J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 84/89

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	ELINOR P. INGLIS	PLAINTIFF/APPELLANT
A N D	VERNE GRANBURG	DEFENDANT/RESPONDENT

Dennis Goffe and Douglas Leys for Appellant

Enos Grant for Respondent

24th, 25th, 26th, 30th January
and 19th February, 1990

CAREY, J.A:

This is an appeal against an order of Langrin, J. dated 30th August, 1989 whereby he dismissed the appellant's application for an interlocutory injunction. We understand that the basis of that result was the learned judge's view that damages was an adequate remedy for the appellant. For myself I would have preferred a note of the judge's thinking on the matter, and would hope that in future, this Court will be provided with some reasons of decisions in matters of this nature.

The appellant's endorsement on his writ dated 16th August, 1989 reads:

> "The Plaintiff's claim is against the Defendant for an injunction restraining the defendant and or his servants or agents

> from interfering with the quiet enjoyment of premises registered at Volume 1171 Folio 827 of the Register Book of Titles which the Plaintiff occupies as a lease(sic) by virtue of a written lease dated the 28th day of March, 1989.
>
> AND the Plaintiff further claims against the Defendant damages for breach of contract arising out of the said lease agreement."

In broad outline, the facts and circumstances as contained in the affidavits and correspondence exhibited thereto were as follows: The appellant is in possession of the respondent's premises known as "Pharos Villa" but latterly as "The White House" by virtue of a 5 year lease agreement dated 28th March, 1989 at a rental of Nine Thousand Dollars (U.S.$9,000.00) quarterly. The lease included a clause for forfeiture if the rent was more than 21 days in arrears. On the same date, the parties executed a management agreement whereby the appellant undertook to manage the villa on a profit sharing basis. Under this agreement, the appellant was obliged not to incur commitments or liabilities in excess of Nine Thousand Dollars (U.S.$9,000.00) or 3 months rental. In the event, she was obliged however to expend some not inconsiderable sums to put the premises into a rentable condition. The total sum was stated at one time to be $71,962.13. The main item in this account related to the cost of repairing the roof of the villa. She did not pay the rent. The respondent exercised the right of re-entry given under the forfeiture clause for non-payment of the rent. Hence the action initiated at the instance of the tenant.

Mr. Goffe contended that the appellant had a right of set-off against the respondent's claim for rent and the exercise of the right of re-entry was therefore unlawful.

Equity would grant relief against the forfeiture and damages would not therefore be an adequate remedy.

Mr. Grant's riposte was that the appellant opted to sue for damages for breach of contract not for relief against forfeiture. Further, the wording of the lease, specifically clause 2(a) of the lease agreement - "To pay the said rent due without any deductions," and the fact that the partnership agreement in clause 14 stipulated that "all payments on account of rental under the lease shall be deemed expenses" demonstrated that the parties intended that the rent must be paid. The main thrust of his submission was that any money spent by the appellant was pursuant to the partnership agreement and in any dispute, would be determined on the taking of accounts: set off would be inapplicable in those circumstances.

From these submissions, I think it is plain that the question for determination is not susceptible simply to the test or whether because the appellant's claim includes damages for breach of contract, inevitably damages is an adequate remedy. It is of course plain as well, that there are serious issues to be tried of which the outcome is uncertain. There are no inflexible rules of general application in considering the next step, viz - determining the balance of convenience:

> "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."

per Lord Diplock in American Cyanamid Co. v. Ethicon Ltd [1975] 1 All E. R. 504 at p. 511.

In determining where the balance of convenience lies in the circumstances arising in the present case, the judge was required to consider whether in point of law, the appellant was entitled to claim to set-off her advances against the rental due under the lease. If she were so entitled, the re-entry would be unlawful and the appellant instead of being allowed to run the villa, as the partnership agreement required, would have been ousted therefrom and prevented from fulfilling her obligations as a partner. At this point, I think it necessary to point out an important fact. The respondent in a letter dated 5th July, 1989 acknowledged that he was indebted to her in $50,751.00. His note reads -

> "Elinor Inglis' lessee improvements and accounts paid on my behalf ... $50,751

Counsel on both sides accepted the principle stated in British Anzani (Felixstowe) Ltd. v. International Marine Management (U.K.) Ltd. [1979] 2 All E. R. 1063 that whether at common law or in equity, a tenant could claim a right to set-off advances made to put the premises in a rentable state. That case it seems to me answered as well, Mr. Grant's submission that the words in the clause requiring the payment of rent without deductions could not be defeated by the principle of set-off. Indeed, one of the arguments in that case by the landlords was that in the very nature of rent, there could be no set-off against it.

Another of Mr. Grant's submissions with which it may be convenient to deal at this point, was, that it was not open to the appellant to claim a set-off because that right was only accorded to a defendant and was not available to a

plaintiff. There is however dicta very much to the contrary. In Hanak v. Green [1958] 2 All E. R. 141 at p. 153 Sellers L.J. said -

> "It cannot, as I see it, make any difference which side commences proceedings in which cross-claims arise. If there is a set-off at all, each claim goes against the other and either extinguishes it or reduces it."

I am very much indebted to the assiduity of my learned brother Downer, J.A. who kindly brought this case to my attention. Where the right of set-off exists, the relationship of debtor and creditor arises: each party is a debtor, each party is a creditor. It cannot then matter who acts first by filing an action because the other can claim a set-off.

Having regard then to the respondent's acknowledged liability to the appellant qua lessor, the high probability is that the re-entry under the forfeiture clause of the lease was unlawful and consequently in breach of the covenant for quiet enjoyment. But the judge would be bound to have in mind the words in clause 1 of the management agreement - "and this lease agreement shall be indivisible with this agreement." The parties were not merely landlord on the one hand and tenant on the other, under the lease, but as well partners under the management contract. This was the practical reality of the situation in which the grant of an injunction had to be considered, and therefore could not be ignored. Equity it has been said respects the sanctity of contracts. Accordingly, it would be a greater hardship on the appellant if she were deprived of her contractual right to manage the villa pending the hearing of the action. The respondent would suffer no great hardship in the interim for he had contracted to lease the villa and participate in a profit-sharing venture. On that basis, the

balance of convenience tilts somewhat in favour of the appellant. Further, it cannot be denied that a right to quiet enjoyment can be protected by injunction. See Kenny v. Preen [1963] 1 Q.B. 499.

Not only must the judge consider whether from the appellant's standpoint damages could be regarded as adequate compensation for the loss she would sustain as a result of the respondent continuing to interfere with her quiet possession of the property from the time of the application for the injunction to the date of trial, but also if the respondent were to succeed at trial, whether he would be adequately compensated under the appellant's undertaking as to damages for the loss he would sustain during the same period. If damages would be an adequate remedy in the latter case as I think it is, there would be no reason to refuse the interlocutory injunction. See American Cyanamid Co. v. Ethicon (supra).

On the evidence, it is plain that the greater inconvenience would be caused to the appellant to interrupt her in the condcut of her contractual obligations. I am satisfied therefore that the learned judge fell into error because he failed to balance all the factors which arose on the material before him.

For these reasons I agreed that this appeal be allowed, that the order of Langrin, J. be set aside and an order made in the terms as announced.

ROWE, P.:

I agree.

DOWNER, J.A.:

I agree.