IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL 1998/Mc339

BETWEEN	OLETHIA McGIBBON	CLAIMANT
AND	CARICOM DEVELOPMENT LIMITED	1ST DEFENDANT
AND	ISLAND HOMES LIMITED	2ND DEFENDANT

Mrs. Ursula Khan instructed by Khan & Khan for the claimant.

Maurice Manning and Ms. Ayana Thomas instructed by Nunes Scholefield Deleon & Co. for the defendants.

Heard: 6th, 14th and 15th April and 27th October 2004

Campbell, J.

Olethia McGibbon started her business selling on the streets, from where she moved into the arcade. On the 1st of June 1996, she entered into a lease agreement with Caricom Development Limited for the lease of shop # 89 in the Spanish Town bus terminal. The lease was for a period of one year and was the first of three one-year terms that McGibbon would occupy in shop #89. Pursuant to the lease agreement, she deposited 12 postdated cheques; these were to cover maintenance and rent. During the first term, the maintenance charges were increased. In a letter dated 19th August 1996 McGibbon was advised as follows:

> "This serves to inform tenants that your maintenance cost will be increased as at August 1, 1996 to $250.00 per sq. ft. With this increase we seek to satisfy all your security concerns."

McGibbon claimed not to have received this letter. There were two successive lease agreements, each for a period of one year. The leases were similar, and each contained a clause 3 Guarrantee - Condition Precedent.

> "As condition precedent to the coming into force of this lease, the lessee shall provide the lessor with a Guarantee which secures the due and punctual payment of the rent payable throughout the term of the lease. This Guarantee shall be in a form acceptable to the lessor and from a financial institution acceptable to the lessor. In lieu thereof, the lessee may pay over to the lessor a security deposit in an amount equivalent to the total sum of the rent payable for the first twelve months of the term. This cash advance shall constitute security for the lessee's faithful performance of its obligations hereunder. If the lessee fails to pay rent or other charges due hereunder or defaults with respect to any provision of the lessee, the lessor may apply or retain all or any portion of such deposit for the payment of any rent or other charge in default. In addition, the same shall be used in and towards effecting repairs to the leased premises and reinstating or replacing such of the lessor's fixtures (if any) as may require reinstatement or replacement if in accordance with the lessee's covenants herein contained, such repairs, reinstatement replacements would have been effected or carried out by the lessee. Such deposit or so much thereof has not been applied by the lessor shall be returned to the lessee at the expiration of this lease."

The lease at Clause 5 also provided for the payment of maintenance charges by the lessee. These were to be calculated in accordance with a formula of one twelfth of the operating cost of the land and building. The operating cost being that sum which would enable the lessor from time to time during each year to pay all of the expenses for the services incidental to his obligations under the lease.

The maintenance charge was to be paid on the same day fixed for the payment of the rent. The lessor would estimate the monthly maintenance charges at the commencement of the year and from time to time as was necessary. As soon as the actual maintenance charge was known at the end of the year and the lessee was advised, either a refund or, where the estimate was less than the actual monthly maintenance, pay the difference.

The lease required that the lessor should, whenever fixing the estimated monthly maintenance charge or the monthly maintenance charge, give the lessee full and adequate figures and explanations. The lease obliged the lessor to provide the certificate of independent auditors to demonstrate that the computation of the monthly maintenance charge was arrived at in compliance with the lease agreement. The certificate issued by the independent auditors is binding on the parties.

It was agreed in a Statement of Fact and issues that:

(I) During the currency of the 1st lease, i.e., June 1995 to May 1997, the second defendant increased the maintenance charge payable by the claimant in respect of the said shop 89. It had requested and obtained post-dated cheques from the claimant for the entire year.

(II) On the evening of the 1st September 1998 during the 3rd lease for the period June 1998 to May 1999, the second defendant padlocked shop 89 on the ground that money was owing by the claimant.

(III) There were hypothecated funds with Victoria Mutual Building Society to cover security deposit required by the lease.

An agreed issue for the determination of the Court was;

Whether the closure was lawful and justified

I think it was unlawful and unjustified. At common law a formal demand must be made for rent in arrears unless otherwise stated in the lease or dispensed with by statute. This formal demand must be made upon the occupier in the absence of the lessee.

