



[2015]JMSC Civ 52

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 02013

BETWEEN JAMAICA EDIBLE OILS & FATS COMPANY LTD CLAIMANT
AND MSA TIRE (JAMAICA) LIMITED DEFENDANT
AND JEANNE LAVAN AFFECTED THIRD PARTY

Mr. Kwame Gordon and Ms. Yana Samuels instructed by Samuda & Johnson for the claimant.

Mr. Douglas Thompson for the Defendant.

Mr. Christopher Dunkley, Miss Amina Whitley and Miss Jahyudah Barrett instructed by Phillipson Partners for the Affected Third Party.

Heard: 1st and 6th May, 2014 and 27th March 2015

Landlord and tenant – Leases - Claim for rent and mesne profits – Underlease created in breach of Headlease – Whether Underlease valid and enforceable – Tenancy at sufferance – Use and occupation of demised property.

In Chambers

Evan Brown, J

Background

[1] This claim arises out of a purported lease agreement (hereafter called “the Underlease”) between the claimant and the defendant. The claimant seeks, inter alia, to recover outstanding rent and mesne profit for the unlawful occupation of the premises, at the agreed rental rate. The claimant was at all material times a duly incorporated company which leased the concerned property from the Factories Corporation of Jamaica (FCJ) in 1998 (hereafter referred to as the “Headlease”). The claimant subsequently entered the underlease with the defendant in May of 2006 for a period of

five years. This was upon written terms with a stipulated rent and a provision for its increase.

[2] The defendant, despite initial payments, stopped making rental payments as agreed, in March 2011. No doubt, this was the catalyst to the claim now before this court. The defendant continued in occupation of the premises and only vacated the premises after an order was made by the court in December 2012 for the defendant to vacate the premises on or before March 14, 2013.

It is also of importance to note, that the claimant sought and obtained an interlocutory injunction on January 23, 2013 (which has been extended until the determination of this case), restraining the defendant from dealing with and or dissipating its assets within the jurisdiction.

Defendant's Submissions

[3] In this case, it may be more helpful to first set out the submissions of the defendant. For their part, the facts are incontrovertible in all material respects. However, one important basis upon which their defence rests is the validity of the Underlease. The defendant submitted that the Underlease was executed in breach of the Headlease. They submit that, in essence, since the Underlease was executed in breach of the Headlease, it is therefore voidable at best. In those circumstances, the Underlease is unenforceable, illegal, imperfect or is a voidable contract. The defendant therefore submits that for these reasons the claim must fail.

[4] In support of these submissions, the defendant urged the court to consider the Headlease first, and in particular Clause 19. This clause is set out hereunder:

"19 Not to Assign or Underlet

Not in any way to assign, underlet or part with possession of the leased premises or any parts thereof or to assign this Lease or part with its interest thereunder or any part thereof without the previous consent in writing of the Landlord (which consent shall not be unreasonably withheld) but in case of any permitted assignment, the Tenant shall continue liable for the performance of the several stipulations herein contained, unless specifically released by the Landlord."

By this clause, the claimant was under a duty to request and receive permission before it sublet the premises to the defendant. The defendant submitted that no such permission was granted before the Underlease was executed and therefore the claimant was in no position and or had no authority so to do.

[5] To buttress this submission, the defendant urged the court to consider a correspondence from the FCJ to the claimant. The correspondence was dated June 12, 2007 and it addressed concerns regarding the subletting of the premises by the claimant. The defendant submits that this correspondence confirms that the Underlease was executed in breach of the Headlease. No tenancy was created in those circumstances and the claim should therefore fail.

[6] In respect to the claim for mesne profits, the defendant submitted that since the claimant had no right to pass good title to the defendant, they are not entitled to a claim for mesne profits. They further submitted that the only party who could properly make such a claim for mesne profits would be the FCJ. However since the FCJ had a valid and enforceable lease over the property, they suffered no irrecoverable loss and would therefore be unable to make such a claim against the defendant. The defendant went further in its written submissions, and submitted that since they had no proper right to possession, neither they nor the claimant had the right to make such a claim for the time that they were in possession.

