

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. C.L.A. 038 OF 2002

BETWEEN	ADOLA MANUFACTURING CO. LTD.	CLAIMANT
AND	MALCOLM MCDONALD	1ST DEFENDANT
AND	SIMON TODD	2ND DEFENDANT
AND	BENBECULA LIMITED	3RD DEFENDANT
AND	CARIBBEAN SYSTEMS LIMITED	4TH DEFENDANT
AND	CIBC JAMAICA LIMITED	5TH DEFENDANT (STRUCK OUT BY ORDER OF COURT on 31 st March 2003)

Mr. Abe Dabdoub instructed by Dabdoub, Dabdoub & Co. for the Claimant. Ms. Ayana Thomas instructed by Nunes Scholefield DeLeon & Co. for the 1st to 3rd Defendants.

Heard: 30th July 2008, and 3rd April 2009.

**Summary Judgment Application – Whether Eviction Unlawful –
Whether Estoppel Arises**

Mangatal J:

1. This is an application by the 1st, 2nd and 3rd Defendants for summary judgment in relation to two issues raised in the Statement of Claim. The claim is for damages against the Defendants jointly or severally for trespass to land and unlawful eviction on the 19th November 2000 from premises located at 4

Fairfield Avenue, Kingston 20. The Claimant further claims damages for unlawful detention and or conversion of its goods against the 1st, 2nd and 3rd Defendants only. The application for summary judgment is in relation to the claim for trespass and unlawful eviction. The application also asks for the claim to be struck out against the 1st Defendant Malcolm McDonald as disclosing no reasonable cause of action. However that aspect of the application was not argued before me and so I will not be dealing with that issue.

2. The Claimant's case is that on the 1st July 1999 it entered into a lease agreement with the 4th Defendant for the lease of part of the premises at 4 Fairfield Avenue. The premises were at the time subject to a mortgage whereby the 4th Defendant was the mortgagor and CIBC Jamaica Limited "C.I.B.C." was the mortgagee. The Claimant contends that CIBC was at all material times aware that it was a tenant of the 4th Defendant.
3. The premises 4 Fairfield Avenue were sold by CIBC in exercise of its powers of sale to William Wilson Limited on the 26th October 2000. The property was then transferred to the Third Defendant in the capacity of nominee of William Wilson Limited. The Claimant avers that the 1st, 2nd and 3rd Defendants were at all material times aware that it was a lawful tenant of the 4th Defendant pursuant to the lease agreement entered into in July 1999.
4. On the 18th November 2000 the 1st, 2nd and 3rd Defendants entered on the premises and according to the Claimant, wrongfully and unlawfully trespassed on the leased premises and unlawfully evicted the Claimant by changing the exterior locks to the building. The Claimant also claims that the 1st, 2nd and 3rd Defendants wrongfully detained its goods and further contends that as a result of the wrongful eviction from the premises and the unlawful detention of its goods it suffered loss of income, loss of

profit and loss of valuable contracts for the manufacture of goods for export and for local sale.

5. The Claimant has leveled a substantial claim against the Defendants, seeking special damages in the sum of \$79,571,458.00 as well as damages for wrongful and unlawful eviction against all of the Defendants and for unlawful detention of goods against the 1st to 3rd Defendants.
6. The 1st, 2nd and 3rd Defendants have filed a Defence, which draws attention to, and relies on the following circumstances. I have singled out those aspects of the Defence that deal with the claims for trespass and wrongful eviction.
7. By Clause 4 (7) of the Instrument of Mortgage dated the 8th May 1995 between CIBC and the 4th Defendant, the 4th Defendant covenanted "Not to lease let or part with the possession or the right to the possession of the mortgaged premises or any part thereof during the continuance of this security without the previous written consent of the Bank".
8. The Claimant had constructive notice of the terms of the mortgage and was bound by those terms.
9. The 3rd Defendant and its agents, the 1st and 2nd Defendants, had no knowledge of a lease agreement dated July 1, 1999 or any lease whatsoever between the Claimant and the 4th Defendant.
10. The 3rd Defendant and its agents gave written notice dated the 31st August 2000 to all occupants of the premises to vacate the premises within 21 days.
11. The Claimant and all other occupants of the premises were allowed reasonable entry to the premises to take their belongings upon reasonable notice being given.
12. The Fourth Defendant in its Defence contends that :

