[2019] JMSC CIV 225

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV04018

BETWEEN	**SHARRYN DAWSON**	**CLAIMANT**
AND	**DIABETES CENTRE LIMITED**	**DEFENDANT**

IN CHAMBERS

Ms Sharryn Dawson, Attorney-at-Law, instructed by Yellowberg Chambers, Attorneys-at-law for the Claimant

Mr Marc Williams instructed by Williams, McKoy & Palmer, Attorneys-at-Law for the Defendant

15th and 22nd October 2019

Injunctions - Whether American Cyanamid principles applicable if Defendant has no arguable defence to claim

Landlord and Tenant – Whether tenant can consent to irregular notice

LAING J

The Applications

[1] By Notice of Application filed on 18th October 2019, the Claimant sought the following orders:

> *"1. That this Honourable Court grants the following orders:*
>
> *a. An injunctive order prohibiting the Respondent from unlawfully evicting the Applicant as intended by the said Respondent's letter dated 26th September*

2019 and served on the Applicant on 4 October 2019 contrary to the Laws of Jamaica;

b. An injunctive order mandating the Respondent to pay the Applicant damages having demanded the commercially let premises within thirty (30) days of date of issuance of the notice contrary to the Laws of Jamaica; and

c. Summary judgment in the matter of the notice, eviction, breach of contract and peaceful enjoyment, trespass & harassment in favour of the Applicant.

2. Costs of the application to be costs in the claim;

3. Aggravated and exemplary damages;

4. Such further order(s), direction(s) or other relief as this Honourable Court deems just."

[2] By a Notice of Application filed on 15th October 2019 the Claimant also sought the following orders:

"1. That this Honourable Court grants the following orders:

a. An order striking out the phrase in paragraph 12 (iv) sentence 6 "…and tried to… property" and sentences thereafter in line 7-9 "The police …may occur" of the respondent's affidavit dated 15 October 2019 in which the respondent deposes to false, scandalous and inadmissible hearsay evidence in respect of the applicant.

2. Costs of the application to be costs in the claim;

3. Such further order(s), direction(s) or other relief as this Honourable Court deems just."

Counsel for the Defendant did not object to the striking out and an order was granted in the terms sought.

[3] At the time of the hearing, the Claimant had not yet filed her Statement of Case. In her grounds for seeking the injunction Counsel quite appropriately made reference to CPR Rule 17.2 (1) (a) which provides that the court has the power to grant an interim remedy at any time including before a claim is made. However, as it is

related to the Claimant's application for summary judgment this was clearly unsustainable in the absence of the Claimants pleadings.

[4] The main fulcrum on which the Claimant's application was balanced was that the notice to quit that she had received from the Defendant was not in compliance with the Rent Restriction Act and was a nullity, therefore as a consequence there was no arguable defence to the Claimant's claim. The Claimant did not produce any authorities to support her submission that the issue was so narrow and clear cut.

[5] Following on those submissions, the Claimant extrapolated and submitted that there was no defence to her claim and she was entitled to an injunction. The Claimant placed heavy reliance on her written submission as follows:

> *22. Further to paragraph 12 above, the Applicant submits that the principles of the American Cyanamid is unable to assist the Respondent efforts to resist the application of the injunction. The Applicant submits that Blackstone's Civil Practice 2009 page 501 paragraph 37.41 is persuasive on this point per extract of the salient points below"*
>
> "No defence
>
> *In **Official Custodian for Charities v Mackey [1985] Ch 168** Scott J said that the American Cyanamid principle: 'are not, in my view, applicable to a case where there is no arguable defence to the [claimant's] claim'. The court will not consider the balance of convenience, but will grant the relief claimed subject to the usual equitable considerations. Injunctions have been granted on this basis in cases of clear trespass (Patel v W.H. Smith (Eziot) Ltd [1987] WLR 853) and of clear breach of contract… Similarly, if all that is at issue on the merits is a simple point of construction, the court will resolve it and dismiss or grant the application accordingly… Alternatively, where there is no defence with real prospects of success the claimant may apply for summary judgment including a final order for an injunction, instead of applying for an interim order…"*

[6] The obvious difficulty with these submissions on the date of the hearing was that the Claimant had not filed a claim. I formed the view that it would not have been prudent for the Court to assume what the Claimant's claim might be in trying to

assess whether there could be an arguable defence thereto. I therefore, adjourned the hearing of the application and gave the Claimant the opportunity to file her Statement of Case and thereby nail her colours to the mast.

