IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. J-443 OF 1985

BETWEEN	JAMAICA OMNIBUS SERVICES LIMITED	PLAINTIFF
A N D	WHARFING SERVICES LIMITED	DEFENDANT

Mr. E.P. DeLisser for the plaintiff.

Dr. L. Barnett and Mr. P. Brooks for the defendant.

DECEMBER 3, 4 AND 7, 1990
JANUARY 16 AND 17, 1991
JULY 30, 1991

COOKE, J.

The plaintiff and the defendant entered into an agreement dated the 23rd day of October, 1979 whereby the plaintiff leased premises situated at 56 Hagley Park Road in the parish of St. Andrew for a term of six years as of the 1st of September, 1979. Clause 5 of this agreement enabled the plaintiff to exercise an option to purchase the leased premises. It is the contention of the plaintiff that this option has been properly exercised and thus brings an action for specific performance. The defendant resists this claim and further counterclaims, seeking an order for possession and for damages. I will firstly deal with the issue as to whether the option has been properly exercised and to this end I will relate relevant circumstances.

In July, 1984, Yvonne Chamberlain, then Company Secretary of the plaintiff, acting on instructions of the board of the plaintiff, prepared an instrument along with a covering letter, which two documents indicated the intention of the plaintiff to exercise the option to purchase. She herself did not send off these documents. She handed them to Horsford Scott who at that time was chairman of the plaintiff's board and the Permanent Secretary in the Ministry of Public Utilities and Transport. The next thing she knew was that in September, 1984, a messenger from the defendant company brought a cheque with a memorandum from Jamaica Citizens Bank attached to that cheque asking that the account number on which the cheque was drawn should be stated. This was the cheque which had been sent to the defendant

pursuant to the purported exercise of the option. This cheque had not been honoured and by this, the time during which the plaintiff could exercise the option had expired.

Ivan Heron is a consultant to Touche, Ross, Thorburn and Company, a firm of Chartered Accountants. In 1983, the plaintiff company ceased its operation as regards the provision of buses for transportation. Ivan Heron was designated by Touche, Ross, Thorburn and Company to take charge of the affairs of the company. So he was in charge at the material time. He prepared the cheque, placed his signature on it and sent it to Horsford Scott for his signature. At this time, to the knowledge of Heron, he was aware that the plaintiff operated three different current accounts. He did not put on that cheque the account against which this cheque was drawn. Asked why not, he stated "It was an omission on my part". This cheque did not have Jamaica Omnibus Service written on it as required by law (see S. 107(1c) of The Companies Act). This was another omission on the part of Heron. Apparently, these omissions seem to have escaped the attention of Horsford Scott.

Owen Moss-Solomon is the Managing Director of the defendant company. This company received the instrument prepared by Yvonne Chamberlain along with the cheque. This cheque as already noted was not honoured. At this stage, Moss-Solomon sought legal advice and thereafter the defendant was adamant in its stance that the option had not been properly exercised. When the plaintiff sent the cheque with an account number now written on the attached memorandum the defendant merely laid it aside.

Clause 5(c) of the lease agreement states as follows:

> "The option shall be exercised in writing and shall be accompanied by the payment of a deposit of ten percent of the purchase money".

It is my view that the payment of the deposit was an integral part of the proper exercise of the option which had to be exercised before the expiry of the term of the lease. The plaintiff argued that the omissions on the cheque "was a postponement of payment pending clarification and this was so understood as between the parties".

