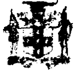

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT CL 2000/J012

BETWEEN	*JAMAICA COTTAGE & MOTELS ASSOCIATION LIMITED*	*PLAINTIFF*
A N D	*CARL CAMPBELL*	*DEFENDANT*

Miss Gillian Mullings instructed by Patrick Bailey & Co. for the plaintiff.

Ravil Golding instructed by Lyn Cook, Golding & Co. for the defendant.

Heard: __February 6 & 7, April 7 and May 16, 2003__

__HARRIS, J.__

The plaintiff's claim against the defendant is to recover the sum of $1,085,000.00 for arrears of rent with respect to property situated at 5 Dumfries Road in the parish of Saint Andrew. The defendant counterclaims for the sum of $3,140,136.88 as rental paid to the plaintiff under a mistake of law.

Evidence on behalf of the plaintiff was given by Mr. Colin Steele, a director of the plaintiff Company. He testified that the defendant became the plaintiff's tenant in 1991, at which time he rented a dining area, one room,

which was used for off course betting and a kitchen for the sum of $15,000.00 monthly from 6 a.m. to 6 p.m. daily.

He stated that the defendant rented additional space in 1992, on which occasion the rental was increased to $20,000.00 monthly. In 1995 the entire property was rented to him, save and except 2 rooms, for a sum of $60,000.00 on 24-hour basis, on condition that the property reverted to the plaintiff company on each New Years Eve's night. In that same year the rental was increased to $90,000.00.

He also recounted that in 1997 he wrote to defendant advising him of future increase in rental to $120,000.00 and that rent was due and owing by the defendant since December 1998.

The defendant testified that he is a shareholder and one of five directors of a company called Chances Entertainment Limited. He stated that a bar, a restaurant and 4 rooms were rented from the plaintiff. The object of the rental was to secure a place for hosting off track betting.

He said he came into possession of the property in 1991 and left in year 2000. He was never rented any space additional to that which he had received in 1991. He further said rental of premises moved from $15,000.00 to $90,000.00 between 1991 and 2000.

It was also asserted by him that rent was due and owing to the plaintiff by Chances Entertainment Ltd and not by him personally as at the time of tenancy agreement he was acting in the capacity as a representative of that Company.

He further revealed that the plaintiff had collected rental in excess of the standard rental and this, the plaintiff ought to refund.

It is a fundamental principle of law that where an agent enters into a contractual relationship with a third party on behalf of his principal, then only the principal can sue or be sued. This rule was acknowledged by Sterling LJ in Bevan v Webb 1901 2 Ch 59 at page 77 when he declared:

> ***"Now there is a general rule of law, that is, whatever a person who is sui juris can do personally he can also do through his agent. That is the general rule but there are no doubt some exceptions."***

In ***Montgomerie v. United Kingdom Steamship Assn 1891 1 QB 370*** at page *372* Wright, J. recognized the rule thus: -

> ***"The contract is the contract of the principal, not that of the agent and prima facie at common law, the only person who can sue is the principal and the only person who can be sued is the principal."***

Generally, an agent, duly authorized by his principal, acting on behalf of that principal assumes no rights nor incurs liabilities. In many cases, the

issue as to whether a person contracted with a third party in his personal capacity, or as an agent for a principal, poses some amount of difficulty to unravel. As a result, in order to determine whether a person is a contracting party or merely an agent, the court analyses the intention of the parties based on all surrounding circumstances.

> ***"The intention for which the court looks is an objective intention of both parties based on what two business-men making a contract of that nature, in those term those surrounding circumstances must be taken to have intended."***

Per Lord Brandon in the Susan [1908] 1 Lloyd's Report 5 at page 12

The plaintiff contends that the defendant had personally entered into the tenancy agreement with them. This the defendant has refuted. He has asserted that his entry into the agreement was in the capacity of managing director on behalf of a company called Chances Entertainment Ltd. The first issue to be resolved, therefore, is whether liability is attributable to the defendant himself, or to his company.

There is no dispute that, by an oral agreement, the contract for the tenancy came into existence in 1991. Mr. Steele stated that at the time of rental of the property the defendant was the person with whom he dealt and at the time he was unaware that Chances Entertainment Limited existed.

