IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. N-127 OF 1998

BETWEEN	**N.C.B. INVESTMENTS LIMITED**	**PLAINTIFF**
A N D	**RINELLA BINNS HARTY**	**DEFENDANT**

Heard on July 11, 12, 18, 2002 and May 15, 2003

Mr. P. Brooks and Miss Catherine Minto instructed by Nunes, Scholefield DeLeon & Co. for the Plaintiff
Mr. P. Bailey and Mr. A. Terrelonge instructed by Patrick Bailey and Company for the Defendant

ANDERSON: J

The Plaintiff, N.C.B. Investments Limited, one of the companies in the N.C.B. group of companies, has brought this suit against the defendant to recover a liquidated sum of money being the amount due as unpaid rental, unpaid maintenance and electricity charges. As amended and further amended, the plaintiff's specially endorsed Statement of Claim claimed specific damages in the sum of Six Hundred and Eighty Two Thousand, Sixty-nine Dollars and Sixty-six Cents, ($682,069.66), together with interest at "one per cent (1%) above the Commercial Banks' rate of interest" and costs. The rent being claimed by the plaintiff was in respect of the rental of a unit, G107, at the Bay West Shopping Centre, Montego Bay, in the Parish of St. James, which shopping centre had been constructed by the Plaintiff company.

There was no dispute between the parties as to the fact or period of the occupation of the unit in question, nor is there any dispute in relation to the amount being claimed as

outstanding and due to the plaintiff herein, although there was an allegation by the plaintiff that the rental charged was "excessive".

In light of the fact that there is no disagreement on the amount claimed by the plaintiff in its claim, and the fact that the defendant was merely saying that the rent was "excessive", and also making a counterclaim, it was decided after hearing submissions, that it would be appropriate for the defendant to put her case first.

The defendant's evidence was to the effect that she had taken possession of the shop in question in June 1998, after she had been induced by the misrepresentation of the plaintiff's servants or agents as to the particular tenants who would be occupying the shopping centre. She alleged that she had been told, not only that a branch of the National Commercial Bank would be opened in the shopping centre, but that there would be a branch of Lee's Fifth Avenue, a leading department store, as well as a branch of Homelectrix and Rooms. These would represent what are commonly described as "Anchor" stores. It was pleaded that this would have provided a "pool of potential customers" for her shop. She said, however, that over the time she was in occupation, business remained slow and she attributed this to the absence of the promised "anchor" establishments like Lee's Fifth Avenue and Homelectrix and Rooms. She did not indicate why she came to this conclusion rather than blaming the slowness of business on, for example, the condition of the road which she also referred as a problem.

She said that in early 1996, having paid a deposit on the shop, she was later given possession, according to her, in June of that year. There was later to be direct evidence which contradicted the defendant's account as to when she received the keys. Exhibit 5,

a letter signed by the defendant on April 23, 1996 confirms her receipt of the key for unit G107. At that time, according to Mrs. Harty, the shopping centre was still under construction, with a few tenants, maybe four or five, and traffic on the street on which it was located was severely and adversely affected by the fact that sewage mains were being laid thereon. This was also later contradicted by the evidence of Ms. Yvonne Wright, who testified that the construction of the centre was completed in 1995. She says that having taken possession of the shop which was basically a "shell unit", she proceeded to install fixtures and generally to equip the shop as an "upscale enterprise" catering to the "high end" of the market. She completed this process and opened her shop in or around November 1996, and operated the business until August 1998.

It is the defendant's contention that on or around the 5th day of August 1998 the plaintiff through its agent Mr. Karl Aird, and purportedly acting under the terms of its lease, and because of the defendant's failure to meet her rental and other obligations, re-entered the premises and took back possession of the unit, by evicting the defendant and padlocking the door to the shop, thereafter transferring the defendant's goods to another shop from where she eventually recovered some of her possessions. The defendant alleges that this eviction was unlawful under the provisions of the Rent Restriction Act; that there was a "constructive seizure" of her goods giving rise to an illegal distress for which she was entitled to recover damages, and which allegations were the subject of her counterclaim.

The defendant also counter-claimed against the plaintiff in respect of losses purportedly occasioned by eviction. This related to lost stock and the alleged cost of improvements

she had made to the rented shop, some of the items used therein, having been allegedly damaged or destroyed.