The defendant submitted that a cheque is not legal tender and thus did not constitute payment. A cheque is a facility by which the payee may obtain

payment. There is thus an obligation of the payer to tender a cheque which results in payment. With this submission I find no fault. It follows therefore that since the cheque was dishonoured there was no payment. It is not contested that it is settled law that as regard the exercise of options there must be strict observance of the stipulated conditions precedent. In this particular case the plaintiff would seek the aid of the equitable jurisdiction of the court in his submission that the behaviour of the parties were such that there is the inference that they both understood that all that was needed in respect of the cheque was "clarification". Authorities relied on were Hunter v. Hopetown 1865 13LT 130 and Samuel Properties (Developments) Limited v. Haye 1972 1 W.L.R. p. 1064. I do not deny that in a proper case it may be inequitable to insist on strict compliance - but I would not contemplate it here. The need for "clarification" was of the making of the plaintiff. It seems sufficiently certain that up to the first receipt of the cheque, the defendant intended to carry out its side of the bargain. If the cheque had been honoured there would have been no dispute of this nature. However, the defendant, following legal advice, decided to insist on what he believed to be his legal rights. Its behaviour since that time has been consistent with this stance. When the cheque was sent a second time, no effort was made to have it encashed. By letter dated 17th December, 1985 to the plaintiff, the defendant through its attorney-at-law made it clear that, "It is our opinion therefore that the return of your cheque resulted in the loss of the benefits of the option". It cannot therefore be said that the defendant was awaiting "clarification". I hold that the option has not been properly exercised.

The defendant has counterclaimed seeking damages in reliance on clause 2(a) of the lease. By this clause the lessee (the plaintiff herein) covenanted:

> "To keep the premises during the term of this lease and to deliver it up to the lessor at the expiration thereof in the same condition as the premises were at the date of commencement of lease fair wear and tear, damage by fire, windstorm, earthquake, flood, act of God or the Queen's enemies as well as the obligations of the lessor under clause 3(b) hereof excepted."

The energies of counsel on both sides, especially counsel for the

plaintiff, were directed to the issue of the exercise of the option. There was little challenge as regards the estimates of the cost of replacement and refurbishing. Likewise, there was no debate as to the principles which should inform the Court in the assessment of damages. The amended particulars of damage as pleaded are as follows:-

" PARTICULARS OF DAMAGE

Loss of motor for lift
Loss of Motorola Base/Out Station set
Loss of six intercom units and one power supply unit
Loss of four airconditioning units
Damage to heavy duty batton door
Damage to roller shutter door
Damage to chain link wire and grill gate
Damage to chain link gate
Damage to flush panel door and "V" jointed door (solid)
Damage to morticle locks
Loss of 78 six inch glass louvre panes
Damage to tropicair jalousie windows
Loss of lavatory bowls and basins
Damage to gypsum ceiling
Damage to shower, shower heads and stop cocks
Damage to white glaze tiles
Damage to cupboards, hinges locks and catches
Damage to shelves and brackets
Destruction of main and sub circuit breakers and breaker panelboards
Destruction of 135 light points
Destruction of 33 110 volt plugs
Destruction of 34 light switches
Destruction of 2 220 volt outlets
Loss of 116 double tube batten type lighting fixtures
Loss of 12 incandescent lighting fixtures
Damage to electrical wiring
Damage to roof and ceiling
Damage to wall finishes
Damage to floor finishes
Damage to Plumbing and Drainage Systems
Overgrowth of Bushes on premises "

There was no inventory taken at the beginning of the lease. The evidence of Owen Moss-Solomon, the Managing Director of the defendant company is that at the beginning of the lease, the premises were in good repair and

had all the fixtures such as doors, windows, air condition units, electrical fixtures, plugs, switches, lighting fixtures, sanitary conveniences and two working lifts as well as an intercom system. All this it is claimed to have been destroyed. To Moss-Solomon, the building had become a shell.

Expert witnesses were called by the defendant and these were hardly troubled by rather scant cross-examination. In its reply to this aspect of the counterclaim, the plaintiff pleaded thus:-

> "In answer to paragraph 19 of the Counterclaim, the plaintiff admits that some of the items particularised (for example, motor forklift, air conditioning units) are missing due to acts of vandalism but repeats that since it is under no obligation to deliver up the premises, clause 2(h) is no longer applicable to the present situation."

