IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1994/J138

BETWEEN	JAMAICA PLANTS LIMITED	PLAINTIFF
AND	COMMISSIONER OF LANDS	1ST DEFENDANT
AND	AGRO 21	2ND DEFENDANT
AND	ATTORNEY GENERAL	3RD DEFENDANT

Miss Janet Nosworthy instructed by Paris Woodstock & Co. for the Plaintiff

Mrs. Susan Reid-Jones and Miss Stacey Ann Bent instructed by the Director of State Proceedings for the 2nd & 3rd Defendants.

HEARD: January 20-24, 27-28 and 30-31, 2003; February 4-6, 11, 2003; December 2, 2004; March 11, 2005 and July 21, 2005

McIntosh M, J.

The Government of Jamaica through an agricultural programme administered by Agro 21, a Government Agency under the Ministry of Agriculture offered to investors certain idle lands which had been divested and were not being utilized for long lease for agricultural use and development.

The plaintiff a limited liability company engaged in farming and agriculture was put in possession of a parcel of agricultural land known as Nonesuch in St. Mary, the acreage of this property was uncertain. Possession was taken by the plaintiff under a handing over certificate from the Commissioner of Lands dated 27th February 1986. On or about 3rd February 1987 the plaintiff and the Commissioner of Lands entered into an agreement in respect of the property.

The lease was for a period of twenty five (25) years with an option to renew for a further term of 24 years.

The handing over certificate described the acreage of the land as being 491 acres however in the Lease Agreement it was described as approximately 789½ acres. This uncertainty as regards acreage was to have been resolved and in a special condition in the lease agreement provision was made for the production by the commissioner of Lands of a survey to be carried out be the Director of Surveys to determine the exact acreage and for determination of the rental based on the acreage as determined by the Director of Surveys. Further there was a provision for adjustment of the annual rent of $54,728.00 stated in the lease agreement (upward or downward) based on the acreage as ascertained by the Director of Surveys.

Up to the time of the trial of this matter no survey plan had ever been produced and the acreage was not ascertained – or if it had been it was never revealed. The rental therefore having been fixed at $54,728.00 that was the only amount required to be paid semi-annually in arrears.

PLAINTIFF'S CASE

The plaintiff took possession of the land, carried out infra structure, repairs and other building works which the plaintiff claims amounted to $743,000.00 and expended other money and incurred other expenses for crops planted in the course of the business for which the property was leased.

It is the plaintiff's case that whilst in occupation of the land it derived income from cane and banana and had planted citrus from which it would earn additional income. Further the plaintiff contends that there was also a limited amount of mango seedlings which could not effectively be utilized.

The plaintiff claims that it was inhibited in implementation of its development plan due to the uncertainly as to the size of the land, that the management of the plaintiff company experienced practical difficulties based on the uncertainty surrounding acreage in terms of crop placement and effective use of the land as well the inability to secure funding and investment. It is the plaintiff's case that it continued to work and use the land albeit in a more limited manner than had been intended by the development plan for the land until the lease was determined by the Commissioner of Lands.

The lease provided for the payment of an annual rent of $54,728.00 bi-annually in arrears. The plaintiff paid rental for the first six months in or about July 1987. No further rent was paid as the plaintiff claims it relied on the representation of an officer at Agro 21 (made to Granville Williams, the Managing Director of the Plaintiff Company) that no further rent should be paid until the precise acreage of the parcel of land had been ascertained and a plan produced. The survey plan was never furnished, the acreage was never ascertained and the rental was not adjusted – this state of affairs the plaintiff claims is a breach of contract.

The plaintiff having paid no further rent in or about April 1991 the Commissioner of Lands served Notice to Quit on the plaintiff for nonpayment of rent.

The plaintiff contends that the service of Notice to Quit when the lease still had 20 years to run, and the commissioner of lands having failed to produced the relevant survey plan to ascertain the acreage and adjust the rental accordingly constituted a material breach of the lease agreement and the plaintiff claims financial loss arising out of the breach.

THE DEFENDANT'S CASE

The Defendant's claim that the action was filed outside the limitation period and is in breach of S.21(1)(a) of the Public Authorities Protection Act. The defendants also contend that the rental Clause set out in the lease was to be observed in any event as that was the whole purpose of a lease. The special condition, that the acreage determined and the rental adjusted upward or downward as the case may be, was included to address the situation where they may be a difference in acreage between what was handed over and what a proper pre-checked plan might reveal and was not a basis for paying no rent whatsoever.

In addition that Miss Carol Sewell, the authorized servant or agent or officer of the defendant allegedly advised the plaintiff not to pay any further rent "until the acreage was firmly established" was no excuse for the non-payment of rent. Miss Sewell had no authority to give the plaintiff any such instructions and

in fact denied in her evidence that she ever did so. In any event the only proper way to amend the written agreement would have been to amend it in writing and not by a casual oral statement. The obligation to pay rent still continued and the plaintiff failed to pay rent for 3½ years.

The Commissioner of Lands was, the Defendant contends, perfectly justified in serving Notice in the circumstances and the true reason why the plaintiff was vacating the premises was not as a result of the notice but because of a serious fire on the property which destroyed the majority of the sugar cane and bananas which the plaintiff was farming.

The main issue to be determined is:

Did the Defendants breach the contract – i.e. the agreement for lease of the property Nonesuch?