The defendant declared that Chances Entertainment Ltd. was incorporated in 1990. A certificate of incorporation of the Company was tendered in evidence as an exhibit showing the date of incorporation of the Company to be August 30, 1991. This illustrates that the date of incorporation of the Company was not 1990 as asserted by the defendant.

Mr. Steele was unable to furnish the specific date in 1991 on which the agreement was concluded. He thereby provided no assistance to the court as to whether the agreement had taken place before, or after August 30, 1991. The defendant was equally unhelpful in this regard, as he proffered no evidence as to the precise date of the commencement of the tenancy.

Notwithstanding the foregoing, the defendant recounted that the property was rented with the object of securing a location for a group of persons and himself to host off track betting. The evidence revealed however, that the business of betting and gaming was not the only enterprise operated by the defendant on the premises. In addition to the betting and gaming company, Chances Entertainment Limited he also operated a bar and restaurant. Consequently, the presence of the betting and gaming company does not in itself demonstrate that Chances Entertainment Ltd. was the principal party to the agreement.

A letter dated August 10, 1992 was sent by the defendant to the plaintiff. It was in response to communication sent by the plaintiff increasing the rent from $15,000.00 to $20,000.00 monthly.

Paragraph 4 of the letter states: -

> "The whole business of rental of the premises must come under serious review. At $20,000.00 our rental has to be for 24 hours so that we can try to maximize the money we make to pay our bills, which are ever increasing"

Paragraph 5 states: -

> "This in effect would mean that the responsibility for the rental of the premises would rest with Chances."

Here, one year after the incorporation of Chances Entertainment Ltd, and subsequent to the formation of the rental agreement, the defendant is suggesting to the plaintiff that Chances Entertainment should assume the tenancy. This clearly denotes that Chances Entertainment Ltd. had not been the contracting party in 1991. The fact that the defendant, subsequent to the agreement, is seeking to place the onus of the tenancy on his company clearly belies his assertion that the contract had been formed on the company's behalf.

Further, on May 13, 1999 the defendant wrote to Mr. Steele stating among other thing, that "Further to verbal discussion, this is to formalize an agreement regarding the debt owing in respect of the rental by Chances."

Almost 8 years after the letting of the property the defendant sends this letter to the plaintiff. In my view, at the time of rental of property in 1991, the Company might not have been in existence. The defendant, in 1999 was seeking to have an agreement ratified by a company, which had not been a party in such an agreement in the first place. This is clearly an attempt to impose that burden of the tenancy on a company, which had not been a participant in the initial agreement.

A Notice to Quit dated October 4, 1999 had been sent by Mesdames Jennifer Messado and Co.- Attorneys-at-law, who then acted on behalf of the plaintiff, to Chances Entertainment Ltd. This does not necessarily demonstrate that Chances Entertainment Ltd. had entered into the rental agreement with the plaintiff. The defendant admitted that, on a previous occasion both Chances Entertainment Ltd. and himself were sued in the Resident Magistrates Court for arrears of rental for the property.

In my view, the negotiations and agreement for the rental of the property were professedly made by the defendant personally. Chances Entertainment Ltd was not a contracting party. No obligation would therefore arise between the plaintiff and Chances Entertainment Ltd. The defendant was the party who was intended to be bound by the contract. He is the proper party before the court.

If contrary to my view, it is presumed that Chances Entertainment Ltd. had been in existence at the time of the contract and that the defendant had been duly authorized to act on its behalf, then the question as to whether the defendant's agency had initially been disclosed to the plaintiff becomes relevant.

Although it is a general rule that a contract made by a duly authorized agent on behalf of his principal is that of the principal, this rule is subject to exceptions. It is a well settled principle of law that an agent, authorized by his principal, who enters into an agreement with a third party who at the material time conceals the fact that he was acting as representative of his principal, may sue or be sued. This state of affairs gives use to an enforceable contract between the agent and third party, as it grants rights to and imposes liabilities on the agent.

