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(4) The witness must have been in a state of considerable alarm. Mr. Hooper relied in that connection on certain observations of the Board in the case of *Anthony Bernard v. The Queen* (unreported) 26th April 1994.

(5) The witness does not appear to have given a description of the appellant in his statement to the police, if indeed he gave a statement.

(6) Finally, Mr. Hooper pointed to the prolonged and unexplained delay in holding the identification parade.

Their Lordships have given anxious consideration to this case, depending as it does on the uncorroborated evidence of a single eyewitness. Nevertheless, they are not persuaded that the case ought to have been stopped by the trial judge. They are fortified in that conclusion by the view that must have been taken by the Court of Appeal. In a careful and comprehensive judgment Gordon, J.A., explained the ambiguous answers which their Lordships have already quoted in the following passage:

> "From this it can be seen that what the witness was saying is that the shooting started or happened in a flash. The 'in a flash' referred not to his opportunity for observing the approaching men but to the commencement of the shooting."

At the end of the judgment, the court held that this was not a "fleeting glance" case. Their Lordships agree. Estimates of half an hour or an hour are obviously exaggerated. But the whole incident must have taken minutes rather than seconds. Their Lordships are satisfied that during that period the witness would have had a sufficient opportunity to make a reliable identification as the two men approached him.

In addition, there was the witness's evidence that he had seen the appellant on two previous occasions, shortly before the shooting. Although this was not a "recognition case" in the ordinary sense, and although the circumstances surrounding the two occasions should have been explored at greater length in chief, the witness's evidence to that effect affords at least some further justification for the judge's decision not to withdraw the case from the jury. For these reasons their Lordships would reject the appellant's first line of argument.

Before considering the second line of argument, it is convenient to set out certain passages from the summing up.

> "On the question of identification you are to approach the evidence with utmost caution as there is always the possibility that Mr. Atkinson might be mistaken. It is common knowledge that more than two million people inhabit Jamaica and there is a rich mixture of all races in this population. There is also the possibility that one person may bear mark resemblance to some in any given area. The further possibility exists that an honest and prudent person may make a mistake in visually identifying another. A mistake is no less a mistake if it is made honestly. It is also possible that a perfectly honest witness who makes a positive identification may be mistaken and not be aware of his mistake. In order for you to determine the quality and the cogency of the identification you must have full regard in all the circumstances surrounding the identification. Now, you ask yourself whether there was this opportunity for the witness to view the accused."

A little later he said:

> "Again, you have to ask yourselves what were the physical condition at the time of the viewing of the accused man, place, the light, distances and whether there were obstructions . . . Again, you will have to ask yourselves whether, having seen this person, on two occasions before, and then on the night of the incident, whether four months later he would be able to point him out as the accused man. . . . But in all this, you will have to remember what I told you about a witness doing a physical identification of person or persons; he might be mistaken, because if you, from this evidence, come to the conclusion that the accused man is mistakenly identified, then it means you would be in doubt and you would have to resolve that doubt in the accused man's favour, because if he is mistaken you wouldn't be certain he was the person there."

Mr. Hooper's only criticism of this aspect of the summing up, is that the judge did not in terms say that a "convincing" witness may nevertheless be mistaken. But he, does say that an honest witness may be mistaken, and not be aware of his mistake. Having regard to the very strong warning given by the judge ("utmost caution") and the repeated references to the possibility of a mistaken identification, their Lordships do not regard the absence of the word "convincing" as being fatal to the summing up. Indeed Mr. Hooper did not himself place much weight on this argument.