The plaintiff's confidence in the validity of the exercise of the option as has already been demonstrated was misplaced. No item of loss has been challenged. Despite the absence of an inventory, I hold that on the evidence of the defendant, the claim in respect of each item is not counterfeit. In respect of the electrical aspect of the claim, I accept the evidence of Raphael C. Walker, an electrical engineer who is Managing Director or R.C. Walker and Company Limited. His report was tendered in evidence as Exhibit 13 and I do not intend to reproduce it here. The figures on this report has been increased somewhat, quite reasonably in my view to cushion escalating prices. I accept that the estimated cost for replacing lifts is Seventy Thousand, Eight Hundred and Nineteen Dollars and Sixteen Cents ($70,819.16); that for restoring the other electrical installation and fixtures is Two Hundred and Seventy-six Thousand, Five Hundred and Twenty-four Dollars and Thirty-six Cents ($276,524.36) and Eight Thousand Dollars ($8,000.00) will replace the two air conditioning units. Leighton Messam, a technical sales representative of Cometech, a company that is in the business of communications and electronics, gave evidence, which I accept, pertaining to the cost of replacing Motorola Base out station unit. This is Twelve Thousand Dollars ($12,000.00) and the cost of installing intercom units is Thirty-six Thousand, Nine Hundred and Fifty-five Dollars ($36,955.00). Thus, the total sum in this area Four Hundred and Four Thousand, Two Hundred and Ninety-eight Dollars and

Fifty-two Cents ($404,298.52).

There is another claim of Five Hundred and Forty-five Thousand, Two Hundred and Sixty-nine Dollars ($545,269.00) for "replacing and/or lost of damaged items in the building". The evidence to ground this claim came from Milton Martin who is a quantity surveyor of the firm of Goldson, Barnett and Johnson, Quantity Surveyors. The report of this firm was tendered in evidence as Exhibit 11. I set out below the summary of that report. It will be noted that the total figure of Five Hundred and Twelve Thousand and Sixty Dollars ($512,060.00) has been increased to Five Hundred and Forty-five Thousand, Two Hundred and Sixty-nine Dollars ($545,269.00) to accomodate the anticipated rise in prices.

" SUMMARY

Preliminaries	$ 35,000.00
Site Clearance	6,000.00
Roof Construction & Cover	52,860.00
Windows	15,720.00
Doors	36,704.00
Wall Finishes	100,335.00
Floor Finishes	21,640.00
Ceiling Finishes	44,506.00
Fitments	69,380.00
Sanitary Fittings	37,690.00
Plumbing Installation	5,625.00
Air Conditioning Installation	42,000.00
Drains	4,600.00
	$ 472,060.00
Contingency Sum	40,000.00
	$ 512,060.00 "

The total sum for replacement and refurbishing is Nine Hundred and Forty-three Thousand, Five Hundred and Sixty-seven Dollars ($943,567.00). This is what reinstatement will cost and this is what the defendant seeks. There are two separate paths which the Court can follow in determining the damages to be awarded. It can make an award which reflects the dimunition in the value of the property as a result of the loss sustained by the damage or it can award the full cost of reinstatement. Unhappily, this choice was not canvassed but I must try as best as I can to come to a determination.