- (a) CIBC and the 1st and 2nd Defendants were at all material times aware that the Claimant was the lawful tenant of the 4th Defendant.
 - (b) The 1st, 2nd and 3rd Defendants wrongfully and unlawfully trespassed on the leased premises and evicted the Claimant and thereafter refused the 4th Defendant entry to the property.
 - (c) The 4th Defendant took no part in nor did it authorize, support or instruct anyone including the 1st, 2nd and 3rd Defendants to evict or lockout, whether lawfully or unlawfully the Claimant from the leased premises.
13. The 5th Defendant CIBC is no longer a party to this Claim. On the 31st March 2003 CIBC applied for, and succeeded in its application for the Writ of Summons by which this Claim was commenced and the Statement of Claim to be struck out as
- (d) Disclosing no reasonable cause of action against the 5th Defendant ; and/or
 - (e) Being frivolous and/or vexatious against the 5th Defendant; and/or
 - (f) An abuse of the process of the Court.
14. Neither the Claimant nor the 4th Defendant attended for the hearing of the application to strike out.
15. The application for summary judgment expressly states that it is made pursuant to Part 15 and Rule 26.3(1)(c)of the Civil Procedure Rules 2002 “ C.P.R.” .
16. Rules 15.1 and 15.2 provide as follows:
- Scope of this Part**
- 15.1 This part sets out a procedure by which the court may decide a claim or a particular issue without a trial.*

Grounds for summary judgment

15.2 The court may give summary judgment on the claim or on a particular issue if it considers that-

(a) the claimant has no real prospect of succeeding on the claim or the issue or;

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

(Rule 26.3 gives the court power to strike out the whole or part of statement of case if it discloses no reasonable ground for bringing or defending the claim.)

17. Rule 26.3.(1) (c) states:

26.3 (1) In addition to any other 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-

(c) that the statement of case or part to be struck out discloses no reasonable grounds for bringing or defending the claim;...

18. I appreciate that the summary judgment jurisdiction is reserved for clear-cut cases and the court is not to engage in what would amount to a mini-trial on the issues . See **Swain v. Hilman** [2001] 1 All E.R. 91 and locally, the unreported decision of my brother Anderson J. in Suit No. C.L.2002 C145, **Caribbean Outlets Limited v. Beverly Barakat**, delivered May 19 2004, and my own decision in Claim No. 1268 of 2003, **Eureka Medical Ltd. v. Life of Jamaica Ltd.** , delivered October 12th 2005.

The Issues

19. The Claimant and the 4th Defendant both aver that the 1st and 2nd Defendants were at all material times aware (the Claimant also imputes awareness to the 3rd Defendant) that the Claimant was a lawful tenant of the 4th Defendant pursuant to a Lease

Agreement entered into on the 1st day of July 1999. The 1st, 2nd and 3rd Defendants have denied that they were aware of the alleged tenancy. See also paragraph 8 of Mr. Malcolm Mc Donald, the 1st Defendant's Affidavit, sworn to on the 12th of February 2007 in support of this application. That, without more, would be a triable issue. However, Ms. Thomas on behalf of the Applicants has argued, and I accept that it arises for consideration in this application, that even if the 1st-3rd Defendant were aware as alleged, the Claimant still has no real prospect of success. In the work by the learned authors **Gilbert and Vanessa Kodilinye, Commonwealth Caribbean Procedure**, 2nd Edition, at page 170, the learned authors discuss the ground of striking out on the basis that the claim discloses no reasonable cause of action. They state:

The reason for the prohibition on evidence is that the basic question under this head is whether such a cause of action is known to the law, which is purely a question of law, the facts being assumed in favour of the party whose pleading is sought to be struck out. (my emphasis).

Therefore in my judgment, the issue that arises is as follows:

Assuming that the 1st to 3rd Defendants were aware of the alleged -tenancy between the Claimant and the 4th Defendant, as a matter of law, would that render the entry onto the premises or the eviction unlawful?

20. There is another issue which although not raised on the pleadings, was raised in argument by Mr. Dabdoub. He submits that the Notice letter dated 31st August 2000 which in the Affidavit of Mr. McDonald is described as a letter to all the occupants of the premises, albeit it is addressed specifically only to the 4th Defendant, indicated that the occupants were being allowed 21

days to vacate the premises and that if they did not so vacate, legal proceedings would be instituted to remove them as a trespasser. Mr. Dabdoub submits that the issue of estoppel arises and that one of the issues for the court to resolve at trial would be whether, having indicated in the Notice that legal proceedings would be commenced, the 1st -3rd Defendants would have foregone any alleged right of self-help against the Claimant as an alleged trespasser. Would these Defendants have been bound to follow through by bringing legal proceedings, to have the Claimant removed from the premises as a trespasser and before making entry onto the premises? Miss Thomas argued that such an issue, if being seriously contended, ought to have been pleaded. I agree with that. Further, for the issue of estoppel to be raised, the Claimant would have had to allege matters other than the conduct of the 1st to 3rd Defendants, which have been raised neither in the pleadings nor in the Affidavit sworn to by Mr. Noel Atkinson, Managing Director of the Claimant Company sworn to on the 26th March 2008 in opposition to this application.