The lease allows for a re-entry of the premises if the rent reserved remains unpaid for a period of 15 days after becoming due and payable, whether legally and formally demanded or not. It should be noted that, before re-entry can be effected, the rent has to be determined to be "due and payable". In This case, there is no agreement on this central vital pre-condition to re-entry. The common law formal demand requirements are therefore applicable to the lease. The clause

requires a wait of 30 days after service of the written notice. The right of re-entry only arises when the breach is not remedied in that period.

The notice that was issued is dated the 21st August 1998, and re-entry was effected on the 1st September 1998. The required period of 30 days had not elapsed. In Cheshire Modern Law of Real Property, Tenth Edition, at page 392, it is noted that the usual practice at the present day is to sue for recovery of possession instead of making a re-entry, for, as Wiles, J. said,

> "The bringing of an action of ejectment is equivalent to the ancient entry. It is an act unequivocal, in the sense that it asserts the right of possession upon every ground that may turn out to be available to the party claiming to re-enter."

Another reason that compels me to the view that the supposed re-entry was unlawful was the inability of the lessor to evidence the service of the notice. Clause 10.10 requires delivery and receipt to be proven by the delivery to the *lessee at its address*. The notice was not addressed to the lessee but to shop #89.

Re-entry of the premises or forfeiture of the lease is a security for the payment of rent. The lease, however, provided other means to secure the payment of rent. For example, the lease provides at clause 7.1 that if the rent is not paid on the due dates, then interest on the arrears becomes payable at the highest rate payable on overdraft facilities from the lessor's commercial banker. A certificate

from the lessor's banker being conclusive as to the rate applicable. This ensures that there is no economic loss to the lessor due to late payments of rental. The lessor did not avail himself of this provision. The claimant had also deposited twelve (12) post-dated cheques with the lessor's office.

The lease also obliged the lessee as a pre-condition to provide a security – deposit to be used towards effecting repairs and towards any sums outstanding in respect of rental at the termination of the tenancy.

This Guarantee provided by Clause 3 **was to "secure the due and punctual payment of the rent or other charges". The lessor was therefore enabled to apply or retain all or any portion of such deposit for the payment of any rent or other charge in default**. The lessor failed to utilize the provision of this Gurantee before the lease was forfeited.

Ms. McGibbon in pursuance of this Gurantee had advised Victoria Mutual Building Society that they were authorized to hold the sum of $93,564.99 on behalf of the defendants whilst the Hypothecation Agreement was in force. That agreement was in force on the re-entry of the lessors. Withdrawal slips signed by McGibbon for this account was lodged with VMBS to facilitate withdrawals from the account by the defendants. The ease and expedition of the procedure was demonstrated after the re-entry of the lessor, with a withdrawal of $23,000.00 from the account.

Even if the lessor had a right of re-entry, and I find there was none, it would have been inequitable for him in the circumstances of this case to take advantage of forfeiture.

The two notices that preceded the notice of 21st August 1998 were ambiguous as to the due date for payment of the rent and maintenance charges. There was no correction of the ambiguity by the defendants. The notices dated 24th February 1998 and 18th May 1998 both express that the balance fell due on the 1st and 15th. Ms. Anderson, the defendant's property manager, testified that there was no date expressed in the agreement for the payment of maintenance. However, Clause 6(2) obliges the lessee to pay to the lessor the maintenance charges on the date fixed for payment of the rent. Anderson testified that the date "the 1st" in her letters to McGibbon was not advising McGibbon of the date her rent was due but was addressed to other lessees whose rents were due on that date. Shown her letter of 21st August 1998, she was unable to say what period the arrears of rent and maintenance claimed therein represented.

The notice on which the lessor purports to act does not conform to Clause 10.3 of the lease agreement; the re-entry is therefore invalid. The notice was therefore invalid. As a result, the closure of the shop, and the re-entry was unlawful. The necessity for conformity with the common law and the provisions of the contract was demonstrated by Carberry, J.A. in Golden Star Manufacturing

Co. v Jamaica Frozen Foods Ltd., a case in which the property was not exempted from the Rent Restriction Act.

> "The relationship is one that is created in the first place by contract, and that contract (or lease, if there is one) forms the inception of the relationship and governs it, subject to the controls and alterations introduced by the Rent Restrictions Act. Thus the common law rules apply to notices given purporting to determine the contractual tenancy, those/these may be varied by the parties in their contract. Subject to such special terms, the notice given purporting to determine the contractual tenancy must be of the appropriate length, and on the appropriate day, be given to the appropriate person by the appropriate person. In short, before turning to the Rent Restriction Act, when it is sought to terminate an existing tenancy the person seeking to terminate it must show that the contractual tenancy, the basis of the original relationship between the parties, has been ended by an effective legal method." (Emphasis mine).

