[2013]JMSC Civ. 56

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 03355

BETWEEN	URBAN DEVELOPMENT CORPORATION	1ST CLAIMANT
AND	SAINT ANN DEVELOPMENT COMPANY LIMITED	2ND CLAIMANT
AND	ROBERT HAMILTON T/A BJ SHOE RENTAL	DEFENDANT

Mr. Charles Piper and Ms Marsha Locke instructed by
Charles E. Piper & Associates for Claimants/Applicants
Mr. Linton Gordon and Ms Tameko Smith instructed by
Frater, Ennis & Gordon for Defendant/Respondent

Heard on: 7th December, 2012 and 26th April, 2013; written submissions supplied – filed on 19th December, 2012 by Respondent and on 27th December, 2012 by Applicant

Notice of Application for Court Orders – Summary Judgment

MORRISON, J

"Where there is no defence, a defendant may go through the notions of defending in order to delay the time when judgment may be entered. It is possible for defendants to put up the pretense of having a real defence to such an extent that some cases run all the way through to trial before judgment can be entered. The CPR provide several ways of preventing this happening. The Court can use its powers to strike out, to knock out hopeless defences, such as those that simply do not amount to a legal defence to a

claim. Entering summary judgment …. Is used where a purported defence can be shown to have no real prospect of success and there is no other compelling reason why the case should be disposed of at trial" – per Blackstone's Civil Practice, 2011, Chapter 34, paragraph 341.

[1] Let me begin by engaging the facts in this dispute. As such it is to the pleadings that one must have recourse to in order to determine the merits of this application for summary judgment.

The Pleadings

[2] By a Further Amended Claim Form filed on May 3, 2004 both Claimants sought to recover the sum of $6,952,545.80 being the amount which they claim is due and owing by the Defendant who trades as B.J. Shoe Rental of Dunns River Craft Market, Main Street, Ocho Rios in the parish of ST. Ann" for outstanding licence fees inclusive of General Consumption Tax due for the period January 1, 2005 to February 28, 2009 in respect of the conduct of his said business at Dunns River Falls and Park and for an order for possession of that portion of the premises occupied by him, his license (sic) having been terminated. The sum claimed includes Court Fees and attorney's Fixed Costs on the issue to the date of commencement of these proceedings."

[3] According to paragraph 1 of the Amended Particulars of Claim the First Claimant is a Statutory Corporation and is the registered proprietor of the Dunns River Falls and Park, the subject property involved in this suit. The second Claimant managed the Dunn's River Falls and Park on behalf of the First Claimant. Says paragraph 2 "the Defendant trades as BJ Shoe Rental … and operate their business on the First Claimant's property, "that is at the Dunn's River Falls and Park (the Park).

[4] Of significance is paragraph 3 which I now quote in extenso: "In or about 1993, an oral licence was granted to the Defendant by the Second Claimant to operate his said business at the Park and pay therefore a monthly licence fee of J$2,300.00. By letter dated November 21, 2005, the first Claimant reminded the Defendant that effect

Janaury 1, 2005, the monthly licence fee would be increased to US$2000.00 to be paid on the first day of each month and called upon him to clear arrears of US$18,605.00 which was then outstanding": See paragraph 4. Paragraph 5 alleges that the Defendant continued to operate his business from the Park and in breach of the licence "has continued to fail, neglect or refuse to pay the licence fee."

[5] The first Claimant demanded of the Defendant, according of paragraph 6, that he clear the balance of US$24,806.00 due and owing as of March 3, 2006. Also asserts paragraphs 7 and 8, the First Claimant also demanded from the Defendant payment of outstanding licence fees of US$81,653.48 as at January 1, 2009 plus GCT for the period December 1, 2004 to February 28, 2009. Paragraphs 9 and 10 contain, in my opinion, the seeds to the resolution of this application. Paragraph 9 reads: "By letter dated January 27, 2009, the Defendant requested of the First Claimant an extension of time within which to pay the outstanding licence fee. "Consequently, by Notice dated March 9, 2009, according to paragraph 10, "the Defendant's license (sic) was determined and he was required to vacate and deliver up possession of all that part of the Claimant's said property occupied by him to the Claimants". Notwithstanding, continues paragraph 11, the Defendant has neglected or refused and continues to neglect and refuse to pay the said outstanding licence fees despite the demands from the First Claimant and the sum of US$6,940,545.00 remains outstanding. Also, the Defendant has neglected or refused to vacate the said portion of the premises occupied by him as licensee despite the termination thereof.