[7] In sum, the defendant's contention is that the claimant cannot seek to enforce a contract which is unenforceable. Reliance was placed on the judgment of Du Parcq J in the case of ***British Homophone Ltd v Kunz & Chrystallate Gramophone Record Manufacturing*** [1935] All ER 627 where the following passage was quoted:

"it is an unlawful act or in other words a legal wrong, to break a contract.... It seems to be consistent with the principle that an agreement to do a legal wrong to a third party should be unenforceable by reason of its illegality."

In respect to the injunction granted, the defendant submits that the claimant ought not to have benefitted from its granting. In the circumstances, the defendant's prayer is that

this will court so rule and in consequence discharge the injunction. The court should also order an enquiry as to damages which they have sustained from the granting of the injunction. Reliance was placed on *Dalton Yap v Union Bank of Jamaica Ltd* SCCA No. 58/98 dated 22nd November 2001 (unreported) to ground their prayer for an enquiry as to damages.

Claimant's Submissions

[8] The claimant on the other hand have grounded their claim on two (2) broad submissions. These grounds are in essence:

1. There was a valid lease executed between the parties which the defendant breached by failing to pay the agreed rent from March 2011 to the agreed date the Underlease was to expire; and
2. Thereafter failed to deliver up possession of the premises in accordance with the Underlease, causing the claimant to suffer damages; those damages being recoverable as mesne profits.

[9] In essence, the claimant firstly contends that the Underlease executed between the parties was valid and effectual. It is their submission that they were not in breach of Clause 19 of the Headlease when they underlet the premises to the defendant. In fact, the claimant avers that the expressed consent of the FCJ was obtained prior to the execution of the Underlease. Interestingly, the claimant submitted that FCJ has always been aware of the action brought against the defendant and held it responsible for the rents due and owing under the same Clause 19. Consequently, by failing to pay the agreed rent from March 2011 to the agreed date that the Underlease was to expire, this amounts to a breach which the claimant is entitled to take action upon. Therefore, they submit that they are entitled to enforce the terms of the lease and seek the court's intervention in any regard thereto.

[10] The claimant further submits that the defendant would be estopped from claiming a breach of the Headlease as a defence in the circumstances. The defendant, they submit, is bound by the equitable principle of tenancy by estoppel. They argue that this principle is applicable in circumstances where a person who does not have an estate in

land has granted or created a lease by words or deed and the grantee has been put into and enjoys possession of the property. In support of this submission, the claimant urges the court to consider the case of **Cuthbertson v Irving** (1859) 4 H. & N. 742. Emphasis was placed on the following passage quoted:

“if any estate or interest passes from a lessor, or his real title is shewn upon the face of the lease, there can be no estoppel. If a lessor has no title, and the lessee be evicted by the title paramount, he may plead that as a defence to an action by the lessor. But so long as a lessee continues in possession under the lease he cannot set up any defence founded upon the fact that the lessor ‘nil habuit in tenementis’ ”.

The submission continued, the claim having been started while the defendant was still in possession, during the currency of the Underlease, the defendant is estopped from arguing that the claimant’s title was defective as a defence.

[11] In respect to the claim for mesne profits, it is the claimant’s submission that an action for mesne profits is in essence an action to recover damages for the loss of the right to occupy a premises; this loss having been occasioned by a trespasser. They argue follows, that such an action is available to a landlord who has commenced an action for recovery of possession against a tenant who remains in possession of the property as a trespasser. The damages recoverable are classified as mesne profits.

[12] They submit further, that since the defendant’s term of lease had expired at the agreed date and it still occupied the premises for some time after, it did so as a trespasser. This the claimant submits, prevented it from in turn yielding up possession to FCJ and forced it to pay rent due and owing to FCJ for the duration of the period that the defendant remained in occupation of the premises.