[7] The Claimant duly filed her Claim Form and Particulars of Claim on 16th October 2019. In her Claim Form she claimed:

> *"…damages and interests (sic) thereon for trespass, breach of contract and breach of use and peaceful enjoyment caused by the defendant's unlawful notice and repeated attempts to unlawfully evict the claimant"*

Is There an Arguable Defence to an Irregular Notice to Quit?

[8] There is case law authority which indicates that the irregularity of a notice to quit is not an absolute bar to the landlord having an arguable defence. Since the fusion of law and equity, a promise by a tenant to accept an irregular notice as valid will be binding on him if it was intended to be binding, intended to be acted upon, and was in fact acted upon (see Woodfall Landlord and Tenant 17.199) .

[9] One case which supports this is **Re Swanson's Agreement, Hill v Swanson** [1946] 2 AII ER 628**.** In that case, a landlord refused to consent to an assignment of lease by a tenant and gave the tenant a notice to quit, which was held to be invalid not having been given 3 months before the relevant date. The Court held that the tenant was estopped from asserting the invalidity of the notice because of her failure to dispute its validity at the time the notice was issued and by her subsequent payment of the incurred rent.

[10] The case of **Elsden v Pick** [1980] 1 WLR 898 concerned an agricultural tenancy and also supports the same principle. In **Elsden**, a notice to quit was given to the tenant but it was shorter than the 12 months required by the Agricultural Holdings Act of 1948 (England). The Court had to determine whether the notice should take effect as a valid notice determining the tenancy. The Court relied on the evidence that the parties had so agreed and consequently held that the notice was indeed effective to determine the tenancy.

[11] The cases seems to favour the application of the principle of estoppel by agreement, but the general principle which can be extracted from these cases and others, is that a tenant is not bound to accept an invalid notice to quit, but can, if he wishes to do so, bind himself. If the parties so agree, then the tenancy will come to an end on the prescribed date by the defective notice, which by agreement, has been treated by the tenant as valid.

The Conduct of the Claimant Post-Notice to Quit

[12] In assessing whether there is an arguable defence to the Claim, it is necessary to examine the conduct of the Claimant and this requires this Court to look at the chronology of events and the exchange of correspondence between the parties.

[13] A convenient starting point is the Notice to Quit issued by the Defendant which is dated 31st July 2019, purporting to give the Claimant thirty days notice to vacate the premises and requesting that the Claimant vacate the premises by 31st August 2019. The Claimant has averred that she did not receive the Notice until 2nd August 2019.

[14] The Claimant responded by letter dated 27th August 2019 addressed to Williams, McKoy and Palmer, Attorneys- at-law for the Defendant in the following terms:

> *"RE: Diabetes Centre Limited (DCL) Letter of Eviction of Commercial property situated at 1 Downer Avenue dated 31 July 2019 with effect on 31 August 2019.*
>
> *This letter serves to acknowledge receipt of the captioned letter duly signed by your clients and demanding the undersigned delivers up the said commercially let property on 31 August 2019. Take note that the abovementioned property will be fully surrendered on the said date demanded at 2:00 p.m."*

It is worth noting that this letter was, on its face, an unequivocal agreement to surrender possession in accordance with the time-period indicated in the Notice to Quit.

[15] By letter dated 28th August 2019, Williams, McKoy & Palmer wrote to the Claimant the material portion of which is reproduced below as follows:

> *"Re: Tenancy at Diabetes Centre Limited (DCL)*
>
> *Further to recent telephone discussions between your Ms. Dawson and the writer, we now formally confirm that we act on behalf of The Diabetes Centre Limited and to hand is a copy of your letter dated the 27th instant.*
>
> *We have been instructed to indicate to you that our clients accept your decision to voluntarily vacate the property on the 31st of August 2019. However, we would like to take this opportunity to make it clear that their notice dated July 31, 2019, does not in any way mandate you to curtail what you deem your legal entitlement, and does not in any way explicitly or implicitly purport that DCL or any of its agents would be taking steps to interfere with your peaceful enjoyment of the property save and except through the proper legal channels. ..."*

[16] The carefully worded and guarded terms of this letter appears to tacitly acknowledge that the Notice to Quit was in fact defective. The letter characterises the Claimant's decision to vacate the premises on the 31st August 2019 as voluntary and advised the Claimant that the Notice to Quit did not mandate her to curtail what she deemed to be her legal entitlement. In my view, the reasonable meaning conveyed by the letter was that if the Claimant did not feel inclined to treat the notice as valid she could refuse to quit and the Defendant would be constrained to use the proper legal channels should they decide to press the issue.

