[2022] JMSC Civ 146

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2022CV01184

BETWEEN	**BATH PLUS LIMITED**	**CLAIMANT**
AND	**EPPLEY CARIBBEAN PROPERTY FUND LIMITED (T/A MALL PLAZA)**	**1ST DEFENDANT**
AND	**ROCK INVESTMENTS LIMITED**	**2ND DEFENDANT**
AND	**DENISE GALLIMORE**	**3RD DEFENDANT**

BY VIDEO LINK

Application for injunction – Whether serious issue to be tried and damages an adequate remedy – Validity of Notices to Quit served – Expired lease with holding over Clause for premises exempt under the Rent Restriction Act – Whether a Landlord had a right after determination of a tenancy for exempted premises can use self-help to retake possession of rental premises.

Ayisha Robb-Cunningham, instructed by Robb Cunningham and Co. for the Applicant.

Jonathan Morgan and Chantal Bennett, instructed by DunnCox for the 1st and 3rd Respondents.

Heard on June 9 and 13, 2022 and July 22 and 27, 2022.

PALMER, J

Background

[1] The Applicant, by its Notice of Application for Court Orders, sought orders as follows:

1) An injunction restraining the Defendants, its servant and/or agents from:

(a) Re-enter and retaking possession of that part of premises known as Shop #6D Mall Plaza situated at 20 Constant Spring Road, Kingston 10 in the parish of St. Andrew which the Applicant holds as lessee from the 1st and 2nd Defendants and which houses the Applicant's business place Bath Plus.

(b) Obstructing and/or interfering with the Applicant's use and enjoyment of that part of the premises which the Applicant's business.

(c) Obstructing and/or interfering with the business and lawful activities of the Claimant/Applicant on the part of the premises which houses the Applicant's business in any manner whatsoever, whether by themselves, their servants, agents or otherwise.

(d) Trespassing onto that part of the premises known as Shop #6 Mall Plaza, 20 Constant Spring, Kingston 10 in the parish of St. Andrew which the Claimant holds as tenant in any manner whatsoever, whether by themselves their servants, agents or otherwise.

2) The Claimant undertakes to pay reasonable damages resulting from the granting and extension of the injunction.

3) This Order along with the ex parte Notice of Application for Court Orders and affidavits in support are to be served on the Defendants within 24 hours from the date of this Order.

4) Costs.

[2] The Claimant company, Bath Plus Limited ("BPL"), entered into a lease agreement with the 2nd Defendant, Rock Investments Limited, for a duration of three years for the premises located at Shop #6D Mall Plaza ("the Shop") located at Constant Spring in St. Andrew. The Shop is the subject of a Certificate of Exemption from

the Rent Restriction Act ("the Act") since 1985, which exempts the Shop from the provisions of the Rent Restriction Act and the lease was due to expire in July 2021. By letter dated November 20, 2020, the 1st Defendant, Eppley Caribbean Property Fund Limited (T/A Mall Plaza) ("Eppley") advised BPL that it had acquired the interest in the Mall Plaza in which the Shop is located and that the monthly payments under the lease would remain in line with the existing lease agreement.

[3] Eppley advised BPL by letter dated November 20, 2020, that it had acquired an interest in Mall Plaza in which the Shop is situated, and advised that payments would remain in line with the existing lease agreement. BPL says that they kept to the terms of the agreement and in January 2021 wrote to Eppley requesting a renewal of the lease for an additional five years. In turn, presumably pending consideration of the request, Eppley agreed to abide by the terms and conditions of the lease. On March 9, 2021, BPL received word from Eppley that their request was still being considered and apologised for the delay. There however does not seem to have been any other written communication and the lease expired on June 30, 2021, and there was no renewal, but the Claimant continued to hold over pursuant to the provisions of the lease and continued to monthly rent.

[4] On February 22, 2022, BPL was served with a Notice to Quit that was erroneously dated March 22, 2022, and gave the Claimant a period of one month to vacate the Shop and deliver up possession, due to expire on March 31, 20222 ("1st Notice"). Another Notice to Quit dated February 23, 2022("2nd Notice"), was found on the Shop floor by the Claimant on or about February 24, 2022, according to its affidavit evidence, in substantially the same terms as the 1st Notice. The Respondents say that the 2nd Notice was served on the Claimant's employee, Charmaine Grant, on February 23, 2022. The 2nd Notice is in substantially the same terms and also expired on March 31, 2022.