Where the Act has been exempted, the lease agreement constitutes the basis for determination of the tenancy. The requirement for a valid notice, even where the tenant pays no rent was underscored by Rowe, J.A. in Richards v Walker (1982), 19 J.L.R. 236, where at page 237 he said;

> "I am of the opinion that a landlord who has not given proper notice to quit and deliver up the premises to a monthly tenant who has not paid his rent has no right of re-entry. This is because at common-law it is only on the determination of the tenancy whether by effluxion of time forfeiture or otherwise that the landlord's right to peaceable re-entry rises. In the instant case Mr. Walker owed an inordinate amount of rent but his tenancy was

not determined because the notice to quit given by Mrs. Richards was defective."

The Guarantees' objective was to secure the "due and punctual payment" of rent. Punctual payment means payments done on time, i.e., on the due date.

In order for the right of re-entry to arise, the rent is required to be unpaid for a period of fifteen (15) days. Naturally, if punctual payments were made pursuant to Clause 3, such a period of delay in payment cannot come about. Such a period of delay would not come about unless the security deposit has been exhausted or the lessor is unable to access the funds in the Hypothecated Agreements. Both provisions, i.e., the obligation to provide a security deposite and the right of re-entry, are to be read together.

A proper construction of the lease obliges that the Hypothecated funds should be called on before the right of re-entry was exercised. In equity, the provision for re-entry for non-payment of rent is regarded as merely security for non-payment. So, providing the lessor can be put in the same position as before, the lessee is entitled to be relieved against the forfeiture of payment of the rent and any expenses to which the lessor had been put. (See Hill and Redman Law of Landlord and Tenants - Tenth Edition, at page 435). The funds at VMBS were adequate to meet the claimed arrears and should have been resorted to ahead of the exercise of the right of re-entry.

Whether Ms. McGibbon was in arrears with her rent/maintenance

Having commenced the lease, the maintenance charges were increased to $250 per square foot. The letter of the 19th August 1996 announcing this increase is terse and inadequate. The lessee could not from this letter ascertain how the increase has been determined, as is her right pursuant to the terms of the lease.

As a result of the increase, McGibbon maintenance was actually increased by $3,666.66 to $8,333.33. However, this computation is nowhere evidenced as having been communicated to McGibbon. The failure to provide McGibbon with full and adequate figures is in breach of the provisions of Clause 6 of the lease. McGibbon testified that in order to ascertain the figures payable, she made inquires at the office. It is clear that the meeting of Mr. Lake with the tenants, as well intentioned as that may have been, was inadequate to provide each lessee, such as McGibbon, with full and adequate figures. There is nothing in the evidence before the Court to indicate how the monthly charges were determined. Clause 6.3 recognizes that in order to determine the lessor's operating cost, which is a key factor in the calculation of charges, it would require the services of an independent auditing professional. The property manager conceded in cross-examination that McGibbon was never given any computations as required by the lease.

Clause 5.3 provides:

"**Delivery of Computation to Lessee**

> The lessor shall, whenever fixing the estimated monthly maintenance charge or the monthly maintenance charge, provide to the lessee **full and adequate figures and explanations so as to enable the lessee to ascertain how the charge has been ascertained. The certificate of independent auditors retained by the lessor that the monthly maintenance charge has been computed in accordance with this agreement and is correct** shall be absolute and binding upon the parties." (Emphasis mine)

On the defendants' case, the evidence is contradictory and confusing as to the amount owing. Several sums are given in separate correspondence, documents and the defendant's counsel's submission.

Mr. Manning, in his final arguments, submitted that McGibbon fell into arrears totaling $32,999.94 from September 15, 1996 to May 15, 1997. In their defence, the defendants traversed Gibbon's allegation that the amount owing was agreed at $23,000.00, by alleging that what was agreed was the sum of $47,333.33, and of that amount $14,666.64 was outstanding.

However, inexplicably at paragraph 7 of the defence, the allegation is that the "shop was padlocked on September 1, 1998 for arrear of rental and maintenance which at the time stood at $9,970.00 and $21,500.29 respectively" (a total of $31,470.29). In contrast with these two positions, Exhibit 17, (the defendants' letter dated 21st August 1998) state that the arrears amounted to

$17,448.00 and maintenance $25,388.28 for a total of $42,836.28. Exhibit 17 contradicts the defendants' later letter dated 4th November 1998, (ex. 19), in which Anderson writes, "At the date of closure of the store, Ms. McGibbon had an outstanding sum of $57,501.28".

