[2020] JMCC Comm 29

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2012CD00131

BETWEEN	**AIRLINK WIRELESS NETWORK LIMITED**	**CLAIMANT**
AND	**D. R. HOLDINGS LIMITED**	**1ST DEFENDANT**
	DONALD RAINFORD	**2ND DEFENDANT**

Lease – Commercial premises – Rent Restriction Act – Whether certificate of exemption has retroactive effect – Whether oral collateral agreement/terms – Re-entry for non-payment of rent – Whether lease lawfully terminated – Whether tort of breach of statutory duty- Whether decision of English Court of Appeal binding- Damages.

Sean-Christopher Castle and Akuna Noble instructed by Kazembe Law for Claimant

Sylvester Hemmings instructed by Sylvester Hemmings & Associates for 1st and 2nd Defendants

Heard: **19th, 20th, 21st November, 12th & 13th December 2019, 2nd April, 22nd September and 27th November, 2020**

In Open Court

Cor: Batts J

[1] On the first morning of trial Claimant's counsel indicated that the 3rd and 4th named Defendants (Jamaica Network Access Point Ltd. and Mark Reid) had never been served. The claim against them was withdrawn. He also endeavoured to make an oral application to strike out portions of the Defence as containing bare denials. Counsel could not explain why the application had not been made either at the

pre-trial review or at case management. I declined to entertain the application at that late stage and directed that he commence his case.

[2] The parties helpfully agreed, and filed, a Bundle of Agreed Documents. This was admitted in evidence as Exhibit 1. It is nicely indexed and paginated and will be referenced throughout this judgment. I was also provided with two judges' bundles. One contained the pleadings and the other the several witness statements in this matter. Anthony Dunn, Glenford Palmer and Errol Christian gave evidence on behalf of the Claimant. The Defendants' witnesses were Donald Rainford (the 2nd Defendant) and Kevin Sergeant. It is remarkable that the bundle contained a witness statement, a supplemental witness statement and a 2nd further witness statement of Donald Rainford. His counsel placed before the court Mr Rainford's further witness statement (filed on 26th July 2019) and his 2nd further witness statement (filed on 18th October 2019) as his evidence in chief. In the course of being cross-examined his witness statement (filed on 10th April 2019) was admitted as Exhibit 2.

[3] All witnesses were cross examined. I do not need, in this judgment, to retell the details of each witnesses' testimony. It will, I think, suffice to reference only such evidence as is necessary to explain my decision and findings. This case, the abundance of paper and the rather lengthy cross-examination notwithstanding, turns on one or two narrow points of fact and law.

[4] The 1st Defendant owned land and a building at 1 Dumfries Road Kingston 5, see paragraph 3 of the 2nd Further Witness Statement of Donald Rainford filed 18th October 2019. The Claimant occupied the ground floor of that building as a subtenant of Jamaica Network Access Point Limited, a company owned by one Marc Reid. That company had rented the entire three stories from the 1st Defendant. The Claimant contends that, at that time, the building was not in a position to be occupied and that certain improvements had to be done to it. The tenant (the Claimant's original landlord) disappeared shortly after the Claimant went into possession. The 2nd Defendant, who owns and controls the 1st

Defendant, thereafter allowed the Claimant to continue as a tenant, see paragraphs 5 and 6 of further witness statement of Glenford Palmer filed on the 30th August 2019.

[5] The Claimant alleges that it was orally agreed that only the ground floor would be rented from the 1st Defendant which was, at all times, at liberty to rent the other two floors to whomever it chose. In this regard, some witnesses called the ground floor the 1st floor but at the end of the day the meaning was clear. The Defendants deny this and say that all three floors were rented but that, upon the Claimant being unable to afford the rental, a variation was made. That variation made the Claimant a tenant of the ground floor only. Both parties agreed that a written 5-year lease was entered into and that it is the document at page 92 of Exhibit 1.

[6] The Claimant's witnesses say that it effected certain improvements to the premises. Further that the Defendants unlawfully entered the premises, changed the locks, and repudiated the fixed term tenancy. The Defendants deny that. They say that the alleged re-entry occurred due to a leaking pipe which required that locks be broken to enter a bathroom on the ground floor. The Defendants say the tenancy came to an end because the Claimant had abandoned the building and/or had surrendered the tenancy. In the alternative it was contended that, as rent was owed and as there was a Certificate of Exemption (page 108 Exhibit 1), the Defendants were not in breach of the law even if there had been a re-entry.There were some collateral issues having to do with the Claimant's possessions, which had been placed into storage, and whether the Claimant had failed to remove them. Finally, the Defendants counterclaimed for rent allegedly owed. The Claimant denies owing rent but says, if rent is due, it is to be set off against the damages to which it is entitled.

