C.A. Civil - Contract — Lease Agreement — Arrears of rent — re-entry by lessor/respondent — Whether lease related to Authority subject to provisions of Rent Restriction Act — whether circumstances gave respondent right to re-enter and determine. Appeal dismissed. No cases referred to

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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 97/89

Landlord and Tenant

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

Legal Drafting and Interpretation

BETWEEN	JOSHUA HENRY LEROY DUFFUS JAMES GORDON	PLAINTIFFS/APPELLANTS
AND	CRUSTY'S BAKERY LTD	DEFENDANT/RESPONDENT

H. Haughton-Gayle for the Appellants

Anthony Pearson for the Respondent

9th November 1992 & 8th March, 1993

FORTE, J.A.

The appellants sued the respondent in breach of contract arising out of the leasing by the respondent to the appellants of its business which operated under the name "Crusty's". They alleged that in breach of the lease agreement, the respondent per its agent, re-entered and took possession of the company, locked certain areas of the building thereby preventing the appellants from gaining entry for the purpose of operating the business. On its part the respondent, counterclaimed for certain sums of money allegedly due and owing on the agreement. The content of the lease agreement will be later referred to in greater detail in order to treat with the complaints made before us. In the Court below Edwards J, found in favour of the respondent, and made the following orders:

1. Judgment for the Defendant;
2. Defendant not in breach of Lease Agreement dated 25/5/86;
3. Plaintiffs action dismissed with costs to the Defendant to be agreed or taxed;

4. The sum of Twelve Thousand, One Hundred & Fifty Dollars ($12,150.00) is owing to the Defendant on the counterclaim;

5. No order as to costs on the counter-claim.

It is from these orders that this appeal is brought. On the 9th November 1992, having heard arguments in support of the appellants' grounds of appeal, we dismissed the appeal and affirmed the order of the Court below. We now set out our reasons for so doing.

Before dealing with the points of complaint in the appeal, and so that they can be clearly understood, a brief summary of the facts is necessary.

The appellants, on the 29th May 1986, entered into a five years lease agreement with the respondent the lease to commence on the 1st June 1986. A significant term in the lease stipulated that if the lessee was over in arrears of rental for more than twenty-one days, the lessor would be entitled to re-enter the premises, and the agreement would thereupon be terminated. This appears in clause 6 (a) of the agreement, the relevant provisions of which are hereunder reproduced:

> "Provided always and it is hereby agreed and declared as follows:
>
> (a) That if the rents hereinbefore reserved or any part thereof shall at any time be in arrears and unpaid for twenty-one days after the same shall have become due (whether legally demanded or not) ... then in any such case it shall be lawful for the Lessor or any person or persons duly authorised by the Lessor in that behalf to re-enter into and upon the demise premises or any part thereof in the name of the whole and thereupon this demise shall absolutely determine but without prejudice to any right of action or remedy of the Lessor in respect of any antecedent breach by the Lessees of any of the covenants or agreements herein contained."

The appellants, thereafter took over the business, but on the 23rd June 1987, the respondent, alleging that there was a breach as stipulated in clause 6 (a), exercised its right thereunder,

re-entered, took over the business, and purported to terminate the agreement.

On that background, two issues emerged both in the Court below, and before us, the answers to which must be the determining factors in resolving the dispute between the parties.

The first is with respect to whether or not the lease agreement relates to property which comes within the Rent Restriction Act (the Act) and consequently is governed by its provisions. The other, purely a question of fact, is resolved by the determination of whether circumstances existed which would give the respondent the right to act under the provision of section 6 (a) of the Agreement.

In order to project the first of these issues, the appellants filed and argued the following ground of appeal as amended:

> "The learned trial judge erred in law when he found that the lease premises were governed exclusively by the lease agreement and common law and not caught by the restrictions of the Rent Restriction Act."