The Defence

[6] I shall here be concentrating on the substantiality of the mounted defence so as to locate the points of departure between the litigants.

Paragraph 3 of the Defence deflects the Claimants depiction of their relationship as being one of licensor/licensee by asserting that the Defendant is a monthly tenant since 1994 paying a monthly rent of J$2,300.00. Further, says he, demands were made of him by servants and/or agents of the Claimants that he vacate the said premises under

the pretext of him being a licensee and that as such he "can be thrown off the property" as the Claimants had other tenants they wish to give the premises to.

[7] According to paragraph 5, the Defendant denies that he agreed to pay a monthly rental or monthly licence fee of US$2,000.00, "and only made payments in United States Dollars when he was threatened with immediate eviction."

[8] As part of the Claimant's strategy to achieve a forced eviction from the premises, enjoins the Defendant in paragraph 6, the Claimants increased the rent from J$2,300.00 to US$2,300.00. In so doing, proclaims paragraph 7, "the said increase was arbitrary, oppressive, in breach of the Rent Restriction Act and disproportionate and imposed in an effort to force the Defendant off the said property."

[9] Paragraph 9 in staying within the theme of coercive conduct on the part of the agents and/or servants of the Claimants maintains that "in an effort to save businesses and without legal advice and in fear of the servants and/or agents of the Claimants the Defendant made some payments in United States Dollars. However at no time did the Defendant agreed or accepted the said sum of United States Two Thousand Dollars ($2,000.00) as the rent he should pay (sic)."

[10] When looked at together paragraphs 12 and 13 accuses "the Claimant, a publicly owned Corporation" of unconscionable conduct and was indulging unconscientious use of its powers; price-gouging, oppression and victimization.

[11] As to paragraph 9 of the Claimants' Particulars of Claim the Defendant's traverse is that he wrote a letter therein referred to "in a desperate effort to save his business and the jobs of his employees".

[12] Pleadings having closed I now invite attention to annexes in support of the Claimants' Particular of Claim.

The first is a letter referred to at paragraph 3 of the Claimants' particulars, under the signature of the First Claimant's Executive Chairman to the Defendant dated November

4, 2005. Therein it refers to "the new licence to be granted for you to operate a shoe rental business at the Dunn's River Falls and Park" at a fee of US$2,000.00 per month effective January 1, 2005. (Emphasis mine) This came against the backdrop of submissions by the Defendant as to the extent of the increase in the monthly fee, the letter continued. The Defendant's submission to the Second defendant as to the extent of the increase was overridden, according to the letter, owing to, *inter alia,* "our survey of the visitors renting shoes and the charges indicate the proposed fee is significantly less that the ten percent (10%) of the gross revenue …" In the circumstances, as outlined, the letter solicited that the Defendant comply with the terms on which the defendant "have been allowed to remain on our property and immediately pay the new licence fee" (Emphasis mine). In the penultimate paragraph of the said letter it concludes that once all outstanding amounts have been paid by you, the Corporation is prepared to issue you with a licence under separate cover.

[13] On March 9, 2006 there was follow-up letter from the First Claimant to the Defendant, I shall now state in extensoy the contents of paragraph two thereof: "Please be advised that we wish for you to indicate in writing, on or before March 20, 2006, your proposal to settle these arrears and make your account current, to the St. Ann Development Company Limited, managers of the Dunn's River Falls and Park property on behalf of U.D.C. Failure to settle the account will result in the company taking the necessary steps to recover the amounts outstanding and deny you access to the premises."

[14] By January 8, 2009 a demand letter from the First Claimant to the Defendant threatening a termination of the Defendant's licence and legal action if the arrears were not paid by February 7, 2009.