[7] The issues for my determination can therefore be summarised as follows:

a.) Was the tenancy in respect of one floor or all three and what were its terms.

b.) Was the tenancy one to which the Rent Restriction Act applied.

c.) How and by what means did the tenancy come to an end

d.) Is there rent owed by the tenant to the landlord

e.) Is the landlord liable to the tenant for damages and ,if so, how is that to be assessed?

The First Issue

[8] The questions, of what were the terms of the tenancy and whether it extended to all floors of the building, can only be answered by looking at the evidence. The Claimant's witness Anthony Dunn states at paragraph 7 of his witness statement, filed 22nd March 2019,

> *"7 We leased the ground floor of the unfinished building at 1 Dumfries Road Kingston 5 and spent significant sums to make leasehold improvements over the course of a year and a half to make the facility habitable and fit for our business."*

[9] Mr. Glenford James Palmer the CEO of the Claimant, at paragraph 12 of his witness statement filed on the 22nd March 2019, stated,

> *"I categorically state that apart from the ground floor of the building, at no time during the entire period was a single square foot of the space on the first and second floors of the building occupied or used for any purpose by the Claimant or its officers or agents."*

At paragraph 16 he stated,

> *"16. In the discussions regarding the Claimant's tenancy, it was agreed with the 2nd Defendant that the Claimant's official lease period would start November 1, 2008 for a monthly rental amount of U$4,465.83 inclusive of GCT. As the 2nd Defendant indicated that he prefers for the Claimant to take over as the landlord*

and therefore he would only deal with one entity, a lease agreement was done between the Claimant and the 1st Defendant to reflect the lease of the whole building. The understanding however was that the Claimant would only pay for the space they occupied which is the ground floor at a cost of U$4465.83 per month and the other floors when rented, the Claimant would collect the rent and pay over to the 2nd Defendant. It was even suggested at the time by the 2nd Defendant, that the Claimant could determine whatever rent they want to charge for the other floors and as such would stand to get some benefit administering the building. This arrangement was accepted by the 2nd Defendant."

[10] When cross-examined the Claimants' witnesses said:

Mr. Glenford Palmer,

Q: How did you come to understand Mr. Reid left the building

A: I don't know, we stopped seeing him around

Q: Suggest that on the 1st October 2008 Mr. Rainford gave you a written lease for the entire building

A: I can't recall specific date. During period May to end of year Mr. Rainford visited a number of times. I can't recall exact date. We did discuss the lease. I made it clear only section I interested in was ground floor on which we had spent money.

Q: did you at any time get a written lease from Mr. Rainford

A: at some time yes, which was being reviewed

Q: when you get that document you paid Mr. Rainford 2 months' rent

A: I have no recollection of that

Q: that was from October and November, 2008

A: I have no recollection of that

Q: that payment was for the entire 3 floors

A: Absolutely not, I have no recollection of any such payment."

Mr. Anthony Dunn,

"Q: On or about September 2008 you commenced a lease with D. R. Holding

A: I am aware of a lease dated 1st November, 2008

Q: Suggest that you were constantly in arrears of rent for leased building.

A: that is incorrect. All advances were with intention we only pay for ground floor only based on discussion between Mr. Palmer and Mr. Rainford. Mr. Rainford only wanted one tenant. Air Link only occupy ground floor. They would try to lease other floors. They could not do that for 18 months because fire escape was not on premises.
As we only occupy ground floor our payments would cover several months ahead.

Q: you documented that

A: in all my statements filed in court as to my understanding of the arrangements.
Air Link put advertisement in the Gleaner to rent out other floors."

[11] That oral evidence is contradicted by contemporaneous documentation. First of all, there is the lease, see page 92 of Exhibit 1. The "leased premises" is defined in that document as follows:

"ALL THAT premises known as 1 Dumfries Road, Kingston 10 in the parish of Saint Andrew registered at Volume 1220 Folio

964 of the Register Book of Titles the leased premises comprising not less than 13,439 square feet building."

The lease is dated the 1st day of November 2008. It is for 5 years expiring on the 30th day of November 2013. The tenant has an option to renew. The rent payable is U$11,500 per month commencing 1st November 2008 with a provision for a 10% annual increase with respect to the other 4 years.

[12] The second document, which makes the testimony of the Claimant's witnesses doubtful, is a receipt dated 27th October 2008 Exhibit 1 page 91.

It reflects a payment by the Claimant of U$26,795 for-

"rental of 1 Dumfries Road, for two months ending 30th November 2008."

The third document is a letter written by Mr. James Palmer, the Claimant's CEO. It reads, page 103 Exhibit 1,

"15 June 2009

Mr. Donald Rainford
9a Dumbarton Avenue
Kingston 10.

Dear Mr. Rainford,

Re: Rent – 1 Dumfries Road

Thanks for meeting with us this morning and for your understanding. Set out below is our discussion and agreement"

1. *That outstanding for the period January – June 2009*

	U$
Rent (6 months x 11,500)	*69,000*
GCT	*11,385*
	80,385

Paid 12.06.09 *(30,000)*
Discount (1 month's rent plus GCT) *(13,397.50)*

Balance Outstanding *$36,9897.50*

Balance outstanding should be paid in three (3) equal instalments as of August 2009.