21. In my judgment, the following are the issues that therefore arise:
 - (a) Assuming that the 1st to 3rd Defendants were aware of the alleged tenancy between the Claimant and the 4th Defendant, does the Claimant's assertion that the 1st, 2nd and 3rd Defendants unlawfully evicted the Claimant from the premises in respect of which the Claimant had an alleged lawful Lease from the 4th Defendant have no real prospect of success?
 - (b) Assuming that the 1st to 3rd Defendant were aware of the alleged tenancy between the Claimant and the 4th Defendant, does the Claimant's assertion that the 1st, 2nd and 3rd Defendants wrongfully and unlawfully trespassed on the said premises have no real prospect of success?

22. The burden of demonstrating that the claim in relation to unlawful eviction and trespass have no real prospect of success is on the Defendant /Applicants-see ...

The law

23. **Issue (a) Whether unlawful eviction claim has no real prospect of success.**

In order to demonstrate that the unlawful eviction claim has no real prospect of success, the Defendant/Applicants will have to show that the Claimant has no real prospect of establishing that it had any lawful right to be or to remain on the premises, whether by agreement, Statute or otherwise.

In her written submissions, Miss Thomas contends that a number of sub-issues arise. I agree that there are relevant subsidiary issues as follows:

24. **Issue (a) (i)**
- a. Is there a reasonable prospect of the Claimant successfully arguing that there was a landlord and tenant relationship between itself and CIBC, and by extension the 3rd Defendant?

The Statutory Provisions of the Registration of Titles Act

Section 94 of the Registration of Titles Act provides as follows:

Any freehold land under the operation of this Act may be leased for any term not being less than one year by the execution of the lease thereof in the form in the Sixth Schedule, and the registration of such lease under this Act; but no lease of any land shall be valid or binding against the

mortgagee unless he shall have consented in writing to such lease prior to the same being registered.

25. At paragraph 625 Volume 32, 4th Edition of the Halsbury's Laws of England, the learned authors state:

*A lease granted by a mortgagor after a mortgage without statutory or express power is good by estoppel between mortgagor and lessee, but void as between the mortgagee and lessee, although a mortgagee who purchases the equity of redemption may be bound by tenancy agreements made by the mortgagor.***Universal Permanent Building Society v. Cooke** [1952] 2 All E.R. 893; **Hughes v. Waite** [1957] 1 All E.R. 603; **Taylor v. Ellis** [1960] 1 All E.R. 549.

A lease that is void between the mortgagee and lessee is void against a purchaser on the mortgagee exercising his power of sale without any express assurance of the mortgagee's rights against the mortgagor. **Rust v. Goodale** [1957] 3 All E.R. 373; *A mortgagee is not bound because on being informed of a proposed tenancy he does not object or fails to evict a tenant, but a lease may be established against the mortgagee by his conduct.* **Parker v. Braithwaite** [1952] 2 All E.R. 837, **Taylor v. Ellis** [1960] 1 All E.R. 549. *The lessee can however protect himself from eviction by the mortgagee by redeeming the mortgage. The reversion by estoppel in the lessor passes by assignment, so that an assignee of the equity of redemption can enforce the lessee's covenants.*

26. In the unreported judgment of Sykes J., Claim No. 2004/HCV 2305, **Jamaica Youth Development Foundation v. Portfolio International Jamaica Limited,**

delivered December 10 2004, paragraph 40, the law is admirably summarized as follows:

40. This is the common law that is applicable when dealing with land under the RTA (Registration of Titles Act)

(a) a mortgagor under the RTA may grant a lease to a tenant.