Years adrift to the First Claimant's letter of November 2005 the Defendant's letter to the First Claimant dated January 27, 2009 was received by the latter on February 7, 2009. It begin, Dear Ms Francis, ostensibly in reference to the First Claimant's legal officer under whose signature the demand letter was penned "Re: Outstanding Licence Fee." After lamenting a downturn in his business which prevented his continued philanthropic

contributions to noted entities, he concludes in this fashion: "I am asking for some leniency in the matter and an extension period in which to pay the balance owed to the UDC for these outstanding amounts. I have already started making payments. Your favourable response would be generally appreciated."

[15] Let me now engage the affidavits of Ms. Laura Heron filed in support of the Application for Summary Judgment. The first of which is dated November 28, 2011. At paragraph 5 she depones that the Second Claimant's records reflect the fact that the Defendant has not at all relevant times been one of three shoe rental businesses operating from four stalls at the Dunn's River Park. Further, all operators of stalls are licensees of the Claimants and all pay a licence fee for the use and occupation by them for the purpose of their respective businesses.

[16] The rise in the licence fees about which the Defendant lambasted in his particulars seems to have been the result as paragraph 6 of the said affidavit attests: "The Claimants' records also show that commencing in or about the year 2000, the First Claimant undertook a complete refurbishment and reorganization of the facilities at the Dunn's River Park. All operators of stall and concessions were notified of the nature of the work which was being done. After relocating the Defendant's business to within the compound and after completion and reorganization in or about the year 2004, the deponent continues, the monthly licence fee of J$2000.00 was increased to US$2,000.00 plus general consumption tax with effect from January 1, 2005. Letters advising each of the concessionairs of the increased licence fee were sent out on or about October 31, 2004. The Defendant, according to the affiant, failed to respond to that and three subsequent letters sent by the First Claimant to him in the result that he neglected or refused to pay the increased fees. However, the Defendant, years later on January 8, 2009 in response to yet another letter from the First Claimant admitted by letter that he owed outstanding licence fees for his shoe rental concessionary. In that letter he sought an extension of time within which to pay the balance. This is the same letter already adverted to and that is referenced in the Claimant's Particulars of Claim dated January 27, 2009. Subsequently, the Defendant's licence to occupy the space

provided for his shoe rental business at the Park was terminated by Notice dated March 9, 2009.

[17] In a supplemental affidavit filed on November 22, 2012 the deponent Ms Laura Heron made the poignant unrefuted statement: "All Franchise operators at Dunn's River Falls and Park, including the Shoe Rental Operators of which the Defendant is one, are allowed to be on the premises only during its opening hours from 6.30 a.m. to 6.00 p.m. each. To gain access the Dunn's River Falls and Park on a daily basis, they must go through a security check point at the entrance and be approved as persons who have legitimate business on the premises, each day. Of the franchise holders, including the Defendant and other shoe rental operators attempt to enter the premises outside of the designated period, will be prevented from doing so by the security personell."

I pass in observing that the Respondent filed his response to the Application on the 5th day of December 2012 a mere two days before December 7, 2012, the date set for the hearing of the application. I need only observe the stricture of Rule 15.5(2) of the CPR.

The Submissions

[18] In resisting the application for summary judgment the Respondent placed reliance on **Wenlock v Maloney** [1965] 2 E.R. 871, **Drummond Jackson v British Medical Association And Others** [1970] 1 All E.R. 1094; **Abdool Salim Yasseen And Thomas v Attorney General And Another** (1999) 66 WIR 173 and **Investments Inc v Clico Holdings (Barbados) Ltd**. 2006 68 WIR 65. The Respondent also sought to rebut the authority of **Street v Mountford** [1985] L.R. 809.

With economy of effort the Applicant's submission issued with a reminder of the judgment of Lord Woolf MR in **Swain v Hillman** and a rank dismissal of the cases cited by the Respondent.

The Law

[19] Applications for Summary Judgment is governed by Part 15 of the Civil Procedure Rules, 2002. Rule 15.1 grants that the Court may decide a claim or a particular issue without a trial, whereas Rule 15.2 allows the Court to give summary judgment on a claim or on a particular issue if it considers that:

a) …

b) the defendant has no real prospect of successfully defending the claim or issue.