2. *Effective July 1, 2009 Airlinks Wireless Network will be responsible for the ground floor. The first and second floor will be the responsibility of Donald Rainford. The rental for the ground floor, will be Four Thousand four hundred and sixty-five thousand and eighty-three cents (4,465.83). This amount is due and payable on the first of each month commencing July 1, 2009. The current lease agreement will be amended to reflect the relevant changes."*

[13] It stands to reason that, if the Claimant was responsible only for the ground floor as at July 1, 2009, then it was responsible for the entire building prior to that. For completion it should be noted that Mr. Glenford James Palmer, in cross examination, admitted writing the letter of 15 June 2009. He said in relation to its contents,

"Q: Airlink now confined to ground floor

A: Always

Q: Says effective July 2009

A: Yes"

[14] I therefore reject the evidence of the Claimant's witnesses that it had only leased the ground floor. I find on a balance of probabilities that the Claimant entered into an agreement to lease the entire building from the 1st Defendant. This was varied in July 2009 to limit the rented portion to the ground floor and to reduce the monthly rental. There was no oral collateral agreement or representation nor any basis in

law to give effect to anything other than the terms of the lease signed by the parties in or about November 2008.

The Second Issue:

[15] Did the Rent Restriction Act apply to the tenancy? This issue is shortly answered. The Rent Restriction Act applies to all premises in Jamaica unless exempted, see Section 3 of the Act. The exemption certificate, with respect to 1 Dumfries Road (page 108 Exhibit 1), is dated the 1st day of February 2011. The Defendant's counsel submitted that its effect is retroactive. He cited no authority but described the proposition as trite. That is an untenable submission. What is trite is that the law leans against giving legislation retroactive effect. If counsel is correct it would mean that landlords, or tenants, may conduct themselves on the assumption that premises are protected and then find out, because of a retroactively effective exemption, that they become exposed to liability. There is nothing in the words of the statute or otherwise to support retroactive effect of certificates of exemption. In this case the Rent Restriction Act applied in the period prior to 1st February 2011.

The Third Issue

[16] The question is how and by what means did the tenancy come to an end. The Claimant alleges that its representatives were locked out and that the guard on the premises had been instructed not to allow its personnel in. The Defendants say the tenancy was surrendered and/or abandoned. They assert that the circumstances of their entry related to a flooding in the building. They say that, after emergency repairs were done, a key was left with the guard for delivery to the Claimant's representatives to enable their entry.

[17] In this instance I reject the Defendants' account. In the first place contemporaneous written communication between the parties does not support the alleged abandonment of the tenancy. I reference firstly a letter dated 2nd February 2010 from the Claimant's chairman to the Defendants, page 166 Exhibit

1. In that letter the Claimant acknowledges the outstanding rent and volunteers an explanation, a third party, one Mr. Reid is blamed. The letter then indicates that efforts were being made to obtain financing and, in its penultimate paragraph, states-

> *"It has been a painful learning experience but we continue to push on. As I said if we are not up and running in sixty days then we will have to decide our future at Dumfries as we cannot continue to incur costs without the revenue to offset it."*

Mr Dunn, its author, offered his telephone number and email so further discussions could be held. There was no written response to this letter.

[18] The other letter of significance, for this issue, is one written by Mr. Winston Spaulding QC. He was the Defendants' legal representative at the time. That letter, dated the 7th July 2010 page 137 Exhibit 1, is addressed to the Claimant's legal representative. It is long and detailed. In its 13th paragraph queen's counsel wrote:

> "*For the twelve months' period from July 2009 to the time of this letter Airlink paid only three months' rent at U$3,833 per month plus GCT. The cumulative balances up to March 2010 when re-entry was effected by D. R. Holdings is U$77,174.00"*

The letter references an undertaking to "leave by the end of March." It says the undertaking was accepted and acted upon by the Defendant. Counsel wrote:

> *"D. R. Holdings right to re-entry was effected in the context of -*
>
> *i. The various breaches, including but not limited to, the outstanding rent*

ii. *The specific arrangement and undertaking by your clients to have vacated the premises at the end of March 2010 if the arrears of rent were not paid*

iii. *The abandonment of the premises in the context and the conduct of your clients as set out in this letter."*

[19] So there it is. An assertion that re-entry occurred in March 2010 because, among other things, the Claimant had abandoned the lease. I am satisfied that senior counsel wrote those words because of instructions received from the Defendants. On a balance of probabilities, they accurately recount the method of termination adopted. The Claimant's letter, of 2nd February 2010, indicated a 60-day time line after which certain decisions would have to be made. Re-entry in March would be less than 60 days after that letter. Furthermore, it is common ground, and the letter from Mr. Spaulding Q.C. makes it clear, that the Claimant had possessions in the premises at the time of the re-entry. In effect the Claimant was still in possession. The lease was for 5 years. It was a lease to which the Rent Restriction Act applied, and therefore, physical re-entry was expressly prohibited without an order of the court (See Section 27 of the Act).