Mr. Hooper's main point was that nowhere does the judge list the specific weaknesses in the identification. Now it is true that the judge did not list the weaknesses in numerical order, nor did he use the word "weakness" when drawing the jury's attention to the points made by the defence. But nothing in Turnbull, or in the subsequent cases to which their Lordships were referred, requires the judge to make a "list" of the weaknesses in the identification evidence, or to use a particular form of words, when referring to those weaknesses. The essential requirement is that all the weaknesses should be properly drawn to the attention of the jury, and critically analysed where this is appropriate. Of the six weaknesses which their Lordships have already identified and which formed the basis of Mr. Hooper's argument in this appeal, all but (4) and (5) were dealt with by the judge at some length, and in some cases more than once. Their Lordships do not regard the omission of any reference to (4) and (5) as crucial. The Court of Appeal said of the summing up:

> "The trial judge no doubt had all these factors in mind and his summation in this short case was in our view, adequate. He outlined the principles involved to the jury in simple language and in so doing followed closely the directions in Oliver Whylie."

The Court of Appeal will have been well aware of the need for the judge to deal adequately with the strengths and weaknesses of the identification evidence: see *Oliver Whylie* (1978) 25 W.I.R. 430 at 433E. Their Lordships see no reason to disagree with the view expressed by the Court of Appeal. They will therefore humbly advise Her Majesty that the appeal should be dismissed.

CENTURY COMMODITIES COMPANY LIMITED *v.* CONSOLIDATED HOLDINGS LIMITED

[SUPREME COURT (Langrin, J.) October 5, 7, 11 and 14, 1994]

Injunction - Interlocutory injunction - Plaintiff tenant on defendant's premises - Defendant exercising right of forfeiture and re-entry and selling land to third party - Balance of convenience - Principles applicable - Judicature (Supreme Court) Act, s. 49.

Landlord and Tenant - Forfeiture and re-entry - Principles applicable.

The plaintiff applied for an interlocutory injunction against the defendant seeking, inter alia, orders that the defendant be restrained from interfering with the plaintiff's right to quiet enjoyment of certain leased premises and that the defendant remove padlocks placed on the gates and doors of the premises. The plaintiff had leased premises from the defendant. The lease contained a forfeiture clause by which the defendant was given the right to re-enter

upon the premises if the rent was unpaid for thirty days after becoming due. The defendant, relying on the forfeiture clause padlocked the entrance. On September 14, 1994 the defendant received the plaintiff's cheque in full payment of the arrears. The defendant returned the cheque, stating that it had entered into an agreement to sell the land to a third party. The agreement for sale was dated September 14, 1994.

Held: unless the material available to the court at the hearing of the application for interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding at the trial in his claim for a permanent injunction, the court should consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief. In the instant case, there is little doubt that there was a serious question to be tried and on the question of the balance of convenience, the court will take into consideration the fact, that the full amount of arrears of rent was tendered to the defendant on the same day when the sale agreement was signed and while the premises were under padlock and manned security; a landlord who elects to enforce his forfeiture in this way remains vulnerable to an application for relief unless and until he obtains a trial judgment for possession; the purchaser of the plaintiff's equity in the property takes subject to it; as damages would not be an adequate remedy to the plaintiff the balance of convenience lies in the plaintiff's favour.

Injunction granted. Plaintiff ordered to pay arrears within seven days.

Cases referred to:

(1) *American Cyanamid v. Ethicon* [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504

(2) *Howard v. Fanshawe* [1895] 2 Ch. 581; [1895-9] All E.R. Rep. 855; 64 L.J. Ch. 666

Application in a Supreme Court action for an interlocutory injunction.

Wentworth Charles for the plaintiff.

John Graham and *Andre Earle* for the defendant.

LANGRIN, J.: This is an application on a Summons for an interlocutory injunction whereby the plaintiff is seeking an Order that:

(1) The defendant, its servants and agents be restrained from interfering with the plaintiff's rights to quiet possession of premises 69–73 Constant Spring Road, Blaise Industrial Park, Block D, Unit 10 and;

(2) Preventing the defendant from refusing the plaintiff's entry into the said premises and to allow the said plaintiff to enjoy quiet possession of the same;

(3) The defendant doth forthwith remove the padlocks and other things placed on the gates and doors of the said premises;

(4) The plaintiff shall until the trial of the action or termination of the lease whichever occurs earlier hold and enjoy the premises according to the lease without entering into any new lease.