[13] The claimant submits that in those circumstances, it is entitled to damages for the trespass for the period the trespasser remained on the property. Consequently, the defendant’s assertion that since the claimant is the original lessee, they are not entitled to mesne profits, has no basis in law. Any party who is entitled to immediate exclusive

possession of the premises and is deprived of it, is entitled to make a claim for mesne profits, the claimant concluded.

The Issues

[14] This issues arising for my determination are:

1. Whether the Underlease was executed in breach of the Headlease?
2. Whether, having regard to the first issue, the Underlease is valid and enforceable?
3. If so, whether the claimant is entitled to the recovery of the agreed rental for the period during the agreed life of the lease that the rent was not paid?
4. Whether the claimant is entitled to mesne profits and at the agreed rental rate?

The Law

[15] The principles of law applicable to this claim are well settled. The starting point is establishing the essence of a lease as this is the foundation upon which this claim is based. Lord Hoffman in ***Bruton v London & Quadrant Housing Trust*** [2000] 1 A.C. 406, had this to say about a lease:

“A ‘lease’ or ‘tenancy’ is a contractually binding agreement, not referable to any other relationship between the parties, by which one person gives another the right to exclusive occupation of land for a fixed or renewable period or periods of term, usually in return for a periodic payment in money. An agreement having these characteristics creates a relationship of landlord and tenant to which the common law or statute may then attach various incidents.”

Upon this construction, it is clear that the essentials for there to be a lease are certainty of duration, consideration (rent) and exclusive possession. Where the landlord has an estate in land, the lease will also grant the tenant a leasehold estate in the land. Leases are subject to regulation, both as to their terms and the way in which they can be brought to an end.

[16] Indeed, there are different types of tenancies which upon an agreement may be established. Two types which are of importance to this claim are tenancy by estoppel

and tenancy at sufferance. These types of tenancies are unique in that they are creatures of equity. A tenancy by estoppel is created where a person who does not have an estate in land to grant or create a lease or tenancy, purports to execute such a lease or tenancy by either words or by deed. Equity operates to prevent the purported landlord from, subsequent to making the purported lease, asserting that his title is defective or that the lease is invalid.

[17] According to the author of **Commonwealth Caribbean Land Law** page 532, the grantee in those circumstances therefore acquires a tenancy by estoppel and is “equally forbidden to impugn the title of the grantor if he has been put into and enjoys possession and use of the property”. This principle is a clear indication of the equitable approach the courts must take in those circumstances. In fact, this rationale was set out in **Cuthbertson v Irving** (1859) 28 L.J. Ex 306 by Martin B, whose words I reproduce as I cannot improve upon:

“This state of the law in reality tends to maintain right and justice and the enforcement of the contracts which men enter into with each other (one of the great objects of all law), for so long as the lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or who the heir or assignee of the lessor really is? All that is required of him is, that having full consideration for the contract he has entered into, he should on his part perform his.”

In essence, a tenancy by estoppel is a lease that exists despite the fact that the person who granted it had no legal right to do so (because, for instance, the landlord holds no estate in the land). Such a tenancy is binding on the landlord and tenant but not on anyone else(see **Bruton v London & Quadrant Housing Trust supra**).

[18] Indeed, according to the authors of **Snell’s Equity** 31st edition page 253, the essence of estoppels, whether at law or in equity, is preventing one party from denying a previously asserted state of affairs where the other party relied on it to his detriment. It is arguable therefore that a tenancy by estoppel may be seen as equitable relief for either a landlord or a tenant.

[19] A tenancy at sufferance on the other hand arises where a tenant remains in possession of the leased property without the landlord's permission after the expiration of his term. It is arguable that the concept of "tenancy" used to describe this type of arrangement is a misnomer. In fact, the 'tenant' is not deemed to be a trespasser because his initial entry was with the permission of the landlord under a lease or tenancy which has subsequently expired. According to Owusu in **Commonwealth Caribbean Land Law** at page 531, such a tenant cannot be sued for damages for trespass or mesne profits. However, the landlord is entitled to maintain an action against him for "the use and occupation of the premises. In **Burrell v Perkins** (1802) 102 E.R. 669, this type of tenancy was described thus:

"A tenant at sufferance is he that at first came in by lawful demise, and after his estate ended continueth the possession, and wrongfully holdeth over."