Property to which the Act applies is set out in section 3 (1) which states:

> "This Act shall apply, subject to the provisions of section 8 to all land which is building land ... and to all dwelling houses and public or commercial buildings whether in existence or let at the commencement of this Act or erected or let thereafter and whether let furnished or unfurnished."

Thereafter follows a proviso which exempts certain property from the provisions of the Act, and which is not applicable to the issues in this case.

The real question in this appeal is whether the lease agreement involving as it does, the use of buildings would be subject to the provisions of the Act. There is no doubt that if the lease relates to the buildings simpliciter, then the provisions of the Act

would apply and the appellants would have been entitled to at least one month's notice, and thereafter an order of the Court, as to the date on which recovery of possession should take place, if at all.

The respondents, however, contended that the contract between the parties, was not concerned with the rental of commercial buildings, but with the lease to the appellant of a business, which they were allowed to control and conduct, enjoying the profits therefrom while paying in exchange to the respondents a sum of $27,000 per month for that benefit.

In our view the contention of the respondents cannot be faulted. An examination of the agreement supports this view. There are several clauses in the contract which demonstrate that the appellants responsibilities went much further than the mere payment of the monthly sum, and to matters connected to the buildings per se. The lease begins, by recognizing the lessor (respondent) as the owner and operator of a business known as "Crusty's" and as holding a trade licence authorizing its operation at three different locations and thereafter expresses the wish of the lessees (appellants) "of taking a lease of the said business together with the goodwill and liabilities as per closing statement of accounts on the date of completion thereof."

The appellants, after agreeing to certain matters relating to the buildings per se, thereafter covenanted with respect to some other relevant matters which clearly relate to the business - e.g.

> "(r) To take over the existing members of staff in the operation of the business and to take responsibility for all statutory and other liabilities to the said staff members during the term hereby created.
>
> (s) To indemnify and keep indemnified the lessor from all liability howsoever arising during the operation of the business during the term hereby created.

"(u) To maintain the standard of the products produced by the business in accordance with the recipes provided by the lessor and not to substitute or introduce new products without the consent of the lessor such consent not to be unreasonably withheld.

(v) Not to undertake for a period of three (3) years from the termination of the term hereby created any business of a similar nature within a fifteen mile radius of Mandeville and in any event not to use the recipes provided by the lessor for any product in any business whatsoever."

On its part, the respondent covenanted to provide the lessees with the recipes and methods of preparation of the products and to assist and use its best endeavours "during the term hereby created" to ensure the success of the business.

Both parties mutually agreed to the following:

"It is hereby mutually agreed and declared that the lessees take over the existing stock and liabilities of the lessor in relation to the said business provided that at the end of the term hereby created the lessor will take over stock and liabilities in equal amounts from the lessees ...".

The cited passages, in our view clearly establish that the parties contracted to a lease of a "going concern" and that the buildings involved were incidental to the real purpose of the contract. The agreement to one figure of $27,000 per month without any attempt to quantify the value of the rental of the business as a different entity, also confirms that the subject of the contract was the business and not the commercial property. In addition, the appellants, it would appear, did not in their pleadings, allege that the respondent, took possession of the premises in contravention of the Act. Instead they pleaded that the respondent in breach of the said agreement, re-entered and took possession of the "Company". In those circumstances we are of the view, that this was not a matter justiciable under the Act, and that the issue as to whether the respondent was

entitled to enter and take over the business, must be decided on the basis of the agreement between the parties. That therefore brings us to the question whether the facts disclosed circumstances which justified the respondent's action under clause 6 (a) of the contract (supra).

The appellants in pursuing this complaint argued the following two grounds of appeal together i.e. grounds 6 and 8:

> "6. The learned trial judge refrain to take into account admitted evidence even by the Defendant/ Respondent that at the date of re-possession there were stocks in hand possibly amounting to Thirty-two Thousand Dollars ($32,000) and cash that the Defendant/Respondent was unsure of the amount. This conclusion is made since the Court made no reference to this aspect of the evidence."
>
> ...
>
> "8. That the finding of the learned trial judge was unreasonable and could not be supported by the evidence."