The plaintiff contends that no rental was due and owing to the defendant at the date of service of the notice as that payment of rental was suspended pending the ascertaining of the acreage and fixing of the corresponding new rental by the Commissioner of Lands. In addition to this, the plaintiff's claim that it was entitled to set off rentals against the value of improvements, that is, the value of works done by the plaintiff and assessed by Barry Wahmann as $743,000.00 which stood as a credit to the plaintiff materially increasing the asset value of Nonesuch.

The plaintiff insists that Carol Sewell advised them to pay no further rent until the acreage was firmly established. In fact Mr. Williams, Managing Director of the Plaintiff Company suggested that this suspension of the payment of rent was made "either by Mr. Ghaznair of Miss Carol Sewell at Agro 21". Later on in his evidence Mr. Williams stated that it was Miss Sewell who advised the plaintiff to pay no further rent.

Miss Sewell testified for the defendant and completely denied ever telling Mr. Williams to stop paying rent and also in her testimony pointed out how unlikely, given her status and length of service at Agro 21, this would have been and coupled with the detailed description of the hierarchy at Agro 21 which Miss Sewell described in her testimony, the court accepts Miss Sewell as a witness of truth and finds on a balance of probability that instructions to pay no rent was never given by the defendants to the plaintiff.

There is no evidence that it was a term of the original agreement that the covenant to pay rent would be suspended or deleted in certain circumstances and albeit no survey plan was provided by the defendants nor was the correct acreage determined, such a term could not automatically be read into the contract or implied.

HALSBURY'S LAWS OF ENGLAND, 4TH Edition Volume 9 at paragraph 356 states:

> "DETERMINING WHETHER TERM IS TO BE IMPLIED. If there is any reasonable doubt whether the parties did intend to enter into such a contract as is sought to be enforced the document should be looked at and all the surrounding circumstances considered; and

> if the document is silent and there is no bad faith on the part of the alleged permission, the court "ought to be extremely careful" how it implies a term.....
> .....

> Whether a term will be implied is a question of law for the court. A term will not be implied to contradict any express term; and in fact ought not to be implied unless on considering the whole matter in a reasonable manner, it is clear that the parties must have intended that there should be the suggested stipulation. The court has no discretion to create a new contract. Where a contract contains an express obligation by a party to the contract, it is for that party to show that there is some implied term which qualifies the obligation."

In this case there are no circumstances, in the opinion of this court which would serve to contradict the express term to pay rent. This would result in the creation of a new contract which the court has no discretion to create.
Even if the rent were to be reduced or increased both the landlord and the tenant would have to agree to vary the terms and if the lease is in writing an agreement for reduction of rent, if it is to be enforceable, must be evidenced by writing – See HALSBURY'S LAWS OF ENGLAND, 4TH EDITION, VOLUME 27 at paragraph 218.

The obligation to pay rent continued and the fact that the survey had not yet been provided would not have suspended the obligation to pay rent. The letter from the Lands Department to Mr. Williams dated March 25, 1991, signed by Miss Arlene Ferguson (which is Exhibit 5 in this case) stated that he was requested to pay "all sums outstanding on this account – One Hundred and Ninety one thousand Five hundred and forty eight dollars ($191,548.00)". The

rent had not been paid for three and a half years. During this 3½ year period the plaintiff was still farming the land and therefore would be deriving a benefit from it. The money that the plaintiff spent on the farm is irrelevant as what is being considered here is whether the plaintiff had an obligation to pay rent to the Commissioner of Lands.

Although there was uncertainty as to the acreage, this was recognized and dealt with by the inclusion of the special condition and the rental clause remained in force until a pre-checked plan was provided which might show a different acreage. It was not open to the plaintiff to stop paying rent.

The plaintiff claims to have tendered a sum which was rejected but the sum tendered was a smaller sum than that which was owing and the Commissioner of Lands was not bound to accept it.

It is clear from the evidence that the plaintiff continued to farm the portion or those acres of land which were not in dispute and paid no rent for it.

The court finds that the Notice to Quit was justified and not in breach of the contract which was made between the plaintiff and the defendant and in fact the inference to be drawn from the evidence is that the plaintiff did not vacate the property because of the notice to quit. The evidence is that after speaking to Mr. Monroe, the Commissioner of Lands, about the Notice to Quit, Mr. Williams traveled to the United States to purchase a unit for the farm, he also continued his business "traveling back and forth on the farm supplying Long Pond and Bernard Lodge with cane and exporting bananas".

Obviously he quit because there were two fires, the second fire being the more devastating which destroyed everything and made it impossible and unfeasible for the plaintiff to continue or carry on business.

The court finds on a balance of probability that the defendant was not in breach of the contract and the plaintiff's claim fails.

The projected proposal in developing the project was submitted to Agro 21. The proposal submitted by the plaintiff and on the basis of which the award was made was for pimento, papaya, citrus and orchard crops but the plaintiff immediately started to farm sugar cane and bananas – sugarcane, admittedly by Dr. Hamilton, "was a big problem".

A number of witnesses were called by the plaintiff to testify as to the development of the project and special damages. The court does not consider it necessary to analyze or deal with this evidence having regard to the court's finding as stated above.

Judgment for the defendant with costs to be agreed or taxed.