The defendant gave evidence that she occupied the shop in the Bay West Shopping Centre for about twenty-six (26) months, during which time she conceded that she had paid rent for only about ten (10) months. She claimed to have complained to her landlord on occasions about the excessive rent, and the fact that the maintenance charges did not seem to be justified. Her evidence was that in or around August 5, 1998 the plaintiff's agent, Mr. Karl Aird, came to the shop and advised her that he had instructions to evict her because of her non-payment of rental and other charges. She pleaded with him, advising him, inter alia, that she was negotiating re-financing through the Bank of Nova Scotia. She said that he said he would speak with his principals to see what could be done, but he returned the following day, evicted her and padlocked and chained the doors of the shop.

Mr. Aird's evidence below was that his first visit was on August 3, 1998, and his return was in fact two (2) days later, on August 5, 1998. The defendant's evidence sought to support the submission that not only was her eviction unlawful, but that her goods in the shop had been the subject of an unlawful distress, for which she was entitled to redress, and this was part of her counterclaim. The defendant called one (1) witness in support of her defence to the plaintiff's claim and also in support of her counterclaim for damages in respect of her fixtures in the shop which she alleged were destroyed by the plaintiff's agents. That witness was Mr. Uther Brown, a construction engineer and holder of a diploma in Architectural Technology.

He testified that he had worked on the refurbishing of the shop for the defendant in 1996 and that the final cost of that exercise was of the order of One Million Two Hundred Thousand Dollars ($1.2 million). He described the finished area as "exquisite" and a "merger of European and American" styles. Mr. Brown said that he had assessed the damage to certain items, which were previously in the defendant's shop in her garage at her home and estimated the cost of replacement would be around Nine Hundred Thousand Dollars ($900,000.00). He also assessed the damage to showcases at One Hundred and Twelve Thousand, Five Hundred Dollars ($112,500.00), damage to mannequins at Twenty Thousand Dollars ($20,000.00), damage to the surveillance camera at Fifty Six Thousand Two Hundred and Fifty Dollars ($56,250.00) and a mahogany desk at Eight Thousand Dollars ($8,000.00). These costs, he indicated, were the sums necessary to replace or repair the items which he had viewed.

Under cross examination by counsel for the plaintiff, he agreed that the values and his consequential estimates were based on the original costing done by someone else, a quantity surveyor named "Simon". Further, he had also included items which he did not see at the defendant's home, but which he knew had been in the shop prior to its being closed. Significantly, there is nothing in his evidence to say when precisely he last saw them there. He was also constrained to admit that the figures he was using in his testimony, admittedly based upon the costing of the quantity surveyor, would itself have included a "margin" or "mark-up" by the surveyor. Also during the cross examination the witness conceded that some of the items for which he had provided estimates were salvageable and therefore would have had a residual value, though this was not taken into account in his assessment. He also agreed that some of the items in the original

quantity surveyor's report had been changed before the completion of the refurbishing. Perhaps the most significant aspect of his testimony as it affected the defendant's counterclaim was his admission that he viewed the items in question in November 1998, several months after the August 5 1998, closure of the shop.

The witnesses for the plaintiff gave markedly different accounts than those given by Mrs. Harty. Thus, for example, Mr. Karl Aird, the main witness for the defendant and the person who had carried out the eviction, indicated that he first went to the shop for the purpose on August 3, 1998. On that day, after speaking with the defendant and acceding to her pleas, he said he would speak to his clients. He returned to Kingston and reported to the plaintiff the following day when he received further instructions to proceed with the eviction. At the time he carried out the eviction of the defendant, the defendant was allowed to lock the door and keep her key, while he had put a chain around the door handle. He had possession of the key to the padlock on the chain and the door key was in the possession of the Plaintiff. There was accordingly, in his view, dual control as neither could get into the shop without the cooperation of the other, absent the use of a locksmith. He did, at the same time, allow her to remove her papers, personal effects and she also took some stock. He also invited her to come and collect the rest of her stock and fixtures whenever she wanted, but despite his request and even firm arrangements to meet with her for her to collect her goods, she had failed to do so. The stock was later moved to another location (an empty shop in the centre) from where the defendant had later collected it. He denied that in the move anything was damaged save for the base of a mannequin which fell off and a glass shelf that he believed was broken in the moving of the contents of the shop. He testified that the surveillance

camera which the defendant had in the shop was not damaged. Nor, he said, was any stock removed from the empty shop in which it had been later securely locked from the time he had removed the contents from unit G107 on the 13th August 1998, until the 28th of October 1998, (a date he later corrected to November 17, 1998,) when the defendant finally collected her belongings.

