any event our opinions are to the contrary and are consistent with the practice that it is the owner of premises who has the standing to apply for and obtain the permits contemplated and this has been the case in our relationship.*

3. *Similarly, we cannot agree with your reading of clause 2.19. The purpose of the lease was Studio and Office use. Clearly the parties contemplated the construction of a studio on the premises. Therefore, the construction and necessary demolition which was the object of the lease cannot possibly be categorized as damage to the premises.*

4. *In any event, the parties did in fact attempt to obtain planning permission to construct and use the premises as specifically contemplated and in the only manner permitted under the lease. However, that permission was not obtained in a reasonable time. We are of the view that the purpose of the lease was frustrated by this failure to obtain permission and the lease is thereby rendered a nullity.*

5. *Further or alternatively your demands are rejected on the basis that the Lease was for an illegal purpose and consequently void.*

6. *Additionally, your demands are to be considered out of any proportion and were not, as expected, supported by evidence.*

7. *While obviously to bring the property to its initial status would imply costs, considering the arguments above, we shall not be liable for any such costs.*

8. *In fact, we already suffered losses in terms of all the time and money invested (construction works, rental payments, security deposit, etc.), as well as in terms of the missing business opportunity. Also, some of the construction works in fact added value to the property, something which the Lessor must take into account.*

9. *Consequently, our position is that no party shall be able to recover the losses.*

[13] It is significant that the letter was signed by Mr. Andrew Mahfood, the defendant's group director, and not by its attorney. He expressed the desirability of resolving the matter amicably but proceeded to refute the claimant's claim. The letter cannot be construed as a demonstration of unwillingness by the defendant to arbitrate. In any event section 5 of the Arbitration Act makes it plain that the point at which the applicant's readiness and willingness to facilitate the arbitration process becomes relevant is "at the time of the commencement of the proceedings" and thereafter. It is the view of this court that the section is not

open to any other construction regarding the point at which the applicant can be said to be "ready and willing" to facilitate to the process."

[14] Orr's J statement in **Douglas Wright Associates v. B.N.S. Jamaica Ltd. (1994) 31 JLR 351** is supportive of this view. At page 356, he said:

> *"Has the bank shown that it is ready and willing?*
> *Section 5 of the Arbitration Act provides that the applicant for a stay must show that he is ready and willing to do all things necessary to the proper conduct of the arbitration. The section requires that this state of affairs must exist both at the time when the proceedings were commenced and also at the time when the Court is asked to exercise its discretion.*

[15] The fact that the defendant's application was filed shortly before the expiration of the time he was allowed to file his defence and acknowledgement of service should not disqualify his application on the basis of lack of readiness and willingness. The application, although made at the nth hour was nevertheless duly filed within the allotted period.

IS THE CLAIM FOR RENT IS SUBJECT TO ARBITRATION?

[16] Are there sufficient reasons for not referring the matter to arbitration? Mrs. Gibson-Henlin argues that concerning rent, clause 4.8 of the lease limits arbitration to the cesser or abatement of rent. Clause 4.8 of the Lease reads:

> *"In case of any dispute or question whatsoever arising between the parties hereto with respect to the cesser or abatement of rent as aforesaid or to the construction or effect of this Lease or any clause or thing herein contained or the rights duties or liabilities of either party under this lease or otherwise in connection with the foregoing the matter in dispute shall be settled by reference to a single arbitrator in case the parties agree upon one otherwise by two arbitrators to be appointed by each party in the manner provided by the Arbitration Act provided that this clause shall not apply or be deemed to apply to any dispute or matter touching or with respect to the rent hereby reserved save with regard to such cesser or abatement of rent as aforesaid."*

[17] **Ross: Commercial Leases/Division G Rent Review,** at chapter 4 states that:

> *"Cesser of rent provisions usually operate only if the premises are damaged or destroyed by an insured risk so as to be unfit for occupation and use. An insured risk may have damaged the premises in such a way as to reduce their rental value substantially, without rendering them unfit for occupation and use. Cesser of rent provisions may also be limited in time, with the result that the premises remain unfit on the expiry of the period or rent suspension.*

The dispute between the parties is not in respect of cesser of rent.