[17] The Claimant's response is contained in her letter dated 31 August 2019 to Williams, McKoy & Palmer as follows:

> *"Re: Surrender of Property Situated at 1 Downer Avenue 2nd Floor, Kingston 5 as demanded by Eviction letter dated 31 July 2019*
>
> *The writer hereby fully surrenders possession and all keys of the above captioned property as demanded by client letter of eviction dated 31 July 2019 and reinforced by attorney letter dated 28 August 2019.*
>
> *Any or any proper review of the law and its operation would have informed your office that notice for commercial leases requires a minimum of twelve (12) months'* ***pursuant Section 26 of the Rent Restriction Act of***

> ***Jamaica*** *(and particularly fixed term commercial leases may require more notice).* ***Further, Section 27 of the said Act expressly <u>prohibits</u> eviction unless by orders of the Court*** *naturally premised on a valid notice. Thus, the conduct to evict the writer is unlawful and must be remedied forthwith.*
>
> *Until such time it may be useful to note that the writer's hourly fees is $20,000J for individual clients and $65,000J for corporate clients at a ratio of 80:20 respectively over a six (6) day work week and thus every hour that the writer continues to unlawfully put out of chambers must be recovered. Further, any disadvantages suffered by the writer's clients as a consequence of the unlawful conduct will be the sole financial obligation of your clients."*

[18] Having by letter dated 27th August 2019 communicated her unequivocal agreement to surrender possession in accordance with the time-period indicated in the Notice to Quit, the Claimant manifested her agreed promise by surrendering the keys to the premises.

[19] The Claimant submitted that her surrender of the keys was not voluntary, because it was done in compliance to the unlawful Notice to Quit. In her letter of 31st August 2019 the Claimant boldly asserted that "*Further, Section 27 of the said Act expressly <u>prohibits</u> eviction unless by orders of the Court naturally premised on a valid notice"*. Against the backdrop of such an assertion, I am unable to accept as settled on a balance of probabilities, that the Claimant was subjected to anything resembling duress or coercion or could reasonably have felt constrained to submit to a notice which she had considered to be unlawful.

[20] The Claimant is an Attorney-at-Law, but for the avoidance of any doubt I wish to state that I have not factored that into my analysis on this point. It is clear to me that any reasonable person in the position of the Claimant, having formed the view that the notice was unlawful would have also have concluded that that he or she was not obliged to respect and honour it, and that if the Defendant insisted on eviction, such and eviction would have been unlawful. In any event, the letter of Williams, McKoy & Palmer dated 28th August 2019, ought to have provided sufficient reassurance that the Defendant would not be attempting a forceful eviction.

[21] I am also of the view that since the Claimant had formed the view that the Notice to Quit was unlawful, she could reasonably have also formed the view that she was entitled to have recourse to the Courts to protect any anticipated violation of such rights. Such a violation could occur if subsequent events had caused her to conclude that the Defendant's did not intend to honour the commitment offered in the Williams, McKoy & Palmer letter of 28th August 2019. The Claimant also submitted that she surrendered the keys to prevent a scene at the premises, however in all the circumstances this would not detract from the voluntariness of the act, but would only be a consideration.

[22] I therefore find that on the evidence before the Court which is capable of establishing on a balance of probabilities that the Claimant agreed to be bound by the irregular notice and acted on such agreement, the Defendant does have a defence which has a realistic prospect of success and the Claimant cannot succeed on a summary judgment application.

[23] In ***Swain v Hillman*** [2001] 1 All ER 91 at page 92, Lord Woolf MR said:

> *"Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of being successful' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder QC [counsel for the defendant] submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*

[24] I acknowledge that a court may grant or refuse interlocutory relief without applying the principles laid down in **American Cyanamid Ethicon Ltd** [1975] AC 396 if the action is concerned only with a simple question of constructing a statue or document (see **Fellows & Sons v Fisher** [1975] 1 QB 122 at 141). However, in this case, for the reasons I have outlined, it is not simply a matter of construing the Rent Restriction Act and the lease agreement as the Claimant argued. The conduct of the parties has to be considered in assessing the effect of the irregular notice.