Nonetheless, Anderson, in her letter to VMBS dated 6th November 1998, stated that she exercised the lessor's right of call pursuant to the Guarantee of the lease, for the sum of $23,276.28. There was no evidence of any payment made by McGibbon that would have caused the sum owing of $31,470.29 (as per para 7 of defence) at the time of padlocking, or of $57,501.28 (per ex. 19) to be reduced to the amount of $23,276.28 called from the hypothecated fund. There is no explanation how, in light of her demand for payment of $42,836.28 (ex. 17), she only called $23,276.28 from VMBS. Why did she not demand the sum of $57,501.28? Under cross-examination, the defendants' property manager admitted that she cannot say whether the sum owing was more or less than the stated sum of $42,836.28 (ex. 17), or for which period that sum represented.

On the other hand, Ms. McGibbon has consistently maintained that she deposited 12 post-dated cheques with the defendants and the excess created by the increase amounted to an agreed sum of $23,000.00. She admitted that two of her cheques were dishonoured, but claims that she immediately tendered cash in

satisfaction of those cheques. Ms. Anderson has admitted that McGibbon did tender cash for the returned cheques and did pay for the bank charges.

Mr. Manning, in addressing the failure of the defendants to issue computations of the maintenance charges, submitted, 'This is a matter of calculation and the claimant, as a businesswoman, must have been capable of determining what was her shortfall.' This submission ignores the provision of Clause 6 that obliges the Landlord "as soon after, at the end" of 1996 to determine "the monthly actual maintenance charge".

Further, the evidence is that the first defendant's managing director, Mr. Lake, summoned the tenants to a meeting which McGibbon attended. McGibbon, in cross-examination, said that the meeting was held towards the end of August 1996 and that there was a discussion between the tenants and Mr. Lake about increases in the maintenance charges. She denied that she had received notification of the increase. In any event the letter that purports to advise McGibbon of the increase in maintenance charges is not in conformity with Clause 5.3, as it does not contain the certificate of the independent auditors. Further, the meeting of Mr. Lake with the tenants would have been inadequate to provide all the tenants with the full and adequate figures that Clause 5.3 stipulates. There were 89 tenants who occupied shops of varying sizes. McGibbon says that in order to ascertain the figure, she made inquires at the office.

It was not for McGibbon to take steps to ascertain what the figures were. The defendants were obliged to provide the certificate of an independent auditor to assure McGibbon that the figures were computed in accordance with Clause 1. There is nothing in the evidence before the Court to indicate how the monthly charges were determined.

Damages

The claimant claims damages for goods that were damaged during the period of closure of McGibbon's shop from the 1st September to the 20th October 1998. The damage to the goods was as a result of a leak of water through a common wall which shop #84 shared with a public bathroom in the complex. These leaks were not denied by the defendants, neither were there denials that they had received complaints in relation to them. An additional source for the damage to the goods to the claimant's shop was dust from road construction that entered through a window that was improperly closed. The claimants had the damaged goods photographed on the day the padlock was removed. The Court had a view of the damage goods by way of photographic exhibits. A representative of the defendants was shown the damage by McGibbon. McGibbon testified that she prepared a list of the damaged goods the same day. The list was exhibited.

Mr. Manning attacked the special damages claim on the ground that it was not strictly proved. Photographs were taken of the contents of the shop on its reopening. Ms. Christian, who was called by McGibbon to observe the damage, is still employed to the defendants but was not called to refute the claim for damage goods. There was no cross-examination on the list produced. I would however

reduce the claim by twenty percent to bring to account the sale of goods that the claimant testified that she held of damaged goods from the shop. The cost price of damaged and unusable goods is particularized at $1,165,724.00

An award of $932,579.20 is made for special damages with interest thereon at 20% per annum from 1st September 1998.

There was no strict proof of the charge for freight, customs duty and travel expenses. Those claims are disallowed. There was no proof other than the bald assertion of loss of profit. I am therefore unable to make an award under that head.

In the respect of General Damages, the contract of lease had four months to run, the loss of profits would have been of assistance to establish the extent of the General damages. As I have already indicated, there is no sufficient proof of profits. Nominal damages for breach of contract are awarded in the sum of $40,000.00 at the rate of 6% per annum from 1st December 1998.

The Defendants to pay the cost, such cost to be taxed if not agreed.