[20] Turning to the terms of a lease, it must be noted that those terms govern the relationship between the landlord and the tenant. Usually in a written lease, the expressed terms govern the exact nature of the tenancy as well as the rights and duties of the parties. It is settled law that a tenant's right to exclusive possession confers upon it the right to assign or sublet the premises unless there is an expressed term in the lease prohibiting the lessee from doing so. Consequently and importantly, where this is a term in a lease and the tenant breaches this term by subletting or assigning, it avails remedies to the landlord rather than making the disposition void or invalid.

[21] However, if the covenant is reinforced by a forfeiture clause, any disposition will be voidable and will entitle the landlord to forfeit the tenancy and recover the property. It is also important to note that there may be instances where the parties covenant that any disposition must be sanctioned by the landlord's prior consent. Where the tenant fails to seek consent before the disposition, the landlord may take out an action for breach of covenant (See **Eastern Telegraph Co. Ltd. v Dent** [1899] 1 Q.B. 835).

[22] It is a general principle of law that an entitlement to mesne profits does not rest in the landlord's entitlement to the reversion of the fee simple in the property but his right to immediate exclusive possession of the property in priority to the tenant. Therefore, a

person who has no legal title to or who may have been in wrongful occupation of land in respect to another party, may have the right to possession of the land. A landlord's entitlement to mesne profits arises upon the expiration of the lease which crystallizes the right to possession of the property to the exclusion of the tenant (See ***Swordheath Properties Limited v Tabet and Others*** [1979] 1 All ER 240 and ***Inverugie Investments Ltd v Hackett*** [1995] 1 W.L.R. 713).

Reasoning

Whether the Underlease was executed in breach of the Headlease?

[23] In resolving this issue this court would have been greatly assisted by evidence from the FCJ indicating that it had in fact given consent to the Underlease. In fact, the defendant asserted that the Headlease was breached and relied on the correspondence from FCJ to the claimant dated June 12, 2007, which was tendered into evidence to ground this assertion. The cut and thrust of this correspondence was that the FCJ brought to the claimant's attention a number of breaches which ought to have been regularized. It is difficult for this court to see otherwise after considering the following excerpt from the correspondence:

“At the time of our visit, it was also observed that there was an illegal occupant in the building purporting to be a subtenant of your company, conducting tyre retreading operations on the property. We regard that occupant as being in unlawful possession of our property since you had not received written consent from FCJ to sublet the property, in breach of Clause 19 of the Lease Agreement.”

It is therefore pellucid that among the complaints FCJ had after the Underlease was executed and certainly at June 12, 2007, was that the premises was sublet without its permission or knowledge and in breach of Clause 19 of the Headlease. This court therefore finds that the Underlease was executed in breach of the Headlease.

Whether, having regard to the first issue, the Underlease is valid and enforceable?

[24] Having found that the Underlease was executed in breach of the Headlease, this issue is whether such a breach invalidated or rendered the Underlease unenforceable.

The court must also consider the fact that the defendant enjoyed continuous possession of the premises throughout the duration of the lease. Likewise and perhaps even more important, the court must consider the fact that the defendant paid the agreed rent for a significant period during the currency of the Underlease. The evidence given is that it was only five months out of the currency of the Underlease that rent was not paid; those five months being the immediate months prior to the expiration.

[25] Can the Defendant therefore, after enjoying possession and use of the premises and in fact submitting to the terms of the Underlease for the majority of its duration, impugn the title of the claimant in a bid to render the Underlease unenforceable? The answer to that question must be in the negative. It seems to me that the judgment of Martin B in *Cuthbertson v Irving* bears relevance in this regard. For, as long as the claimant enjoyed everything which the Underlease purported to grant, it is obliged to honour the contract it entered into and is estopped from reneging, particularly at such a late stage.