[18] Regarding abatement of rent, **Stair Memorial Encyclopedia/Landlord and Tenant (Reissue)/General Law (15) Remedies/191** states:

> "*The tenant is entitled to an abatement of rent if he loses the enjoyment of all or any part of the subjects let to him either through the fault of the landlord or through some unforeseen calamity. The subjects must usually be in such a poor state of repair that they cannot be said to be in a tenantable state of repair before abatement is justified. The fault of the landlord may be that part of the subjects are withheld from the tenant or that the landlord fails to put them into a tenantable state. If the tenant remains in possession he may not rescind the contract but this does not deprive him of his right to an abatement. An abatement of rent is similar to a claim for damages, but abatement is due for the loss of possession for which the rent is payable, while damages must be proved in a separate action.* "

[19] The dispute between the parties does not relate to abatement of rent. It is arguable that the defendant was entitled to terminate the lease because of its inability to acquire the necessary permission to transform the premises to a recording studio The issue arises as to whose responsibility it was to obtain the requisite permission The issue of abatement of rent does not arise. Notwithstanding, if the defendant's claim that the premises are unfit would not permit an abatement of rent, the allegation is inextricably bound up with the issue of fitness for purpose to which consideration must be given in arriving at a decision as to the claimant's entitlement to damages.

[20] It is the view of the court that Mrs. Gibson-Henlin's reliance on the Court of Appeal case of **House of Blues Ltd. and Evan Williams's v Secret Paradise Resort Ltd.** delivered on the 21 September 2005 is misplaced. The circumstances of that case are distinguishable. In that case there was no arrangement by the second appellant to refer any dispute to arbitration or to be subject to arbitration. The first defendant had however so agreed. Panton P said thus:

> *"A party may only be bound by a reference of a "submission" if that party was a party to the "submission". In the instant matter, the two agreements that have been exhibited do not show the second appellant as being a party to either. On the face of it, therefore, the second appellant is entitled to have his suit proceed in the normal way. Given the situation, I am satisfied that Reid, J., was in error when he ordered a stay of proceedings so far as the second appellant is concerned.*
>
> *The result is that the agreements between the respondent and the first appellant are subject to arbitration whereas those, which are oral, between the respondent and the second appellant are not so subject. This creates an undesirable state of affairs, which is recognized by the attorneys-at-law for the parties.*
>
> *The appellants have submitted that any enforcement of the arbitration clause would mean that a part of the dispute would be arbitrated, while another part would be litigated; and, the Court will not permit this as the result could be inconsistent findings, and a plurality of proceedings."*

[21] Panton P cited with approval Mc Nair's J statement;

> *(B) "…I think this is a case where, inevitably, in the disputes between the time charterers and the shipowners complicated, difficult questions of law may arise some of which may arise in the action between the shipowner and the bills of lading holders. If the matter goes to arbitration as between the shipowners and the time charterers I think there is a high degree of probability that these same questions of law would come up to the Court on a special case. Again, one might get questions of law, determined in the direct action between the shipowners and the bills of lading holders, being determined, presumably by another Judge at first instance, when the award came before him on a special case stated by the arbitrators…*
> *Furthermore, I think that there is force in the point made by Mr. Donaldson, on behalf of the shipowners, that time and expense and*

costs would be saved to a very substantial degree by insisting that the whole of these disputes between the ship-owners and the bills of lading holders, and between the shipowners and the time charterers should be disposed of in one set of proceedings. That set of proceedings must be proceedings in Court. The bills of lading holders are not subject to arbitration."

(c) "I think that a serious risk would be run that our whole judicial procedure, at any rate in relation to this claim, would be brought into disrepute if, as I have indicated is a serious possibility, you get conflicting questions of fact decided by two different tribunals, quite apart from the other matters which I have mentioned."

[22] The circumstances of that case are entirely disparate. Not only did the second defendant not agree to arbitrate, attendance by the first defendant would have resulted in a plurality of proceedings. In the instant case the parties agreed to arbitrate and a determination of the matter involves reference to the claimant's entitlement to rent. The claimant was also clearly of this opinion on the 4 December 2011 when its attorney-at-law sent the following electronic mail to the defendant's representative Mr. William Mahfood.