Section 49(1) of the Judicature (Supreme Court) Act, states the legal basis for the grant of an injunction as follows:

> "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that such order should be made . . ."

The principle by which a Court is guided in granting the relief by way of injunction was clearly set out in the *American Cynamid v. Ethicon* (1975) 1 A.E.R. 504 at p. 509 by Lord Diplock as follows:

> "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages

> recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's needs for such protection must be weighted against the corresponding right of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The Court must weigh one needs against another and determine where the balance of convenience lies."

Lord Diplock continued at p. 511 as follows:

> "It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide different questions of law which call for detailed consideration . . . so unless the material available to the Court at the hearing of the application for interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial at the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

It is against this background that I have to decide and if necessary go on to consider which way the balance of convenience lies.

The affidavits disclose that the plaintiffs entered into a Lease Agreement with the defendant company on December 1, 1991 for five years with option to renew for a further 5 years. The subject matter of the lease is premises situated at 69–73 Constant Spring Road, Blaise Industrial Park, Block D, Unit 10 at a rental of $17,430.83 per month for the first year with an annual increase of 10%.

The plaintiff which carries on the business of General Hotel and Restaurant Suppliers inclusive of furniture and appliances commenced occupation of the premises on December 1, 1991.

The lease contained the following proviso for re-entry:

> 4. (b) "That if the rent hereby reserved or any part thereof shall at any time be unpaid for (30 days) thirty days after becoming due (whether legally . . . then and in such event it shall be lawful for the Lessor . . . to re-enter upon the leased premises and thereupon this lease shall absolutely determine . . ."

In breach of this covenant, the plaintiff has been delinquent in paying the rent over a period despite repeated warnings by the defendant. On September 1, 1994 the plaintiff was four months in arrears with its rental payments.

On the 10th September, 1994 the defendant in exercise of its rights of re-entry re-entered and took possession of the premises. The gates leading into the premises were padlocked and armed security guards were placed at the entrance.

A letter dated 14th September 1994 on behalf of the defendant was forwarded to the plaintiff's attorney, Mr. Wentworth Charles and Company. It states as follows:

> "We act for Consolidated Holdings Limited. We acknowledge and thank you for your letter of September 14, enclosing cheque payable to Consolidated Holdings Limited in the amount of $104,895.72.
>
> As you are aware, the matter between Consolidated Holdings Limited and your client is being handled by our Attorneys-at-Law Broderick, Graham and we attach hereto for your information a copy of the letter to you dated September 13, 1994, in case this letter has not been received by you.
>
> In the circumstances, we return to you the cheque for $104,895.72 and ask that you contact our Attorneys-at-Law in the matter.
>
> With respect to the offer for purchase we will inform Consolidated Holdings Limited, accordingly."

On the 15th September, 1994 a letter was forwarded to Wentworth Charles & Company by John G. Graham which states as follows:

> "Our client's letter of September 14, 1994 did not enclose the cheque for $104,895.22 in favour of Consolidated Holdings Limited as it was sent in error to us.
>
> We now take this opportunity to enclose the cheque along (sic) a copy of our letter to you dated September 13, 1994 which clearly outline our client's position."

Mr. Orrett Hutchinson, General Manager of the defendant in his affidavit sworn on 3rd October, 1994 depones at paragraph 17 as follows:

> "That the defendant has since entered an agreement to sell the premises. It is a condition of that agreement that the purchaser be allowed to take immediate possession of the premises in order to carry out internal renovations to same. The defendant in entering this agreement has relied on the change of the 'status quo' relative to the premises and will suffer hardship if the plaintiff is allowed to re-enter into possession. This is especially so because it is unlikely that the purchaser will be willing to complete the purchase with the plaintiff still in possession."