Chances Entertainment Ltd. was incorporated August 30, 1991. The rental contract was concluded in 1991. If the contract was formed subsequent to August 30, 1991 the defendant would have been obliged to have revealed to the plaintiff the fact that he was acting on defendant's behalf. It is clear that he did not. This is evidenced by his letter of August 10, 1992 to Mr. Steele, which demonstrates that on that date, it was the first time he brought to the plaintiff's attention the fact that Chances

Entertainment Ltd was the tenant, having suggested in the letter that responsibility for the rent should rest with the Company.

Further, on May 13, 1999 he wrote to the plaintiff stating that he was formalizing a verbal agreement between them with respect to the rent owing by Chances Entertainment ltd.

It is obvious that in 1991 when the oral agreement was made, the plaintiff would have been led to believe that they were dealing with the defendant and not Chances Entertainment Ltd.

The rights of a party who enters into a contract with agent of an undisclosed principal was clearly outlined by Earl Cairns LC, in Kendall v Hamilton (1879) 4 Appeal Cases 504 at page 514 when he stated:-

> ***"Now, I take it to be clear that, where an agent contracts in his own name for an undisclosed principal the person with whom he contracts may sue the agent or he may sue the principal, but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even as though the judgment does not result in satisfaction of the debt."***

At the time the contract was made, the defendant did not disclose to the plaintiff the existence of Chances Entertainment Ltd nor did he state that he was acting on behalf of that company. He made a contract with the plaintiff in his own name notwithstanding he was acting for the company. The plaintiff would therefore have been led to conclude that he was the one

who contracted with them personally. It follows that he would be personally liable to the plaintiff. The fact that he had written the letters of May 13, 1999 imputing the tenancy to be that of the company, does not exonerate him from liability, nor did he cease to be liable when the plaintiff discovered that Chances Entertainment Ltd was the principal contracting party. There is nothing to show that the plaintiff had unequivocally elected to regard the company as the sole contracting party.

The next issue to be addressed relates to the amount owing to the Plaintiff by the defendant. The plaintiff stated that they initially rented a dining area, one room and a kitchen for $15,000.00 monthly. Over the period 1991 to 1997 the rental was increased on each occasion on which they rented the defendant additional space.

There is no dispute that rent is owing for the period December 1998 to February 2000. The question however, is, how much is due and owing to the plaintiff?

Provision is made by the Rent Restriction Act for the control of rent, as to public or commercial buildings, dwelling houses and building land. It also provides for a standard rent to be determined by an Assessment officer. Section 17 (1) states as follows:

"Section 17 (1)

Subject to subsection (2), until the standard rent of any premises in relation to any category of letting has been determined by an Assessment Officer under section 19, the standard rent of the premises in relation to that category of letting shall be the rent at which they were let in the same category of letting on the 1st day of July, 1976, plus any increases sanctioned pursuant to this Act or, where the premises were not so let on that date, rent at which they were last so let on that date, plus such increases as aforesaid, or in the case of premises first so let after that date, the rent at which they were, or are, first so let, plus such increases as aforesaid:

Provided that

(a) ....

(b) ....

(c) in the case of public or commercial buildings which were exempt, pursuant to paragraph (e) of the proviso to subsection (1) of section 3, prior to the 5th of April, 1983, the standard rent shall be the rent, if any, at which they were let at the date aforesaid."

Until the standard rent is determined by an Assessment Officer, the standard rent is that at which the property was let in the same category of letting on July 1, 1976, in addition to increases permitted by the Act. If I it was not rented on that date, then the date at which it was last let before that date in addition to any statutory permitted increases, or in the case of property being let for the first time, at which it was, or, is first let plus permissible increases.

Section 3(1) of the Rent Restriction (Percentage Assessed Value Order) 1983 provides as follows: -

> "The standard rent as determined for any premises, pursuant to the Schedule shall be increased on each anniversary of the application date by such amount as shall be necessary to be increased by 7½ % of the standard rent payable immediately prior to such increase."

In 1991, the defendant was charged and paid a rental of $15,000.000 monthly. There is no evidence that a standard rental had been fixed by the Assessment Officer despite the fact that the plaintiff is mandated by virtue of Section 18(1) of the Act to apply to an Assessment Officer to determine the Standard rent. This he was obliged to do. A Certificate was issued by the Rent Assessment Board on September 20, 1999 illustrating that the premises were not exempt under the Act. The premises are therefore controlled. They are subject to the restriction of 7½ of annual increase of rental as dictated by the Rent Restriction (Percentage Assessed Value Order.)