In this regard, on hearing an application for summary judgment the court may, according to Rule 15.6(1)(a),

a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;

b) …

c) …

d) …

e) Make such other orders as may seem fit.

[20] I wish to draw to the written submissions on the law as filed by the Respondent. I decline the submission that "In proceedings for striking out pleadings, in this case the defence, the Court must first satisfy itself and be sure that there is no reasonable cause of action."

[21] Striking out applications are governed by Part 4 of the CPR . In fact, Rule 26.3(1) mandates that in addition to any powers under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court:

a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;

b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

c) that the statement of case or the part to be struck out discloses no reasonable grounds

d) that the statement of case or the part to be struck out is prolix or does not

comply with the requirements of Parts 8 or 10.

It can generally be summarized that striking out is used as a means of enforcing compliance with the provisions of the CPR, practice directions, court orders and directions which are made at the instance of the Court's case management functions.

[22] So, while I am prepared to concede that there is some overlap between the procedures for Summary Judgment and Striking out they are separate and distinct procedures. It seems to follow to me that, case law appropriate in Striking out applications may be wholly inappropriate for Summary Judgment applications.

[23] In **Wenlock v Moloney And Others**, *supra*, the Defendants applied under the Rules of the Supreme Court and under the inherent jurisdiction of the court to strike out the writ, statement of claim and replies and to stay or dismiss the action on the basis that the pleadings disclosed no reasonable cause of action, and were vexatious and an abuse of the process.

[24] The Court had little difficulty in overruling the decision of the Master to strike out the plaintiff's pleading on the basis that the decision amounted to a trial in chambers without discovery, oral evidence and cross-examination which were not authorized by the rules of the Supreme Court or by a proper exercise of the inherent jurisdiction of the Court.

Not dissimilarly are the cases of **Drummond-Jackson v British Medical Association And Others** *supra* **Abdool Salim Yasseen and Thomas v Attorney General And Another (No. 2)** *supra*, and **M4 Investments Inc. v Clico Holdings (Barbados) Ltd.** *supra,* are all concerned with the striking out of pleadings.

[25] It is unitarily the position that all of the cited cases relied on by the Respondent were brought under the obsolete Rules of The Supreme Court. The superior Courts in all the above cases were reluctant in countenancing the striking out applications for the reason that such applications should be reserved for 'plain and obvious cases, where

the alleged cause of action, on consideration only of the allegations in the pleadings was certain to fail.'

I find that the cited cases are inapplicable to the case under consideration.

[26] The considerations here are, assuming the Claimants are right, whether:

1. the relationship between the parties can fitly be as that of a licensor/licensee, there being –

    a) no written intention between the parties for the defendant to have any interest in the land;

    b) no intention on their part to create a lease or tenancy;

    c) no fact of exclusive possession being with the Defendant in any portion of the Park: and

2. having agreed to the defence and the admissions as filed by the Defendant, ought summary judgment to be entered in favour of the Applicant.

Before doing so, however, the crucial question is should the contention of the Defendant trump the grant of the Application?

[27] The Defendant says that the issue of whether the Defendant is a tenant or a licensee is an issue that can only be determined at a trial where persons are subject to cross-examination. That the first Claimant by increasing the rent as it did acted in breach of the Rent Restriction Act.

That as the only document evidencing the contract between the parties are receipts on which are endorsed the words "Rental of Shoes Stall-D/River Falls", then the Court should await the trial of this matter in determining the status of the Defendant *vis-à-vis* his being deemed a tenant or a licensee.

[28] In **Street v Mountford** [1985] LR 809 the House of Lords had to determine whether a document intituled "licence agreement" did in fact and law correctly describe

the relationship between the parties on its merely saying so. The facts are that by an agreement one "S" granted to "M" the right to occupy two rooms at a stated sum subject to termination by two weeks notice and to other conditions set out in the agreement. The agreement was intituled "licence agreement" and contained a declaration signed by "M" that she understood that the agreement did not give her a tenancy protected under the Rent Act. "M" and her husband moved into the rooms of which they had exclusive possession. Subsequent events caused "S" to approach the court with a view to ascertaining whether the occupancy by "M" was a licence or a tenancy. The Recorder determined that it was a tenancy. The Court of Appeal dissented. The House of Lords in agreeing with the Recorder held that where residential accommodation had been granted for a term at a rent with exclusive possession, where the grantor did not provide neither attendance nor services, the legal consequence was the creation of a tenancy. Thus, despite the rubric of "licence agreement" on its true construction, the agreement had the effect of creating a tenancy.