[25] I find that it is at the very least "arguable", on a balance of probabilities, that the Claimant voluntarily surrendered the lease and the keys. Whether it was voluntary is not a finding of fact which I am required to make for purposes of the Application before me. I also find that it would be open to a Court at trial, in finding that there was an unequivocal agreement to and surrender of the lease, to consider that the Claimant in the initial stages of the dispute did not seek an injunction or challenge the irregularity of the Notice to Quit in a meaningful way. Having regard to the possibility of a Court making these findings in a manner which may be favourable to the Defendant, I have concluded that the Defendant does have an arguable defence to the Claim. In view of my finding that the Defendant does have an arguable defence, I am convinced on a balance of probabilities that the **American Cyanamid** principles ought to be applied in deciding whether the Court Should grant the injunction sought by the Claimant and reject the Claimant's submission that that test should not be applied,

The "American Cyanamid Test"

[26] The relevant criteria to be considered in deciding whether to grant an interlocutory injunction as extracted from **American Cyanamid** (supra) may be summarised as follows:

(a) Is there a serious issue to be tried?

(b) Are damages an adequate remedy?

(c) Where does the balance of convenience lie?

These principles as explained and refined in cases such as **National Commercial Bank Jamaica Ltd v. Olint Corp Ltd** [2009] UKPC 16 (28 April 2009) have been accepted and repeatedly applied in this jurisdiction.

[27] It was said in **American Cyanamid Co. v Ethicon Ltd** (supra at 407) that at the interlocutory stage it is no part of the court's function "*to decide difficult questions of law which call for detailed argument and mature consideration.*" I have examined

the above but I have not made any final determination of the issues which need to be considered in this claim. I have also given the reasons which have caused me to conclude that there is an arguable defence, and that such a defence has a reasonable prospect of success. Having regard to those findings I have no hesitation in finding that there is a serious issue to be tried on the Claim. The Defendant has not challenged this.

[28] The next question would be whether damages would be an adequate remedy for the Claimant if she were to succeed at trial and would the Defendant be able to pay them to her. There is no suggestion that the Defendant would be unable to pay them and the Defendant has given evidence of its ownership of the relevant property. I therefore find that damages would be an adequate remedy for the Claimant and the Defendant would be able to pay them. The Claimant's claim is only for Damages. Based on these findings, I am guided by the authorities including **American Cyanamid** that an interlocutory injunction should not be granted however strong the Claimant's case appear to be at this stage. The Claimant has also conceded that damages would be an adequate remedy having regard to her claim. That concession explains in part her submission that the **American Cyanamid** principles ought not to apply, since a proper application of these principles would mean that she is not entitled to an injunction.

[29] It is therefore unnecessary for me to proceed to consider the balance of convenience. However, there is one consideration I wish to highlight and these additional comments are clearly obiter dicta. The grant of an injunction is a discretionary remedy based on equitable considerations. There are two remedies for breach of a valid lease agreement:

1) Damages for breach (also for any resultant trespass); and

2) An action to compel specific performance of the contract

It is settled law that specific performance is a discretionary remedy awarded in accordance with settled principles. The court will only award specific performance

where the person injured by the breach would not be adequately compensated by an award of damages.

[30] Exclusive possession is a critical element of the relationship of landlord and tenant. It is not disputed in this case that the Applicant surrendered the keys to the premises. This was following her letter dated 27th August 2019 in which she agreed to surrender her possession on the said date at 2 pm. I appreciate that she asserts that this surrender was "involuntary" in the sense that it was in response to an invalid notice, but that does not change the fact that the legal effect of handing over the keys was that she gave up exclusive possession. The consequence of surrendering the keys was to terminate the lease.

[31] In my opinion, in such circumstances as existed at the time of the hearing of the application for the injunction, it would not be proper for the court, exercising its discretion on equitable principles, to make an order for an injunction. This is because the effect of such an order would be akin to an order for specific performance (which has not been claimed), and the real effect would be to "reinstate" or "reactivate" the lease which has been terminated by the Claimant's surrender of the property. Whether such surrender was "voluntary" or only done in compliance with an irregular Notice to Quit, would not be a material consideration as it relates to this particular issue. This is a matter of academic interest only, but the undesirability of reinstating the lease is a factor I would have considered in refusing the grant of the injunction had it been necessary for me to rely on this point.

[32] For the aforementioned reasons I refuse the Claimant's application for an injunction.