(b) a registered proprietor is not prohibited from agreeing in the mortgage document not to lease without the written agreement of the mortgagee as an additional requirement to that of section 94 of the RTA;

(c) any lease granted in respect of the property subject to mortgage is not valid or binding on the mortgagee unless the mortgagee agrees in writing before the lease is registered;

(d) any lease granted by the mortgagor in breach of the covenant not to lease without the consent of the mortgagee is binding only on the mortgagor. One definite source of the validity of this lease is the doctrine of estoppel that would prevent the mortgagor from denying the existence of the lease as between himself and the tenant;

(e) any tenant under a lease that was granted in breach of any covenant not to lease without the consent of the mortgagee or without the consent of the mortgagee under section 94 is not a tenant of the mortgagee and is a trespasser vis a vis the mortgagee;

(f) there is nothing in the RTA that says that the mortgagee cannot subsequently recognize the tenant as his tenant. Even if the mortgagee is prepared to accept the tenant as his tenant no tenancy can arise unless and until the tenant agrees to become the tenant of the mortgagee. If the mortgagee recognizes the tenant as his tenant and the tenant then agrees then this is a new tenancy that comes into existence at the point at which there is consensus ad idem between the tenant and the mortgagee. It is not an adoption of the existing tenancy between the mortgagor and the tenant;

(g) In circumstances where the tenant's lease does not bind the mortgagee and the mortgagee does not accept him as a tenant, then such a person is not a tenant for the purposes of the Rent Restriction Act. One cannot become a tenant without a landlord and if in respect of the mortgagee the tenant was put in, in breach of the mortgage or in breach of the Rent Restriction Act and there is no creation of a tenancy between the mortgagee and the tenant, then there cannot be any landlord and tenant relationship which attracts the RRA. The Act only applies to tenants and landlords and no other class of persons.

27. By clause 4(7) of the mortgage Instrument, the 4th Defendant covenanted as follows:

Not to lease let or part with the possession or the right to the possession of the mortgaged premises or any part thereof during the continuance of this security without the previous written consent of the Bank

28. Although in the Agreement for Sale dated 16th May 2000, between CIBC and William Wilson Limited, possession was agreed to be “ on completion subject to the existing tenancies and occupancies, Special Condition 14 of the Agreement for Sale provided as follows:

(14) The Vendor hereby warrants that it has not previously consented to any lease, tenancy, licence or to any other right for any person to occupy the property.

29. In **Rust v. Goodale** (above), at page 379 Harman J. adjudged that although the Contract of Sale in the case before him was expressed to be subject to the underlease, that simply meant that the contract was subject to the underlease in so far as it had any validity. It may have been put there simply by way of caution by the vendor. Since the tenancy was void, the purchaser having acquired the fee

simple, the mortgagee/vendor passed to the purchaser everything, which included the right to override a term, including a void tenancy.

30. In **Taylor v. Ellis** Cross J. held that many years of inactivity by the mortgagee and then by his successor did not create a tenancy between the mortgagee and the tenant who had been let premises in breach of a term of the mortgage that he could not lease the property without the written permission of the mortgagee. At page 551, letter I, Cross J. stated:
The only way that he (the landlord) could turn him (the tenant) out of possession is by going into possession himself, which is a thing a mortgagee is generally unwilling to do. It would be quite wrong to infer merely from the fact that the mortgagee allowed the tenant to remain in possession, having knowledge of the tenancy-there is no doubt in this case, and it is accepted, that the mortgagee knew of the tenancy-that the mortgagee has consented to take the tenant as his tenant.
31. In **Parker and Others v. Braithwaite** Dankwerts J. held that although the agent of the mortgagee knew of the tenancy from April, 1951 and only sought possession in January 1, 1952, that was not recognition of the tenancy.
32. The onus of proving that the mortgagee consented to the lease, in writing or otherwise, is on the tenant **Taylor v. Ellis**. A mortgagee who has recognized the tenant as his tenant cannot treat him as a trespasser and evict him.
33. In **Rust v. Goodale** (above), it was held that the right to treat as a trespasser a tenant of the mortgagor under a lease which the mortgage precluded the mortgagor from having had power to grant was not destroyed by the mortgagor's selling of the mortgaged property. It was also not necessary

for the mortgagee to have expressly assigned to a purchaser his rights against the mortgagor and the tenant of the mortgagor. The purchaser therefore had the right to treat the tenant as a trespasser.