[20] I find as a fact that the 1st and 2nd Defendants re-entered the premises in March 2010 and took possession. This was done due to frustration at not being paid rent. A frustration enhanced by the letter of 2nd February 2010 which suggested that the Claimant was unable to pay rent owed. I reject the Defendants' evidence that flooding caused re-entry. I find, accepting evidence given in cross-examination by Mr Kevin Sergeant, that there was no need to enter the leased premises in order to access the bathrooms. They were directly accessible through a door in the lobby area. Re-entry was unlawful because, although the lease agreement clearly states the landlord may re-enter when rent is owed (whether formally demanded or not) page 95 Exhibit 1, the Rent Restriction Act prohibits

physical re-entry without an order of the court. In protected tenancies landlords re-enter by filing a claim. They are only able to retake possession if either, an order of the Court is made or, the tenant voluntarily surrenders the lease.

[21] I find as a fact that there was no surrender or abandonment of the lease in March 2010 or at all. The Claimant had possessions there and had not taken any action to suggest they were surrendering the lease to the Defendants. The letter of 2nd February 2010 raised the possibility of surrender after 60 days nothing more. It constituted neither an abandonment nor a surrender of the 5-year lease.

The Fourth Issue

[22] The question concerns whether rent is owed by the Claimant to the Defendant. This is the subject of the counter claim, a second amended iteration of, which was filed on the 18th October 2019. Notwithstanding all the evidence, the question is easily answered with reference to contemporaneous documentation. The Claimant itself wrote admitting to owing rent as late as 2nd February 2010. No rent has since been paid. The answer therefore is in the affirmative. The amount owed, and for what period, I will address later on in this judgment.

The Fifth Issue

[23] This relates to whether the Defendants are liable and, if so, how is compensation to be assessed. There has been a wrong committed. The Defendants interrupted the Claimant's possession in a protected tenancy in breach of section 27 of the Rent Restriction Act. It is not a breach, of the terms of the lease, for the Defendants to re-enter and take possession because rent was owed and the lease provided for re-entry without notice in such a situation. The Defendants' liability, if any, would be for breach of Statutory Duty. That is acting contrary to the provisions of the Rent Restriction Act. Paragraph 74 of the Amended Particulars of Claim does allege a breach of the Rent Restriction Act by unlawfully changing locks. This is a sufficient plea to alert the Defendants that the Claimant was relying on a breach of

Statutory Duty. The question however is whether the Rent Restriction Act provides a civil remedy where a breach of it occurs.

[24] Section 27 of the Act, which precludes physical re-entry by the landlord, makes the breach a criminal offence. The Act is designed to protect a class of persons namely tenants of protected premises. The Claimant falls within that class. The Act places a duty on landlords to respect the tenant's right to quiet enjoyment. There is unavailable to persons in the Claimant's position any viable alternative remedy. On first principles therefore the Claimant should be entitled to assert a claim, against the Defendants, for damages for a breach of section 27 of the Rent Restriction Act. However, the Court of Appeal of England decided otherwise when considering similar, but not identical, provisions see, ***McCall v Abelesz and another [1976] QB 585***. Although a highly persuasive authority, I decline to follow that decision for the reasons set forth in the following paragraphs.

[25] In the first place the statutory provisions differ in respects which are important for resolution of the issue under consideration. The English Court of Appeal considered section 30(2) of the Rent Act 1965.That section reads as follows:

> *"… (2) If any person with intent to cause the residential occupier of any premises-- (a) to give up the occupation of the premises or any part thereof; or (b)…. does acts calculated to interfere with the peace or comfort of the residential occupier or members of his household, or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence, he shall be guilty of an offence…."*

Subsection (3) of section 30 has provision for a fine or imprisonment in the event of a breach. Subsection (4) states: *"Nothing in this section shall be taken to prejudice any liability or remedy to which a person guilty of an offence thereunder may be subject in civil proceedings."*

Lord Denning, the Master of the Rolls, observed at page 593D of his judgment:

> *"First I would consider the section as if subsection (4) were not there. It creates a criminal offence punishable by fine or imprisonment. It does not give a civil remedy in damages. Nevertheless, it would be possible for the courts to hold that there was a civil remedy, but they would only do so if they saw on examination of the whole Act that Parliament had so intended…"*

Lord Denning then considered subsection (4). After examination of the authorities he stated at page 594B*: "By putting in the clause "without prejudice" the draftsman shows that that section itself only gives rise to a criminal offence, and not to civil proceedings".* He then concluded, and in this he was joined by Lord Justice Ormrod, that subsection (4) preserved any liability or remedy which already existed in civil proceedings "*apart from* "Section 30 but created no new liability (pages 594C and 594 D-F of the report).