The agreement for sale is dated the 14th September, 1994 on the same day that the managers' cheque for the arrears of rent was received by the defendant.

By a writ in this action dated 15th September, 1994 the lessee (tenants) claims possession of premises and relief against forfeiture. An interim injunction was granted by the Supreme Court on the 16th September, 1994 for a period of 7 days and further extensions have been granted since that time.

At Common Law when a tenant commits a breach of covenant for payment of rent and the lease contains a proviso for forfeiture, the landlord may either waive the breach or determine the lease. The lease may be determined either by the landlord re-entering the premises in conformity with the proviso for forfeiture or by issuing a writ claiming possession.

The principle which governs the Court in granting relief against forfeiture is that the Court will grant relief only where the Court can give compensation for the forfeiture. In general, therefore, equity granted relief only where the forfeiture in substance was merely security for payment of a monetary sum.

The most important illustration of these principles was the proviso for re-entry contained in a lease. As illustrated in *Howard v. Fanshawe* [1895] 2 Ch. p. 581, Equity would relieve against forfeiture of the lease for non-payment of rent even after a peaceable re-entry by the landlord without the assistance of the Court. Such a proviso was regarded simply as a security for rent.

Statute has intervened to supplement equity with the advent of the Rent Restriction Act but the Minister under the Act is empowered to exempt certain premises from the provisions of the Act. In the instant case the premises were exempt from the Act but the principle of the Common Law still applies.

From the cases cited it is clearly established that the object of the proviso for re-entry is to secure to the landlord the payment of his rent and avoids the necessity for bringing an action for the debt.

Mr. Charles who appeared for the plaintiff conceded that the rent was owing but submitted that because the total sum representing the arrears of rent was tendered, he is entitled to the relief. The plaintiff would experience severe hardship if it is required to obtain alternative accommodation.

Mr. Graham on behalf of the defendant based his submissions on the conduct of the plaintiff relative to the non-payment of the rent coupled with the obligation of the landlord in the contract for sale of the premises.

Based on the authorities and the dispute as to questions of fact there is little doubt that there is a serious question to be tried.

Turning to the question as to where the balance of convenience lies, I have to ask myself this question. Would it hurt the plaintiff more to go without the injunction pending trial than it would hurt the defendant to suffer it? In answering this question I am mindful of the fact that there is no breach of the law more delicate than that which goes to restrain the exercise of a legal right. That jurisdiction rests upon the principle that one party is taking advantage of a forfeiture by exercising rigidly his legal rights thereby creating hardship and great loss and injury while at the same time he may have full benefit of his contractual rights under the lease where he can be compensated for his loss. The landlord will be relieved of all hardship if he is fully compensated by the tenant of all his rent and expenses.

In so far as the Landlords' Agreement for sale is concerned the Court takes into consideration the fact that the full amount of arrears of rent was tendered to the defendant on the same day when the sale agreement was signed and while the premises were under padlock and armed security.

A landlord who has elected to enforce his forfeiture in this way remains vulnerable to an application for relief unless and until he obtains a final judgment for possession. The purchaser of the property must be taken to have known and particularly when the lease should have been registered than an application for relief against forfeiture was imminent. The inescapable inference must be that a purchaser in those circumstances would have acquired the premises subject to the plaintiff's equity. Against that background, it is my view that damages would not be an adequate remedy for the plaintiff.

In my judgment the balance of convenience lies in favour of the plaintiff and I so find.

Accordingly, for the foregoing reasons the interlocutory injunction should be granted, in terms of paragraphs 1, 2, 3, and 4 of the Summons as amended dated 23rd September, 1994. But it will be discharged:

If the plaintiff does not within (7) days from the date hereof pay or tender to the landlord's Attorney-at-Law or in case of refusal into Court all the arrears of rent. Costs granted to the defendant to be agreed or taxed and to be paid within 21 days from date of agreement or taxation. Certificate for counsel granted.

Plaintiff gives usual undertaking as to damages.

Leave granted to appeal.