The plaintiff stated that increases in rental on each occasion were as a consequence of the defendant being allocated additional space. However, a letter from Mr. Steele to the defendant on September 20, 1993 shows that reasons given by the plaintiff for an increase of rental from $20,000.00 to $24,000.00 monthly with effect from October 1, 1993 was as a result of increases in property taxes, insurance premiums, water rates and

maintenance costs. Mr. Steele admitted in cross-examination that the increase was also due to the allotment of additional space to the defendant.

Surely, if the increase in the cost of letting was as a result of the plaintiff granting to the defendant, use of additional space, as well as increases in rates and maintenance costs, the plaintiff would have included all those facts the letter to the defendant.

A further rental increase was imposed in 1995. On January 19, 1995 the plaintiff, through their directors Messrs. Steele and Glen Dawson, wrote to the defendant, stating inter alia: -

> "Please be advised that effective March 1, 1995 your rental will be increased to $60,000.00 per month. As discussed, this will entitle you to full use of the facilities now occupied except on New Years Eve."

The foregoing extract from letter does not show that the rent was increased following the defendant's receipt of additional space. The plaintiff stated that the defendant had not been given exclusive possession of the area occupied by him at the time the property was rented in 1991, as it had been let from 6 a.m. to 6 p.m. daily. The defendant denied that this arrangement existed.

However, in his letter of August, 1992 to the plaintiff he stated that "at $20,000.00 our rental has to be for 24 hours, so that we can try to

maximize the money we make to pay our bills." Here the defendant, express his dissatisfaction with the limitation imposed on him as to the hours during which he was permitted to have use of the property. This obviously supports the plaintiff's declaration that the property had been rented on a 12-hour basis initially.

The terms of the agreement were varied by virtue of a letter of January 19, 1995. This collateral agreement signed by both plaintiff and defendant grants the defendant full use of and access to the rented premises on a 24-hour basis daily, except on New Years Eve. The inference to be drawn, is that the plaintiff, at this stage, increased the rental not because the defendant was afforded more space, but as a result the extension of the hours during which the premises were rented. This, the Act does not permit.

The premises were controlled. Any sum charged for rent in excess of the standard rent is subject to the provision of the Act.

Section 21(1) provides as follows:

"21(1) The amounts by which the rent of any controlled premises may exceed the standard rent shall, subject to the provisions of this Act, be –

a) any amount sanctioned by order of an Assessment Officer, on the application of a landlord, where the landlord has incurred expenditure in effecting –

(i) substantial improvements or structural alterations in the premises; or

(ii) substantial improvements to the amenities of

> the premises, or substantial improvements in the locality from which the tenant derives benefit, not being improvements for necessary maintenance and drainage;

b) where the rates and taxes (other than water rates and sewer rates) payable in relation to the premises have been increased after the date on which an Assessment Officer or a Board, pursuant to section 11, determined the standard rent of the premises, such portion, if any, of the increase as the Assessment Officer, on the application of the landlord, may by order sanction;"

The foregoing shows that the increase of rental to $60,000.00 contravenes the provisions of the Act.

The plaintiff imposed a further increase of rent in 1995 in the sum of $90,000.00 monthly. They stated that this increase was based on the defendant being furnished with use of tables, chairs and a discotheque owned by them. However, a letter dated October 4, 1999 from Mesdames Jennifer Messado & Company to Messrs. Livingston, Alexander & Levy who then acted for the defendant is proof to the contrary.

Paragraph 4 of that letter states: -

> "Further, for the last six years, our client provided the discotheque free of additional rental, for your clients use and profit. This immediately means that services are provided with the rental and furniture (chairs and tables) that makes the property exempt from the provisions of the Rent Restriction Act."

Clearly, the increase rental was not as a result of the defendant being supplied with the furniture and discotheque as the plaintiff asserted.