[26] Apart from the observation with respect, that this is a strained and unnecessarily artificial construction of the phrase "without prejudice", it is pertinent that section 27 of the Jamaican statute has no provision similar to the English subsection (4). There is therefore no warrant to conclude that the draftsman was signalling an intent not to create a new liability or remedy. On the contrary it seems to me that the positive and direct wording of the Jamaican provision, which contrasts with the '*negative introductory sentence"* of the English Act (as per Lord Justice Shaw at page 594F of the report), suggests the very opposite. Section 27 of the Jamaican statute is as follows:

> "*27(1) Except under an order or judgment of a competent court for the recovery of possession of any controlled premises, no person shall forcibly remove the tenant from those premises or do any act, whether in relation to the premises or otherwise, calculated to interfere with the quiet enjoyment of the premises by the tenant or to compel him to deliver up possession of the premises.*
>
> *(2) Every person who contravenes any of the provisions of subsection (1) shall, upon summary conviction thereof before a Resident Magistrate, be liable to be imprisoned for any term not exceeding twelve months "*

This section was introduced as part of wide ranging changes made in 1979 to the Rent Restriction Act. Those changes were intended to protect tenants from eviction without an order of the court. To hold that a tenant could not obtain injunctive or other relief would be to run counter to the Parliamentary intent. It is worth noting that the section protects tenants not occupiers. The "floodgate" concerns expressed by Shaw LJ at page 599D do not therefore arise.

[27] In the second place, the judges, in the English Court of Appeal, were equally impressed by the fact that the litigant before them had an alternate remedy in a claim for "harassment" under the law of contract and/ for breach of covenant (see per Denning MR at page 594D, Ormrod LJ at page 597C and Shaw LJ at page 600C). The Claimant in that case had been invited, by the trial judge, to amend his pleading to include such a claim but declined, see per Ormorod LJ at page 599A. In the case at bar the Claimant has no other remedy. This is because his fixed term lease has been terminated for non-payment of rent. His status now is that of a statutory tenant. His only available remedy is for breach of the owner's statutory duty not to recover possession except by way of an order of the court.

[28] Thirdly, it is clear, from perusal of the judgments, that the English court was influenced by the fact situation before them. The defendant (landlord) purchased

the premises and had thereby inherited accumulated utility bills. It appears that other tenants (who had by then given up possession) had been delinquent in payments. In the context of a common meter arrears therefore accrued. The landlord disputed the bills with the utility company but the result was disconnection. Their lordships (and in particular Ormorod LJ) were not comfortable with the trial judge's finding that the landlord was deliberate in his dilatory approach to the negotiations. This sympathy may well have affected the court's attitude to the remedy sought. In this case there is no similar situation. The Defendants proceeded to evict contrary to the expressed prohibition of the statute. In the course of his cross-examination the 2nd Defendant referenced the late obtaining of a certificate of exemption as *"an oversight by my staff". This* suggests he may, at the time of the eviction, have thought the exemption was in place. It may have been the only ameliorating circumstance but he has not said so and I am required to make no such finding. It would, in any event, be unfair to make such a finding as no such factual issue was placed before the court.

[29] The decision of the English court is therefore not an authority for the proposition that section 27 of the Jamaican Rent Restriction Act gives no remedy for breach of statutory duty. I have found no decision of binding authority, in this jurisdiction, which has applied that case. In the matter of ***Crowne Fire Extinguishers Services Limited and Edward Taylor v David Rudd (1990) 27 JLR 235*** the Jamaican Court of Appeal referenced, but did not adopt, **McCall's** case. Per Lord Justice Downer at page 240 H:

> *"To reiterate, it is highly probable that the courts in this jurisdiction will follow the English Court of Appeal in McCall v Abelest* (sic) *(supra). As previously stated however what could be in issue at a trial would be the averment in paragraph six of his Statement of Claim that the appellants "unlawfully and maliciously directed the third defendant (Public Service) to disconnect the electricity supplies to the said premises".*

It is important to observe that the court declined to strike out a claim which was based on breach of statutory duty. The application for a mandatory injunction, to compel restoration of electricity, was refused because: (a) the Jamaica Public Service Company Ltd was not a party to the proceedings and therefore could not be compelled to restore power (page 238 D of the report), (b) because an unusually strong and clear case had to be demonstrated (page 238 E) and, (c) because damages were deemed to be an adequate alternate remedy (page 241 D). It is apparent that the Jamaican Court of Appeal did not, in that interlocutory appeal, have or consider full argument on the applicability of ***McCall*****.**

[30] This however is the issue which falls for determination in the case at bar. The decision in ***McCall*** turns on a differently worded statute. The decision runs counter to the clear purpose of the Jamaican Rent Restriction Act. It would be odd indeed if the court was to deny relief to a statutory tenant in circumstances where, as here, a person has acted in clear breach of the statute. It would mean that a litigant, who acted with alacrity to seek injunctive relief before eviction was completed, would be turned away from this court with no avenue for redress. That would be wrong.