34. In this case it is an undisputed fact that CIBC, the mortgagee, did not give its consent in writing to the lease.
35. The cases seem to make it plain that mere awareness of the tenancy does not without more amount to recognition by the mortgagee of the tenant.
36. Further, the only allegation made in the Statement of Claim as it relates to the connection of the 1st, 2nd and 3rd Defendants, or CIBC with the Claimant and the 4th Defendant's tenancy arrangement, is that they were aware that the Claimant was the lawful tenant of the 4th Defendant (my emphasis). There is in fact no allegation by the Claimant that CIBC or the 1st -3rd Defendants consented to the tenancy.
37. There is further no assertion on the Claimant's part that the mortgagee CIBC accepted it as a tenant and that a new tenancy was created between itself and the mortgagee. There is also no assertion that a new tenancy was subsequently created between itself and the 3rd Defendant. I agree with Ms. Thomas' written submission that in any event, the letter dated 31st August 2000 from the 3rd Defendant's Attorney made it clear that the 3rd Defendant did not want to enter into any landlord and tenant relationship with any of the occupants of the premises.
38. I am therefore of the view that the Claimant has no realistic prospect of succeeding in proving that there existed a landlord and tenant relationship either with CIBC, or by extension, with the 3rd Defendant.

Issue (a) (ii)- If no Landlord and Tenant Relationship exists between the Claimant and the 3rd Defendant, what is the Claimant's status vis-a vis the 3rd Defendant?

39. If the Claimant has no real prospect of establishing that it was a tenant of the 1st-3rd Defendants, then it would not be entitled to the protection of the **Rent Restriction Act** and the statutory tenancy thereby created which requires a landlord to obtain a court order before possession can be recovered from the tenant. This is because that Act only applies to the landlord and tenant relationship and does not protect trespassers or persons who are in effect trespassers.
40. The cases all demonstrate that where the mortgagee has not consented to the lease, and in this case the mortgagee CIBC's consent was required to be in writing, whilst the lease may be good by estoppel against the mortgagor, it is void as between the mortgagee and the lessee. It is equally void between the lessee and the purchaser who purchases the premises pursuant to the mortgagee's exercise of the power of sale under the mortgage. The status of the Claimant/lessee as it relates to the 1st to 3rd Defendants is trespasser.
41. In my judgment, based on the authorities, there is no reasonable prospect of the Claimant succeeding in its claim that it was unlawfully evicted by the 1st -3rd Defendants.

Issue (b) Does the Claimant's assertion that the 1st, 2nd and 3rd Defendants wrongfully and unlawfully trespassed on the premises have no real prospect of success?

42. A trespass to land is an entry upon or any direct and immediate act of interference with the possession of land. At paragraphs 677 and 680, 4th Edition, Volume 32, the law in

relation to the exercise of the right of entry is summarized as follows:

677. Where the mortgaged property is in the occupation of the mortgagor or of a tenant of the mortgagor whose tenancy is not binding on the mortgagee, the mortgagee exercises his right to possession either by entering on the land if this can be done peaceably or by bringing an action in a county court or where that court does not have jurisdiction, the Chancery Division of the High Court for delivery of possession of the land. If the mortgaged property is in the occupation of a tenant whose tenancy is binding on the mortgagee, the mortgagee exercises his right by giving the tenant notice to pay rent to him.

.....

680. Even if the mortgagee's entry is forcible so as to subject him to penalties under the criminal law, once he has entered his right to possession gives him the possession for civil purposes, and he can treat the mortgagor or any other person who is on the property as a trespasser.

Of relevance also are the cases **Hemmings v. Stoke Poges Golf Club Ltd.** [1920] 1 K.B. 720, and **Beddall v. Maitland** (1881) 17 Ch. D. 174.

43. In **Rust v. Goodale** the purchaser from the mortgagee was held to be entitled to all the rights exercisable by the mortgagee having acquired the fee simple. This included the right to immediate possession.
44. I am of the view that the Claimant has no real prospect of success in relation to the claim against the 1st -3rd Defendants for trespass to land because the Claimant was a trespasser in respect of whom, undoubtedly for civil purposes, the 3rd Defendant had the right to take

possession by means of self-help. Even if the entry was not performed peaceably, in the circumstances of this case the civil law would not afford the Claimant a remedy.

RULING

45. I am therefore of the view that the 1st, 2nd and 3rd Defendants are entitled to summary judgment against the Claimant as regards the Claims for unlawful eviction and trespass to land. Costs are awarded to these Defendants against the Claimant to be taxed if not agreed.
46. Although the 1st, 2nd and 3rd Defendants have succeeded on this Summary Judgment application, this has not brought the proceedings to an end. In accordance with Rule 15.6 (3) of the C.P.R. I will now hold a Case Management Conference with regard to the remaining claims and issues in this matter.