[5] By letters dated March 28, 2022, March 30, 2022, and March 31, 2022, BPL says it was threatened by the 1st Defendant that it would recover possession of the Shop by midnight March 31, 2022. Another letter was sent after the expiration of the

Notice on Eppley's behalf indicating that it would retake possession within twenty-four hours. Eppley attempted to retake possession by affixing locks to the Shop door, which Applicant alleged was a trespass and BPL had the locks removed by the afternoon of April 1, 2022. Eppley's agents padlocked and chained the Shop again and BPL once again removed it and after several attempts at retaking possession, the Applicant engaged a locksmith to restore access to the Shop.

[6] The Applicant stated that it does not owe rent and paid the April 2022 rent. The injunction was sought as undue hardship was likely to be caused to its business in having to relocate, as it had $23,000,000 in inventory and spent $5,000,000 to renovate the Shop in 2017. Also, business was improving since the lifting of COVID-related curfews. BPL also stated that it should be given due consideration as it had endured dust nuisance and loss of business when the Mall Plaza was being renovated, and it continued to pay rent. It contends that damages would not be an adequate remedy in the circumstances and gave its undertaking as to damages.

[7] Counsel for Eppley referred to Clause 4 (28) (b) of the lease agreement relating to holding over after the lease expired. A new tenancy was created with the consent of the Landlord and without the need for any express agreement in writing, terminable by either party by one month's written notice to the other expiring at the end of the month of the tenancy. Eppley agrees that the 1st Notice served on BPL on February 22, 2022, was inadvertently dated March 22, 2022, and was posted on the Shop door after service on BPL staff failed. The 1st Notice nonetheless refers to "Charmaine" as the person on whom service was effected. BPL claimed the 2nd Notice was found on the ground on February 24, 2022, But Eppley says it was served on BPL's employee, Charmaine Grant, on February 23, 2022, set to expire March 31, 2022.

[8] Eppley claims that in addition to informing the Claimant, through its principals Retinela and Gladstone Mallit, of the fact of the 1st Notice, it sent several reminder letters and emails as it got closer to the March 31, 2022 deadline in the Notice to

Quit. The Applicant does not deny receipt of the second Notice to Quit or the reminder letters. When BPL Claimant failed to vacate the Shop by March 31, 2022, Eppley says that it exercised its lawful right to peaceably re-enter into possession of the Shop by having its agent place a padlock on the entrance door on April 1, 2022. These were removed by BPL and it re-entered possession of the Shop without the consent of the 1st Defendant.

[9] Eppley had its agents replace the padlock and chain on the entrance door of the Shop on several occasions in its attempt, according to the affidavits filed on its behalf, to re-take peaceable possession of the Shop but these were also removed by the Claimant or its agents. No further locks or chains were placed on the doors after April 3, 2022, and on April 4, 2022, BPL filed its Claim and Notice of Application for Court Orders seeking injunctive relief. The Claim seeks damages for trespass, loss of quiet enjoyment of leased premises, loss of profits from trespass, aggravated and exemplary damages, special damages and an injunction. The 1st and 3rd Defendants filed a Defence and Ancillary Claim seeking a declaration that the tenancy had been terminated, damages for trespass against the Claimant company, payment of an agreed rental adjustment for the time the Claimant has withheld possession and damages for breach of contract.

[10] When the parties appeared on April 7, 2022, the 1st and 3rd Defendants consented to an interim injunction being granted to prevent Eppley from re-entering and retaking possession of the Shop, subject to their right to rely on the terms of the lease agreement, until the hearing date on April 25, 2022. The injunction was extended on that date and the hearing of the application for injunctive relief was fixed for June 9, 2022.

Submissions

BPL

[11] Counsel for BPL submitted that there were two issues to be determined:

(i) Whether the Defendants can forcefully evict the Claimant and lock down the rented shop without a Court Order;

(ii) Whether the injunction should remain until the Court grants the eviction order.