[31] The time has long past when the courts of independent Jamaica must consider themselves bound by decisions of an English, or any other, court. The Court of Appeal of Guyana, after appeals to the Judicial Committee of the Privy Council were abolished, made its own independence clear in ***Peter Persaud and others v Plantation Versailles & Schoon Ord, Ltd [1970] 17 WIR 107 as per Bollers C. Ag and Crane JA*****.** It is perhaps time that we do likewise. Decisions of the Judicial Committee are binding on us, not because they are English, but because that body is Jamaica's final court of appeal. There is no reason in law or principle why case law from other English courts should be regarded as binding. They may be highly persuasive authority but are not binding. In this case, for all the reasons stated above, I decline to follow or apply the decision of the English Court of Appeal in ***McCall*****.** I hold that section 27, in addition to its penal consequence, provides a tortious remedy in the way of a breach of statutory duty.

[32] The Claimant owed many months' rent and, as the lease allowed for termination by re-entry, the question as to what loss has been caused arises. There is no doubt that the 1st Defendant was entitled, under its expressed terms, to terminate the lease by re-entry. The Claimant is therefore not entitled to any compensation for the remaining term of the lease. This would, in any event, be offset by the rent to be paid for that remaining period. This is because the agreed rent is the measure of damage for use and occupation, or more accurately, for the loss of use and occupation during the unexpired portion of the lease. It was urged upon me that the Claimant has lost profits, it would otherwise have earned, had it not been dispossessed. When regard is had to the totality of the evidence the prospect, of the Claimant earning a profit was extremely remote. The Claimant's representative in his letter, at page 166 Exhibit 1, made that clear. There is no evidence to support any reasonable prospect of the Claimant becoming profitable. I reject the oral evidence, given by Mr. Dunn, that the Claimant had a launch date slated for June 2010. I find as a fact that they had not started business and, due to their financial issues which remained unresolved, were most unlikely to have been able to do so.

[33] It is appropriate at this juncture to say a few words about a document, admitted into evidence by consent and, which purported to be an expert report supportive of the claim to damages. It is to be found at page 72 of Exhibit 1 and is accompanied by a letter dated June 25,2019. That letter is signed by Karl Bowen Chartered Accountant. It is captioned "*Auditors' Report on Expenditure Statement*" and is with reference to Airlink Wireless Network Limited (the Claimant). The cover letter comments on financial statements for the year ending "*December 31st 2009*". Its final paragraph is as follows:

> "The company records show that company sales for a year are in excess of One Hundred and Two Million ($102,000,000). The company would have increased in value for another Thirty Million Dollars ($30,000,000) with goodwill."

The document attached to the letter is entitled "*Statement of Expenditure for Period June, 2008 - December 31,2009"*. These total $33,379,910.31. There is another document (at page 75) entitled Cash Flow (12 months). It indicates that the fiscal

year begins May 2008.It is printed in small type and, as far as I can discern, indicates that as at December 31st the Cash position was $102,536,364.00. There was no oral evidence supportive of these documents. It is relevant I think that the Claimant's witness Mr Anthony Dunn in his witness statement, filed on the 22nd March 2019, stated:

> "*2… The company was incorporated with the Companies Office of Jamaica on May 30,2008"*
>
> *11. Our projections called for $102 million of net profits in the first year just based on the number of subscribers we anticipated based on demand and reach."*

Whatever the projections however it is clear that by the 2nd February 2010 (when Mr Anthony Dunn wrote to the Defendants see page 166 of Exhibit 1) they had not been realised. Mr Dunn wrote in part:

> *"As you are aware, Airlink has been having serious financial issues as our plans to have started service over a year and a half ago has (sic) not materialised due to several setbacks"*

[34] Mr. Dunn's letter has caused me not only to doubt, but to reject entirely, the opinion prepared by Mr Karl Bowen. It strains credulity that a company, which had not started service in 2010, could have such sales (or net positive cash flow) as at December 2009. Mr Sylvester Hemmings, the attorney for the Defendants, sought on several occasions during the trial to challenge Mr Bowen's expertise. I refused him permission to do so. This I did because it is unfair for one party to agree the expert report being admitted into evidence, without reservation, and then to seek to challenge the credentials of the expert, see paragraphs 35 to 37 of my judgment in ***Phenee Anthony Plummer et al v John Glen Plummer [2020] JMCC Comm 6 (unreported judgment delivered 8th April 2020)***. In this case, fortunately for

the Defendants, the Claimant's witnesses gave evidence which discredited their own "expert report".