"Our client does not agree with you that you are entitled to terminate the lease on the basis you say or at all. It is a fixed term lease and he is not in breach, it is therefore clear that neither of you are agreed. There are three methods for resolving this matter.

1. *Mediation*
2. *Arbitration*
3. *Litigation*

Arbitration is provided for in the lease in relation to some of the matters that are in dispute between our client and you. We take the view that it is always useful to attempt to resolve matters by the agreed methods. We recommend that you agree to proceed to mediation or arbitration within the next seven days. If there can be no agreement in that respect then unfortunately, we will have to proceed to litigation as our instructions are to commence those proceedings.

You may or may not be aware that there are two options for arbitration in Jamaica at this time."

[23] On 27, April 2012, having not heard from the defendant, counsel stated that rent was not covered by arbitration. She was nevertheless still requesting that the matter proceed to arbitration. It is useful to quote:

> *Alternative request for arbitration*
> *Otherwise kindly consider this our client's second request to refer the dispute to arbitration except for the issue of rent which is not covered by the clause. Our client's first request is contained in our email of the 4th of January 2012.*
> *In respect of the issue of rent we will file the claim if we do not hear from you within the 14 days aforesaid bearing in mind that it is not covered by the arbitration clause.*

[24] The tenor of Mrs. Gibson-Henlin's mail makes it apparent that she recognized that the success of the claim is predicated on the defendant's entitlement to terminate the lease. She also noted the desirability of attempting to resolve the matter by way of arbitration.

[25] Ms. Wong contends that the claim for rent now falls as damages because the lease was frustrated and the defendant surrendered possession. The claimant is no longer entitled to rent because there is no occupation of the property pursuant to the lease agreement. The defendant is now entitled to damages. She submits that the claim cannot properly be framed as a claim for rent. The damages which are claimed by the claimant is lost income for the period the defendant surrendered possession.

THE LAW

[26] The learned authors of **Hill and Redman's Law of Landlord and Tenant** at paragraph A 613 expressed the view that a party who complains of the breach of an agreement for a lease can bring an action to recover damages instead of suing for specific performance. They cited as authority, the case of **Oldershaw v Holt and Another, Executors of Frewin** (1842) Adolphus and Ellis Reports Vol.12 590. In that case the tenancy was determined by the landlord as a consequence of the tenant's breach. It was held that rent could not be recovered

where the tenancy was determined by the landlord's own act. The appropriate remedy was by action for mesne profit.

[27] Reliance was also placed on, the English Court of Appeal case of **Foster v Wheeler** 1988 Ch Division Vol. 38, 130. The defendant in that case entered into an agreement for a lease but refused to proceed with the agreement. The court held that the plaintiff was entitled to damages. At page 134 Bowen LJ said:

> "*The measure of damages depends on the circumstances which are not fully before us. If it turns out that Dr. Ord acted reasonably as to the lease, and that Miss Wheeler's was a wanton refusal to accept it, the damages may be very substantial. We decide nothing further than that the matter must go to an inquiry. The plaintiff must at all events recover whatever loss to him arose naturally and immediately from his being left with the property on his hands."*

[28] At paragraph 986 and 987, the learned authors stated:

> "986*. Where the lessee refuses to proceed with the contract the lessor may claim specific performance, or treat the contract as discharged, or sue for damages. If he pursues his remedy in damages, the restrictive rule in* ***Bain v. Fothergill*** *has no application and therefore the normal measure is represented by the contractual rent reserved by the lease less the rental value of the premises at the time of breach. This was applied in Marshall v. Mackintosh where the plaintiff had relet the premises at a lower rent, which was all they would now command, and damages were assessed on the basis of the difference between the contractual rent under the broken agreement and the new rent. If however the plaintiff has succeeded in reletting at a higher rent than the contractual rent because of market improvements, then he will only be entitled to nominal damages: this was the position in* ***Oldershaw v. Holt.***
>
> *987. Beyond this there are no authorities."*