[29] In arriving at its decision the House of Lords paid particular regard to the well summerised judgment of Windeyer, J in the Australian case of **Radaich v Smith** (1959) 101 CLR 209 at p. 222: "what then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land use it for some stipulated purpose or purposes. And how is to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a live or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise … In right of exclusive possession is secured by the right of a lessee to maintain ejectment and, after this entry, trespass …"

[30] Turning to the current case, it is nigh difficult for the Respondent to maintain that he is a tenant as opposed to being a licensee. Can he seriously contend that the receipts issued to him by the First Claimant which bear the words "Rental of Shoes Stall

D/River Falls" equate to that of a tenancy? **Street v Mountford**, *supra*, is persuasive authority in saying no. On the true construction of the several documents tendered by the Applicant the answer is a categorical no. On now to the principle which informs summary judgment applications.

[31] As already noted the principle involved here is whether the Respondent has a case with a real prospect of success. However, this has to done with regard to the overriding objectives of dealing with the case justly.

[32] In **Swain v Hillman** [2001] 1 All. E.R. 91, Lord Wolf M.R. said that the words 'no real prospect of succeeding' did not mean 'real and substantial' nor does it mean that summary judgment will be granted only if the defence is 'bound to be dismissed at the trial.' In fact, it does not even require compelling evidence. All that is required is enough evidence to raise a real prospect of a contrary case. The defence sought to be argued must carry some element of conviction.

[33] In the instant case the Defendant's mere denial is that he was ever a licensee to the First Claimant. He deplores the claim on the basis that the "increase in rent was arbitrary, oppressive, in breach of the Rent Restriction Act"…; that the conduct of the First Claimant "was unconscionable", that the First Claimant engaged in price-gouging, oppression and victimization.

I find myself unable to say that what the Respondent has put forward amounts to a defence. What he has put forward is his defiance. I need only make reference to the Respondent's letter of January 27, 2009 in response to a series of letters from the First Claimant's Executive Chairman, culminating with that of the Legal Officer to that entity, all of which addressed the issue of "license fees." The Respondent wrote, "Dear Ms Francis, Re: Outstanding Licence Fee, I write in reference to your letter dated January 8, 2009, regarding outstanding licence fees for the shoe rental concession I operate on the Dunn's River Falls property. Due to the financial constraints being experienced by my business, I am unable to honour the increased rate applied to the current fees at this

time. A complaint was filed in the Courts by other operators on the property due to the hike in the fees, a matter that is still unresolved."

[34] I confess of being unable to say how in the light of the Respondent's self-acknowledged 'licence fee' reference that he can now say that he is a tenant and not a licensee. A freudian slip? Maybe so. Be that as it may, applying the test as is laid down in **Swain v Hillman**, *supra,* I am to say that the Defendant's prospect of successfully defending the claim is rather more fanciful and unrealistic than it is of being real. In that regard I embrace the extract from Blackstone in my opening remarks.

[35] Accordingly, the application for Summary Judgment is granted in the sum of $6,952,545.86 up to February 1, 2009 with interest thereon at 3% from 16th July 2010 to 26th April, 2013.
Costs awarded to the Applicant to be agreed or taxed.
Second Defendant Robert Hamilton ordered to deliver up possession by 3rd May, 2013.

Order

1. Summary Judgment is granted in the sum of $6,952,545.86 due up to February 1, 2009 with interest thereon at 3% per annum from July 16, 2010 to April 26, 2013;
2. An Order for possession of that part of the Claimants' said property which is occupied by the Defendant who is to vacate the property by May 3, 2013;
3. Costs awarded to the Applicants to be agreed or taxed.