[35] The only loss proved, consequent to the Defendants' retaking possession, relates to the Claimant's alleged expenditure in or on the building and its possessions left therein. However, the 5-year lease has no provision for compensation by the landlord for sums spent improving the property. At common law these become the property of the landowner once they form part of the realty. Furthermore, the evidence is clear that, subsequent to the dispute arising the Claimant was given an opportunity to remove its possessions from the building. In this regard the evidence of the Claimants' witnesses is as follows:

> Mr. Glenford Palmer:
>
> Paragraph 41 of his witness statement filed on the 22nd March 2019,
>
> *"41. After locking out the Claimant and its staff from the premises, the 2nd Defendant held onto all the infrastructure and furniture including all executive type furniture to include even the conference room executive table and chairs plus other executive desk and leather chairs, cabinets, telecommunications equipment including the expensive tower that was installed on top of the building, backup generators and all equipment and installation that were brought, installed and placed in the offices of the Claimant. The 2nd Defendant destroyed our future and our ability to take care of our families financially which we never recovered from up to this day."*

When cross examined he said this,

> *"Q: are you aware of items in the property*

A: yes

Q: the items were taken into storage

A: they were never abandoned

Q: they were with Orandy Movers

A: Yes, get email from Orandy

Q: You acted upon email

A: Yes, I visited

Q: putting them in storage done to safeguard your property

A: I can't speak to that

Q: sum of money was paid for 2 months to keep it in storage

A: not aware of that."

[36] His evidence is consistent with the Defendants' assertion that the Claimant was given an opportunity to enter and remove their possessions. In this regard the oral evidence of Mr. Anthony Dunn, the Claimant's other witness, is significant:

"Q: In those emails you undertook to remove property and did not

A: no because the communication I get from Samuda and Johnson was February 2011. I was told he asking we remove our things. I went and collected my files.

Q: suggest having communicated through your lawyers that you would remove your property you failed.

A: no, communication to me was Ambassador Rainford was putting my stuff into storage and I could collect my personal files.

Q: all items were removed from the building

A: I would not know. I only took my personal files."

In answer to the court, on this issue, this is what the witness said,

"J: you were shown some emails from Samuda & Johnson. Can you explain them

A: the discussion I had with Samuda & Johnson was to file suit. The stuff being referred to in the email was just my personal stuff.

J: 2 days

A: I don't know where that came from. I told them that if I could not make it the Saturday I could remove my stuff on the Sunday. They told me of it on the Friday. They told me he was putting Air Links items into storage and I said I had personal items not related to Air Link."

The emails being referenced above are found at pages 131 to 134 of Exhibit 1. They reflect communication between Samuda & Johnson, for the Claimant, and "jbarnes" for the Defendants. The first email is dated 24th January 2011 and the last one the 17th February 2011. The email of 26th January 2011 from Samuda & Johnson is captioned "*Lease No 1 Dumfries Road - Removal of Airlink's property- Our Ref; SJ 37/10."* It ends with the following words:

"Please have your client provide 3 convenient dates for our client to conduct the assessment and thereafter by

mutual agreement a date can be set for the removal exercise to be conducted"

In his email of the 16th February 2011 Mr Samuda is clear:

"We thank you for your email sent on February 14 2011.Our clients can begin the removal exercise at 10:00 am on Saturday, the 19th instant.

Please be advised that our clients instruct that all the property cannot be removed in one day and, therefore, they request that the removal be completed on Sunday the 20th instant beginning at 10 am.

Kindly advise if Sunday is also convenient for your client"

Jbarnes responds on the following day,17th February 2011 at 8:32 am:

"My client agrees to your client's proposal that the removal exercise be carried out on Saturday the 19th instant at 10:00 am. He also agrees that, if it cannot be completed on that date, it may be continued on Sunday the 20th instant beginning at 10:00 am."

[37] There were no further emails between the lawyers on that subject. It is clear however that the emails concerned more than Mr Dunn's personal files as he would have us believe. It is clear, and I accept as a fact, that by January of 2011 the Claimant had decided to remove its possessions from the building and, more importantly, were being allowed to do so by the Defendants. The Claimant, as I have already found (see paragraph 21 above), had already been dispossessed. The agreement, to remove possessions, is to be regarded as an act of mitigation

of damages. It in no way compromises their complaint concerning a breach of statutory duty.

[38] There is however, on the evidence, no explanation provided for the Claimant's failure to remove its possessions. Mr Dunn says he attended, as agreed, and removed his personal files. In the absence of an explanation for the Claimant's failure to remove its possessions, as agreed, I cannot fault the Defendants for removing the items and putting them in storage. This was done on or about the 22nd February 2011, see pages 135 and 136 of Exhibit 1. An amount of $63,750.00 was paid by the Defendants to Orandy Moving & Storage Company Ltd to have the items removed. The Defendants also agreed, with the removal company, that they would only be responsible for the first 38 days of storage and after that "*it is understood that Airlink Ltd will be solely and wholly responsible for all obligations under the contract".* The Claimant was not a party to this agreement.