[29] The authorities cited above appear to be irreconcilable with the position taken by the learned authors of **Woodfall's law of Landlord and Tenant 26th edition** as it states:

> *"A tenant is not justified in quitting before the end of the term because the landlord has failed in the performance of a stipulation on his part, such as a covenant to repair. In such a case the tenant remains liable to rent, although he may be entitled to recover from the landlord damages for breach of covenant; and those damages may include the cost of substituted lodgings until the premise are repaired. The tenant may be entitled to set off his claim for damages against any rent due from him."*

[30] Sampson Owusu, in his text/work, **Commonwealth Caribbean Land Law** supports Woodfall's position. At page 626 of his text he states:

> *"Remedial rights in the landlord and tenant relationship are governed by property law, which does not recognize the principle of mitigation of damages under the law of contract. Where a tenant wrongly repudiates a lease and vacates the premises without giving the requisite notice, the tenant remains liable for rent accruing due during the term, although the premises remain vacant. The landlord is not obligated by law to re-let the property with the view to mitigating the loss to the tenant."*

[31] The learned author cited the Australian case of **Maridakis v Kouvaris** (1975) ALR 197. In that case, the tenant withdrew from the lease without the permission of the landlord. The landlord was only able to rent the premises some 3 months after. The court rejected the tenant's contention that the landlord failed to mitigate his damages and held that he was not under any duty so to do. It is noted that is an Australian case while **Foster and Wheeler** and **Oldershaw v Holt** are English authorities.

[32] This court holds the view that there is much force in Mrs. Wong submission. Upon the giving up of possession of the premises, the landlord's remedy ought to lie in damages which are calculable by the rent which would have become due and payable for the remaining period of the lease. Notwithstanding this apparent conflict of opinion regarding the issue, for the reasons stated above, this court maintains the view that the circumstances of the case justify its reference to arbitration.

[33] Ms. Wong further contends that the contract was frustrated. **Hill and Redman Law of Landlord and tenant** at paragraph 2415 define frustration of a lease in the following terms.

> "*The doctrine of frustration, which is of general application to contracts, is that both parties are discharged from their liabilities under the contract when circumstances are so altered by unforeseen supervening events that the whole basis of the contract disappears. "*

[34] The task of proving frustration of a lease is difficult but not insurmountable**.** At paragraph 2414, the learned authors stated:

> *'It has been decided that the doctrine of frustration may in exceedingly rare circumstances apply to any class of lease. "It has now been finally settled by the unanimous decision (Lord Russell dubitante) of the House of Lords* ***in National Carriers Ltd. v Panalpina (Northern) Ltd*** *[1981] AC 675 [1988] All ER 161 that in exceedingly rare circumstances a frustrating event may operate to determine a lease."*

[35] The parties, in the agreement for lease, agreed to attempt to resolve the matter amicably before instituting legal proceeding. I am in agreement with the statement of Orr J in **Douglas Wright T/A Douglas Wright Associates v Bank of Nova Scotia Jamaica Limited** (1994) 31 Jamaica Law Reports 351, 358 that:

> "*The authorities reveal that the basic stance of the Courts has been that parties who have agreed to arbitrate should be held to their agreement. For example, in* ***Wickham v. Harding*** *(1859) 28 L.J. EX 215, Bramwell, B. against whose order at first instance staying proceedings the plaintiff had appealed, said, in the Court of Appeal at page 217:*
>
> > *"…a bargain is a bargain, and the parties ought to abide by it, unless a clear reason appears for their not doing so."*

[36] It is true that there are matters of law to be determined, as to whether there is a breach or a frustrating event which justifies the termination but this court is of the view that those matters are grounded in issues of facts which can be resolved by arbitration. The learned authors of **Blackstone** 2004 opined thus:

> *"The fact that a dispute raises complicated issues of facts or law and involves more than two parties or has given rise to an*

acrimonious relationship between the litigants should be no barrier to mediation. In all these cases, mediation may ultimately provide the parties with a more satisfactory resolution to their dispute than the court can."

[37] In the circumstances:

1. Further proceedings in this matter is stayed pending arbitration.
2. Cost is to be determined by the arbitrator.
3. Leave to appeal granted.