[12] Counsel cited the authority of ***Bowes v Anderson*** [1894] 1 QB 164 for the proposition that the tenancy is terminable by a valid Notice to Quit and is authority for the premise that every Notice to Quit must expire at the end of the periodic tenancy. It was submitted further, relying on the decision in ***Lemon v Lardeur*** [1946] 2 All ER 329, that the notice must accurately reflect the date on which the notice should expire. It was submitted that both Notices to Quit were invalid and did not effectively terminate the tenancy. While it was acknowledged that the Shop is indeed exempt from the provisions of the Rent Restriction Act, the exemption related only to the right to increase rent over and above the prescribed rate.

[13] On the authority of ***American Cyanamid v Ethicon*** [1975] AC 396 Counsel outlined the criteria that must be satisfied in the grant of an injunction. It was submitted that there is a serious issue to be tried as a Landlord ought not to be permitted to recover possession of premises without an order of the Court, save in instances where no more than the necessary amount of force is used. It was further submitted that where a Claimant has proved that there is a serious issue to be tried, the status quo should be preserved until the final determination of the claim (Reliance placed on ***Karren Goulbourne v Associated Gospel Assemblies*** [2019] JMSC Civ. 103).

<u>Eppley</u>

[14] Counsel for Eppley submitted that the injunction granted should be discharged as there is no serious issue to be tried. Relying on the dicta of Lord Diplock in ***American Cyanamid*** it was submitted that the Court in considering whether or not to grant an injunction, should be satisfied that the Claim is not frivolous or vexatious and that there is a real prospect of success. For the Claimant to succeed, Counsel

argued, it would have to prove that the Defendants trespassed on its land or breached their right to quiet enjoyment under the lease.

[15] It was submitted that the provisions of the Act do not apply to the Shop, due to the Certificate of Exemption granted in 1985. Therefore, the reasons as outlined in sections 26 and 31 of the Act (relating to reasons for the issuance of a Notice to Quit under the Act) do not apply to Shop. It was submitted that as the tenancy was duly determined, Eppley did not need to obtain a court order to recover possession but could exercise self-help to recover the exempted premises once no more than reasonable force was utilised (See ***Wilson v Campbell*** Claim no. 2007 HCV 02615, paragraph 37 and ***Butcher v Mayor, Aldermen and Burgesses of the Borough of Poole*** [1942] 2 All ER 572).

[16] It was submitted that the Eppley needs only show that it complied with the requirement for Notice under the lease, before seeking to retake possession. It was submitted further that BPL's contention that Eppley could only recover possession after the expiration of the lease if the Claimant had defaulted on its rental obligation, was incorrect. Counsel contended that this was not a case of re-entry being due to a breach of an obligation or outstanding rent. The lease having been determined due to effluxion of time, the tenancy could be terminated by written notice of a month, entitling the Landlord to re-enter possession. Clause 4 (28) (b) of the Lease provides that the monthly tenancy created is terminable by either party by one month's written notice and does not stipulate any requirement for there to be default on the part of BPL. Counsel posited that for the Court to require an act of default would be akin to treating the lease as if it subsists and would impose obligations on the parties to which they did not agree.

[17] While Counsel acknowledged the inadvertent insertion of the March 22, 2022 date on the 1st Notice served, any issue was resolved by service of the 2nd Notice on February 23, 2022. The 2nd Notice was issued more out of an abundance of caution than out of a belief that it was insufficient to bring an end to the tenancy and was sufficient to determine the tenancy, he submitted. With the expiration of the Notice

and there being several reminders by the Defendants, Eppley's intention was made clear. It was Counsel's position that none of the methods to retake possession involved unnecessary force, threats or trespass and affixing the chain/padlocks to the Shop door was done when no one was present. The letters issued after the 2nd Notice were not threats but simply reminders as the end of the notice period drew nearer. It was there submitted that the Court should find that the Claimant has failed to show that there is any serious issue to be tried and refuse the injunction.

[18] On the issue of whether damages would be an adequate remedy, it was submitted, relying on the principles laid down in ***American Cyanamid*** and ***National Commercial Bank Ltd. v Olint Corp. Limited,*** Privy Council Appeal No. 61 of 2008 that the Court should determine whether BPL is likely to succeed at the trial in establishing whether there is a serious issue to be tried and if not, the injunction should be refused. If the measure recoverable at common law in damages would be adequate, and the Defendants would be in a financial position to pay damages, no interlocutory injunction should be granted. It was submitted that BPL did not present any evidence to suggest that it would incur losses that cannot be compensated for in damages, an issue fundamental to whether an injunction ought to be extended. BPL's claim speaks primarily about monetary losses compensatable by an award in damages, and there was no evidence of loss that is not financial.