[39] The Defendants will in consequence be liable for wrongfully depriving the Claimant of its possessions only for the period March 2010 to 19th February 2011.This is because the Claimant failed, on the 19th February 2011, to take reasonable steps to mitigate its losses by collecting the items as agreed. The breach of statutory duty is a tort, so is detinue and conversion. Litigants seeking tortious remedies have a duty to mitigate. The Defendants unilaterally retained a removal company and contracted it to store the items. There is no evidence that the Claimant was alerted to this intended course of action. Furthermore, it would have been unnecessary to do so had the Defendants acted in accordance with the law, by commencing a claim for possession, instead of effecting re-entry and dispossession. I will not impose on the Claimant the costs of repossession and storage.

[40] The Claimant has placed no evidence before me as to the value of its possessions at the premises in the period March 2010 to February 2011. There is no evidence as to income they may have earned from use or hireage of the items. The torts of breach of statutory duty, detinue and conversion are not actionable per se. Loss

must be proved and in this case consists of the Claimant being deprived, of possession and use, of these items. The Claimant has been deprived of these items for some time but I have no way of quantifying the loss. A nominal award is the only result possible. Furthermore, given the dire financial position of the Claimant, I find that the Claimant was not likely to be earning a profit in the relevant period. It was in arrears of rent at the time of repossession and, after two years at the premises, had not started to operate. It seems to me that no causal connection has been demonstrated between the Defendants' re-entry and the Claimant's failure as a business venture. The Claimant will therefore be awarded $100.00 as nominal damages for breach of statutory duty. An authority supportive of an award of nominal damages, where there is a breach but no consequential damage proved, is ***Marathon Asset Management LLP and another v James Seddon and another [2017] EWHC 300 (Comm) Case No.CL 2013-000689 decided 22nd February 2017*** per Leggatt J at paragraph 283.

The Counter- claim

[41] It is convenient at this juncture to return to the fourth issue, being, quantification of rent owed to the 1st Defendant. The Claimant, as stated in paragraph 13 above, admitted owing US $ 36,987.50 in June 2009.I accept that as truthful and accurate. It was also admitted that, with effect from the 1st July 2009, the monthly rental was reduced to US $4,465.83. As at that date the Claimant was responsible for the ground floor only. There is evidence that on the 7th September 2009 J$395,673.43 was paid for rent "*for month ending 31st July 2009"*, page 104 Exhibit 1. On the 30th November 2009 a further US$5000.00 was paid "*for the period 1st August to 31st August 2009*", page 105 Exhibit 1. In evidence also is a managers cheque, for J$500,000 dated 23rd February 2010, made payable to the 1st Defendant, see page 106 Exhibit 1. There is no evidence from official sources as to the relevant rate of exchange. I therefore will use the rate adopted by the parties in the documentation. In this regard the J$395,673.43 represented one month's rent of US$4465.83 in September 2009.That computes to a rate of J$86.60 to one United States dollar.

Utilising that rate I compute rent owed as at March 2010 as follows:

Rent due as at June 2009	US$ 36,987.50
Rent due 1st July 2009 to 31st March 2010	US$ 40,192.47
TOTAL	US$ 77,179.97
Less Rent paid after June 2009:	
(a) J$395,637.43 which converts to	US$4,465.53
(b) US$5000.00	US$5000.00
(c) J$ 500,000.00 which converts to	US$5,643.34
TOTAL	US$ 15,109.17
BALANCE DUE	US$ 62,070.80

[42] The 1st Defendant included in its counter- claim a 10 percent increase in rental as at November 2009. The Rent Restriction Act only allows an annual increase of 7.5 percent. I have decided not to grant or award any increase in rental for the following reasons:

(a) It is to be assumed that the wrong annual increase had been adopted in the previous year and is therefore reflected in the amount admitted by the Claimant as being due and owing in June 2009.

(b) The rate of increase, allowed by the statute, does not distinguish between rent paid in Jamaican dollars and that paid in United States dollars. The rate is out of sync with the rate of depreciation of the currency of the United States. Of that I take judicial note. It will therefore be unjust to grant any increase in the circumstances of this case.

[43] Interest at the “commercial rate” was also claimed. There was no evidence lead in that regard. This is necessary if I am to exercise the discretion, given by the Law Reform (Miscellaneous Provisions) Act, as to which see per Campbell J in ***Casilda Silvest and anor v Rupert Ellis and anor [2015] JMSC Civ 63(2011HCV 03331)*** unreported judgment dated 15th April 2015 at paragraph 20. I therefore make no award of interest as damages. Interest will, of course, run on the judgment as provided for in law.

Conclusion

[44] There is in the final analysis judgment on the claim, for the Claimant against both Defendants, in the amount of $1000.00. On the counter-claim there is judgment, for the 1st Defendant against the Claimant, in the amount of US$62,070.80. As most of the time in this trial was taken with the allegations in the claim, and as the Claimant has been successful, the Claimant will recover 75 percent of the costs of the matter against the first and second Defendants. Such costs to be taxed or agreed.

David Batts
Puisne Judge