[26] I find that although the claimant breached the Headlease, the Underlease is valid and effectual. I am fortified in this view as the authorities make it clear that where such a breach occurs, it avails remedies to the landlord rather than invalidate the lease (See *Eastern Telegraph Co. Ltd. v Dent*). It also follows that the claimant is entitled to recover the unpaid rents for the duration of the Underlease that the rent was not paid.

Whether the claimant is entitled to mesne profits and at the agreed rental rate?

[27] It appears to me that after the expiration of the Underlease, a tenancy by sufferage ensued. This is so as the defendant came into possession of the premises by lawful demise, but thereafter wrongfully held over when the Underlease expired. Whilst I am guided by the view that a landlord in such a tenancy cannot sue for mesne profits, the landlord may nonetheless take out an action against the tenant for 'the use and occupation of the premises'.

[28] It is my view that when one considers the principle behind the remedy of mesne profits, the claimant's prayer for mesne profits may not be unfounded. It is clear that the

claimant was entitled to immediate exclusive possession of the property in priority to the defendant upon the expiration of the Underlease. The evidence is that the claimant continued to pay the FCJ rent for the period of time that the defendant remained in possession of the premises without paying rent. In those circumstances, I find that the claimant's prayer for mesne profits is akin to an action against the defendant for the use and occupation of the premises after the expiration of the Underlease. I therefore find that the claimant is entitled to recover damages at the agreed rental rate in respect of this period.

Third Party Interest

[29] Another dimension of this matter was the grant of a freezing order over the assets of the defendant. At the hearing of the substantive matter, the question of the discharge of that order was considered. Miss Lavan, a director of the defendant, swore in an affidavit that she extended credit and loan facilities to the defendant to the tune of US\$240,791.55. To secure her interest, she was given a lien over certain of the defendant's machinery, equipment and motor vehicles. This lien was evidenced in a Bill of Sale exhibited to her affidavit. It was Miss Lavan's further contention that her lien ranked in priority to the claimant's interest. The evidence of Miss Lavan was amply supported by the Mr. Mike Shill Jr., another director of the defendant. On those premises, she sought to move the court to discharge the freezing order.

[30] There was evidence before me that the defendant expressed a clear intention to remove its assets from the jurisdiction of the court. With that no issue was joined. Mr. Mike Shill Snr., also another director of the defendant, told a representative of the claimant that the defendant would have been relocating to Suriname. When pressed about the settlement of the defendant's debt to the claimant, Mr. Shill Snr. responded that the company had no money. Consequently, there was a real risk of the claimant being left with an unsatisfied judgment in the event of success at the hearing. It was on that basis that I extended the freezing order until the determination of the substantive matter.

[31] Having decided in favour of the claimant, the question of the discharge of the injunction remains. With its judgment in hand, the claimant can now move to enforcement. However, the period between the handing down of the judgment and the commencement of enforcement represents a sort of twilight zone. If the claimant is without the protection of the freezing order ad interim, the defendant may be presented with a window of opportunity to deprive the claimant of the fruits of their judgment by the removal of their assets from the jurisdiction. If that were to happen, the court would have acted in futility. With one hand, the court would have wielded its sword to give justice to the claimant and with the other, withdrawn its protective shield, simultaneously allowing the defendant to frustrate its order. I am therefore constrained to allow the freezing order to remain in effect until the fear of dissipation or removal of the defendant's assets has passed.

Conclusion

[32] I therefore make the following orders in favour of the claimant:

1. That the defendant pays the claimant outstanding rent in the sun of \$4,572,225.76.
2. That the defendant pays the claimant mense profits in the sum of \$3,791,090.70
3. Interest on the sums awarded at the commercial rate.
4. Costs to the claimant to be taxed if not agreed.
5. Freezing order granted on the 25th February, 2013 to remain in effect for a period of twenty-eight days from the date hereof.