It would seem that an important factor in the decision making process is the intention of the wronged party as regards his plans for the damaged property. So in Hole & Son (Sayers Common) v. Harrisons of Thurnscoe [1971 1WLR 659] the cost of reinstatement was not allowed as there was a finding that the plaintiff in that case had no intention of repairing the damaged buildings. In this case there is no direct evidence as to the intention of the defendant as regards the damaged premises. There is no evidence as to the course of business in which the defendant is involved. Had there been such evidence perhaps it would be open to the Court to infer that on a balance of probability the defendant would have repaired the building for leasing. Indeed, the defendant has gone to some trouble and expense to engage the professional services of experts to demonstrate the cost of reinstatement. But this could be a strategy the sole aim of which is to secure substantial damages. On the other hand, this exercise could be interpreted as a genuine desire to have the premises placed in a condition in which it could be leased to its financial advantage. In all this, the plaintiff has not resisted in any way the path of reinstatement. It is a problem of some difficulty. I hold that the defendant is entitled to the full cost of reinstatement. Since the latter part of 1985, because of the action brought by the plaintiff, the defendant's hands have been tied. What could it do? The matter was before the Court which precluded any initiatives on the part of the defendant by which it could be demonstrated that it intended to lease the premises. The defendant is a subsidiary of Hardware and Lumber Company Limited, a well known and established business enterprise in Jamaica. I assume that since there is no evidence to the contrary, that the damaged premises would not be allowed to remain in its devastated condition. There is evidence as to how much rental would have been received. This suggests that there was the contemplation that the premises would have been rented. As regards the total sum of Nine Hundred and Fifty-three Thousand, Five Hundred and Sixty-seven Dollars ($953,567.00), I will make no deductions. The property will no doubt become more valuable as a result of the replacement and refurbishing. However, I respectfully follow Hollebone v. Midhurst and Fenhurst Builders [1968] 1 Lloyd's Rep. 38, in which it was decided that no such deduction should be made because of the enhancement in the value of the property.

The defendant further counterclaims mesne profits in the sum of Four Hundred and Forty-nine Thousand, Thirty-six Dollars and Twenty-five Cents ($449,036.25). This is the amount which the defendant asserts that an economic rental, that is, rent on the open market, would have provided. John Dolphy of C.D. Alexander Realty Company Limited gave evidence to this effect. In considering this claim, the Court must first determine the status of the plaintiff after the expiration of lease. It seems indisputable that the leased premises falls under the description of a 'commercial building' within the meaning of the Rent Restriction Act ('the Act'). It may well be that these premises qualified for a certificate of exemption under Section 3(1)(E) of 'the Act'. The fact is that the premises is not subject to a certificate of exemption. It follows therefore that these premises are subject to 'the Act'. Now, pursuant to Section 26(i) of 'the Act', a notice to quit bearing the date 19th November, 1985 was served on the defendant. By this notice in which reasons are set out, the "date of determination" was the 30th of November, 1991. No further step was taken by the defendant to enforce its right to possession until the filing of its defence and counterclaim in this action. So until now there has been no judicial determination as to the merits of the cause for the recovery of possession. It is my view that until such an order is made, the plaintiff's status is that of a statutory tennant. As such the defendant is not entitled to economic rental but is confined to rental at the rate of the last year of the lease. This amount is Four Thousand, Four Hundred Dollars ($4,400.00) per month. The period is from the 1st September, 1985 to 31st January, 1991 and is computed to be Two Hundred and Eighty-six Thousand Dollars ($286,000.00).

The order sought for possession in the counterclaim by the defendant is granted. There has been statutory compliance with the Act and the reason given that

> "The term of six years for which the said premises was leased to you expired on the 31st day of August, 1985".

is a valid one.

I will now summarise:-

(i) There will be judgment for the defendant on the claim in respect

of the order sought for specific performance.

(ii) There will be judgment for the defendant on the counterclaim as follows:-

(a) There is an order for possession and the plaintiff is to quit and deliver the premises to the defendant within seven days of the date hereof.

(b) There will be an award of special damages as follows:-

Refurbishing and replacement $953,567.00

Mesne profits (Rental) $286,000.00

There will be interest at 3% on the sum of Two Hundred and Eighty-six Thousand Dollars ($286,000.00), the sum in respect of mesne profits as of the 1st September, 1985 until 31st January, 1991. Interest is limited to mesne profits as in my view the estimates have taken into consideration the inflationary factor. Accordingly, the defendant will in no way be prejudiced. Finally, there will be costs to the defendant on both the claim and the counterclaim, which costs are to be agreed or taxed.