[19] Counsel for Eppley submitted that the lease made provision where the tenant holds over after the determination of the lease by effluxion of time, which BPL also acknowledges. However, he disagreed with BPL's position that after the lease had expired, the only way to bring the tenancy to an end was by default on the BPL's part, such as non-payment of rent. It is illogical, it was argued, for Eppley to only be able to recover possession of the Shop from BPL if it is in default, and if that default is corrected, such as by paying outstanding rent, for example, BPL could continue to hold over indefinitely.

[20] Counsel submitted that the Claimant's position that the exemption under the Act only applies to the increases in rent but not to the right to retake possession without a Court Order, is not mistaken. The circumstances in the ***Goulbourne*** case, Counsel posited, were distinguishable from those that pertain in the case at bar. In ***Goulbourne,*** the issue concerned whether the exemption could extend retroactively; an issue not relevant to this case.

Analysis

[21] The authorities of ***American Cyanamid v Ethicon a***s applied by the Privy Council in ***NCB v. Olint*** have outlined the applicable law to be considered in determining whether an injunction should be granted and have been refined to the following three criteria:

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

(ii) Are damages a sufficient remedy?

(iii) Does the balance of convenience weigh in favour of a grant of an injunction?

[22] The Claimant contends that there is a serious issue to be tried as the tenancy has not been validly determined by either the 1st or 2nd Notices. While it acknowledges that the Shop is exempt from the provisions of the Act, it says that this would only apply to the increase of rent and even if the Landlord was entitled to recover possession it ought to be by way of an application to the Court save where no more than necessary force was used. Eppley agrees that the exemption applies but does not agree that it is limited to the issue of rental increase but entitles Eppley to recover possession by means of self-help once a valid notice to quit, which need not include any of the reasons outlined in the Act, has been served. Eppley also argues that the ***Goulbourne*** case supports it position as in that case, the exemption was only ruled inapplicable to the relevant lease as the Claimant sought to apply it to a lease that had been entered into before the exemption was obtained.

That is not an issue relevant to the case at bar as the exemption was in place long before the current lease had been entered into by the parties.

[23] In the ***Wilson*** case, the Court held that a tenant-at-will could not benefit from the provisions of the Act like rent-paying tenants would. The parallel being drawn to this case is that BPL is not a tenant under the Act due to the fact of the exemption. Accordingly, as in ***Wilson***, Eppley's position is that it is entitled to exercise its right to self-help provided that no more force than reasonable was extended.

[24] There is no dispute that the relevant lease was determined by effluxion of time, and BPL acknowledged this fact, for as the time counted down towards the lease's expiration, BPL wrote to Eppley regarding a five-year renewal. The lease expired and BPL held over, and Clause 4 (28) (b) of the lease outlined what would happen in the event of the Claimant holding over:

> *(b) in the event of the Tenant holding over at the expiration of the Term hereby created with the consent of the Landlord and without making any express agreement in writing for a new tenancy, the tenancy during the period of such holding over shall be deemed to be a monthly tenancy on such terms and conditions herein as shall be applicable to a monthly tenancy terminable by either party by one month's written notice to the other, expiring at the end of the month of the tenancy.*

[25] Apart from a letter in March 2021 in which Eppley wrote to BPL advising that the request for a new lease was being considered, the next communication seems to have been the 1st Notice on February 22, 2022. While there may have been an issue with the date stated on the 1st Notice, BPL does not deny that it received it on the date that Epply alleges. The 1st Notice included the particulars of the Shop, the date the Notice expired and the date on which it was served. The 1st Notice bears a date of March 22, 2022 which the Claimant knew was erroneous, not just because it was acknowledged by the Mallits as received on February 22, 2022, but the 1st Notice also bears the date of service on BPL's employee, Charmaine, as being February 22, 2022. The notice period was stated to expire on March 31, 2022, which is the end of the monthly tenancy. The reasons stated in the notice were:

> *(i) The premises, being a commercial building is reasonably required by the landlord for use by them for business and trade;*
>
> *(ii) The premises… is required for the purpose of being repaired, improved or rebuilt; and*
>
> *(iii) Expiry of the Lease agreement for Shop #6 on June 30, 2021.*

[26] I do not find that the error in the date of the 1st Notice invalidated the notice and met the requirements under Clause 4 (28) (b) that permitted for a notice period of a month. The issuance, however, of the 2nd Notice the following day, had the effect of superseding the 1st Notice on February 22, 2022. The affidavit of service filed on behalf of Eppley states that the 2nd Notice was served at the Shop on the BPL's employee, Charmaine Grant. While BPL initially acknowledged the receipt of the 2nd Notice to Quit as being on March 22, 2022, it subsequently acknowledged that it was received on February 24, 2022.