At the start of the hearing of this appeal, Mr. Haughton-Cayle for the appellants abandoned several grounds filed and decided to rely on the grounds stated above i.e. grounds 2, 6 and 8. However, in advancing his arguments, he did not in any way urge upon the Court, the complaint made in ground 6, relating to an omission by the learned trial judge to take into consideration, evidence of the value of stock and cash at the business place at the date of the re-entry by the respondent. He preferred to rely on submissions which were aimed at demonstrating that at the date of the re-entry there was in fact no outstanding rental owed to the respondents and therefore -

> (i) there was no existing breach of clause 6 (a) of the contract at the time, and
>
> (ii) the respondent should have failed in the counterclaim, the learned trial judge falling into error in finding that an amount of $12,125 was owed and consequently awarding judgment to the respondent for that amount.

The requirement for payments by the appellants to the respondent was fixed in the following clause of the lease:

> "The Lessees shall pay to the Lessor or its designate a rental of $27,000.00 per month on the 1st day of each month during the first year of the term hereby created and an increase of 20% on the annual rent per annum thereafter, payable monthly in advance."

In the counterclaim, the respondent detailed the amount owed as follows:

"PARTICULARS

	Debit	Credit
June, 1986	$ 27,000.00	$ 27,000.00
July, 1986	27,000.00	27,000.00
August, 1986	27,000.00	27,000.00
September, 1986	27,000.00	Nil (Cheque dishonoured; not replaced)
October, 1986	27,000.00	27,000.00
November, 1986	27,000.00	27,000.00
December, 1986	27,000.00	27,000.00
January, 1987	27,000.00	Nil (no payment made)
February, 1987	27,000.00	15,000.00
March, 1987	27,000.00	65,750.00
April, 1987	27,000.00	6,750.00
May, 1987	27,000.00	27,000.00
June, 1987 (20% increase)	32,400.00	20,250.00
	$356,400.00	$296,750.00
Amount owed after 13 months		59,650.00
	$356,400.00	$356,400.00 "

The respondent therefore not only claimed to recover that amount, but alleged that the breach of clause 6 (a) was in respect of arrears to that extent i.e. $59,650. The basis for this sum included an assertion that there were no payments made in September 1986 and January 1987 as the cheques then paid had been dishonoured. However, in testifying for the respondent at the trial, the witness Carol Levy, admitted that the amount of the dishonoured cheque for September 1986 was in fact made good in October 1986. It appears also that she admitted that there was in fact a payment of $27,000

for the month of January 1987. However, that cheque was exhibited (Ex 3), and shows that it had been in fact returned, and thereafter re-presented for payment in December 1987. In June 1987, when the re-entry was made by the respondent, though the amount for September 1986 would have been paid, the sum for January 1987, would still have been outstanding. In addition, in keeping with the agreement, on the 1st June 1987, the rental would have been increased by 20%, and consequently an increased amount of $32,400 became payable on the first day of each month. On the 23rd June 1987, when the re-entry was made only $20,250 of that amount had been paid, consequently, the appellants would have been in arrears for a total of $12,150 (being the balance due for June 1987 which was due on 1st June 1987, being payable in advance) plus $27,000 (the unpaid amount for January 1987) which amounts to $39,150. In our view this evidence established that the respondent acted within its right under the agreement, to re-enter and take possession of the business, as the appellant at the time, was in excess of twenty-one days in arrears with the payment.

In so far as the appellants challenged the award in the counter-claim, we are of the view that there is no merit in that complaint. The learned trial judge found on evidence on which he was entitled so to find, that the appellants made good the $27,000 for January 1987, when the cheque was re-presented in December 1987, but nevertheless were still liable for the outstanding amount which they failed to pay for June 1987. In the event, we dismissed the appeal, affirmed the orders of the court below, and ordered that the appellants pay the costs of the respondent - such costs to be taxed if not agreed.