In cross-examination, Mr. Steele admitted to other increases in the rental. In April 1994 there was an increase of $30,000.00 monthly. These increases were also in breach of the Act.

There being no evidence that the standard rent of these controlled premises had been fixed by an Assessment Officer, the standard rent must be taken to be $15,000-.00, that is, that for which the premises were first let.

No evidence exists as to the precise date in 1991 when the premises were first let. Paragraph 1 of the defendant's letter of August 10, 1992 to the plaintiff shows that the first increase became effective on September 1, 1992. It is reasonable to assume that the plaintiff would not have first increased the rent until sometime after the expiration of a year from the commencement of the letting.

Taking the effective date of the first increase to be September 1992 and taking into account an annual increase of 7½ %, by December 1998 the standard rental would have been $24,885.74 monthly. The evidence revealed that the defendant paid to the plaintiff $70,000.00 on account of the debt. The defendant would therefore be indebted to the plaintiff as follows:

December 1998	$24,885.74
January 1999 – March 1999 @ $24,85.74 monthly	$74,657.22
April 1999 to February 2000 @ $26,752,17 monthly	29,4273.87
	323,816.83
Less sum paid on account	70,000.00
	$323.816.83

I will now turn to the counter claim. Section 20 of the Rent Restriction Act permits a tenant to recover any sums paid as rental to his landlord in excess of the standard rental. It is indisputable that the defendant had paid that sum to his landlord in excess of the standard rent. It is therefore necessary to determine the extent of the plaintiff's liability to the defendant.

The defendant stated that he paid sums to the plaintiff for space rented between 1991 and 2000. He declared that rent moved from $15,000.00 to $120,000.00 over the period. The plaintiff admitted that there were the following increases:

September 1, 1992	-	$20,000.00
October 1, 1993	-	$24,000.00
April, 1, 1994	-	$30,000.00
March 1, 1995	-	$60,000.00
April 1, 1996	-	$90,000.00
April 1, 1998	-	$120,000.00

Although the defendant averred in his counterclaim that he paid the plaintiff an amount of $3,140,136.88 in excess of the standard rent, he did not specifically state in evidence the amounts he had paid. He merely stated that he paid rental to the plaintiff. This notwithstanding, the plaintiff's evidence discloses that the defendant had paid the rental charged, up to November 21, 1998. The defendant would thereby be entitled to recover any sum overpaid by him.

Miss Mullings urged that the would not be entitled to recover any amount paid in excess of rent, prior to November 1994, as any claim for the period 1992 to October 1994 is barred by virtue of the Limitation of Actions Act.

The statute of limitation was not raised in the Reply and defence to counterclaim and ought to have been pleaded as a foundation to part of the defendant's counterclaim. This objection, having not been raised in the pleading, the plaintiff cannot now rely on the fact that part of the defendant's counterclaim falls outside the period prescribed of the statute.

The plaintiff is liable to pay the defendant the sum of $2,930,054.80 made up as follows: -

Period	Standard Monthly Rental	Monthly Charged & Rental Paid	Total Excess Rental Paid
1st Sept. 1992 - 30th Sept.1993	16,125.00	20,000.00	$50,375.00
1st Oct. 1993 - 31st March, 1994	17,334.38	24,000.00	$39,993.72
1st April 1994 - 28th Feb. 1995	18,634.38	30,000.00	$125,021.02
March 1, 1995 - 31st March, 1996	20,032.04	60,000.00	$519,583.52
1st April, 1996 - 31st March, 1997	21,534.44	90,000.00	$821,586.76
1st April 1997 - 28th March 1998	23,149.52	90,000.00	$802,205.73
1st April 1998 - Nov. 30, 1998	24,885.74	90,000.00	$520,914.05
Total			$2,879,679.80

Judgment for the plaintiff on the claim in the sum of $323,816.83 with interest thereon at rate of 12% per annum and costs of the action to the plaintiff to be agreed or taxed. Judgment for the defendant on the counterclaim in sum of $2,879,679.80 to be agreed or taxed.

It is further ordered that the sum of $323,816.83 with interest adjudged to be recovered by the plaintiff from the defendant be set off against the sum of $2,930,054.80 adjudged to be recovered by the defendant from the plaintiff.