[27] Service of the 2nd Notice on March 22, 2022, could have invalidated that 2nd Notice as being effective to determine the monthly tenancy, and having superseded the 1st Notice, could have been viewed as being an insufficient notice period. Unfortunately, though later corrected, the interim injunction would have placed reliance on this erroneous date of service of the 2nd Notice, an issue that formed a substantial part of the original submissions on BPL's behalf. BPL amended its position to say that it received the 2nd Notice on February 24, 2022, and even though it does not acknowledge receipt of the 2nd Notice on February 23, 2022, as Eppley contended, this is a sufficient notice period to meet the requirement of Clause 4 (28) (b). The 2nd Notice was served at BPL's business place, the Shop, and splitting hairs as to whether this was on February 23 or February 24, 2022, is unnecessary, as both dates exceed the one-month notice period required.

[28] I find that the 2nd Notice was in fact served on BPL at the Shop, the location of its business, on February 23, 2022. The main basis for the Claimant saying that its claim has a reasonable likelihood of success at trial, and a Court would likely find that the injunction was rightly granted, is essentially whether the tenancy was validly determined by any of the Notices it received. I find that while the 1st Notice

would have been adequate to determine the monthly tenancy, the 2nd Notice superseded it, and is accepted as giving the appropriate notice period sufficient to determine the monthly tenancy.

[29] Counsel for both BPL and Eppley acknowledged that where the Act does not apply, a party may employ self-help methods to retake possession once it uses only such force as is reasonable in the circumstances. The method of force complained of by BPL included the padlocking/chaining of the Shop doors and letters from Eppley reminding of the pending expiration of the notice period. I do not find the force used or the issuance of reminder letters, are, by any stretch of the imagination, unreasonable force in the circumstances. With the exemption to the Act being in place, the expiration of the notice period at March 31, 2022, and the further letter on April 1, 2022, that the efforts employed by Eppley were entirely reasonable in the circumstances. It is clear that they abandoned these reasonable efforts after the repeated re-entry by the Claimant and clearly, any escalation ran the risk of being viewed as unreasonable. I find that Eppley was entitled to exercise its right to use self-help to retake possession of the Shop and they were not trespassing.

[30] If damages are an adequate remedy, the injunction ought not to be extended. Paragraphs 1 – 5 of the BPL's Claim Form seeks damages for trespass, loss of quiet enjoyment and loss of profit from trespass. I have already expressed my view as to the likelihood of success on the issue of trespass, reasoning that I believe applies to the cause of action for loss of quiet enjoyment. I do not find that there is a serious issue to be tried as I find the reasonable likelihood that BPL will show Eppley is a trespasser is low. The remaining remedy sought relates to an injunction against Eppley to prevent it from harassment or eviction from the leased premises, apparently indefinitely, despite the acknowledged determination of the lease and the term that allowed for the termination of the tenancy by appropriate notice.

[31] There would have been no need to request a new lease had the prior lease still subsisted and it is clear that all concerned treated this as a monthly tenancy as provided for under Clause 4 (28) (b), which explicitly stated that the parties agreed,

in advance of the expiration of the lease, that BPL would hold over, with the consent of the Landlord and without need for further written agreement, for a monthly tenancy. I do not find that there is a serious issue to be tried but in any event, BPL has its remedy at common law in damages, which I find are adequate to compensate it for any loss proven. Judgment is therefore given on the Application for the 1st and 3rd Defendants/Respondents as follows:

(i) The interim injunction granted is discharged;

(ii) Stay of Execution is ordered for seven days pending the circulation of the written decision;

(iii) Costs of the Application awarded to the 1st and 3rd Defendants/ Respondents, to be taxed if not agreed;

(iv) Applicant's Attorneys-at-Law to prepare, file and serve the orders herein;

(v) Leave to Appeal is granted to the Applicant.