The only other witness called for the plaintiff was Ms. Yvonne Wright, the plaintiff's property manager for the Bay West Shopping Centre. I also found Ms. Wright to be a credible witness. She testified that she became manager of the shopping complex in April 1996. She was the person who gave the keys to unit G107 to the defendant, and this was done on the 23rd April 1996, as evidenced by a letter signed by the defendant and tendered into evidence. (See Exhibit 5). According to her evidence, she could not have made any representation as to the names or quality of prospective tenants to the defendant which induced her to enter into the lease agreement, since by the time she first met Mrs. Harty to deliver the keys to shop G107, Mrs. Harty had already signed and returned the offer letter dated February 27, 1996 from the plaintiff, sometime around March 19, 1996. Exhibit 3 was the letter which had been sent to the defendant, and on which the defendant had signified her agreement to the terms of the offer at a meeting at the Plaintiff's offices on Trafalgar Road in Kingston, at which time she had also paid the deposit. This is an important piece of evidence since that meeting took place in March before she had met agents of the defendant, Yvonne Wright, Stephanie Gordon and Mr.Wint whose representations she now claims, had induced her to enter into a lease of the premises. Mr. Brooks reminded the court of this important piece of evidence in his closing. Between April when the key was delivered and June 1996,

because the plaza was new, there was a moratorium on rental. Contrary to defendant's assertions, the shopping center had about sixteen tenants at the time the defendant opened her doors to the public.

As property manager the witness was au fait with the rental paid by the tenants and the cost of maintenance and electricity. She said that at the time when the defendant was evicted, there were some thirty (30) stores operating there. She also testified that, contrary to the allegations of the defendant, the shopping center operated twenty-four (24) hour security service, janitorial services, garbage collection, sanitary conveniences and general maintenance and utilities for all the public areas. Ms. Wright confirmed the amounts owed by the defendant and also stated that at the time she was evicted, the defendant was entitled to a rebate of One Hundred and Thirty Two Thousand, Two Hundred and Four Dollars and Eight Cents ($132,204.08) in respect of overpaid maintenance charges. She was also entitled to a refund of Two (2) month's security deposit in the sum of Forty Six Thousand Five Hundred Dollars ($46,500.00) and electricity deposit of Five Thousand Dollars ($5,000.00). (It was as a result of these concessions that the plaintiff sought leave to amend its statement of claim to bring it in line with the evidence). She also contradicted the evidence of the defendant as to the lack of vehicular access to the shopping center from Harbour Street, which the defendant had stated was blocked for "over one (1) year". In fact, access was never closed off from Harbour Street, although there were times when the street was reduced to only one (1) lane. In truth, the defendant herself had been forced to admit that some persons did in fact park within the Shopping Centre.

Ms. Wright also gave evidence as to the exemption of the premises from the provisions of the Rent Restriction Act. She said when she took up her position in 1996 as manager of the complex, she was briefed by Mr. Stewart and Ms. Stephanie Gordon and was made aware that there was a pending application for exemption from the provisions of that Act. The exemption eventually was received in May 1998 and it was after that receipt that the Notice to Quit upon which the Plaintiff acted, was issued.

In so far as the evidence of the defendant is concerned, I formed the view that it was not credible and ought not to be relied upon. Indeed, her insistence that she had received keys in June 1996 even when confronted with the evidence of the letter which she had signed dated April 23, 1996, deals a serious blow to her credibility. With respect to the first factual issue upon which I must decide, I do not believe, on a balance of probabilities, that the defendant was made any representation of the nature she alleged, nor that, even if she was, that this, in any way, induced her to enter into the lease agreement for the shop. At the very highest, I would hold that any assertions allegedly made as to prospective tenants were mere assertions as to future developments. As is stated in **Treitel "The Law of Contract", Seventh Edition,** 1987: "The general rule is that no relief will be given for a misrepresentation unless it is a statement of *existing fact.* There may, therefore, be no remedy if the statement falls into one of the following categories-

- ❖ Mere Puffs
- ❖ Statements of Fact and of Opinion
- ❖ Representations as to the future".

In this regard, I refer to the evidence given by the plaintiff's witness, Ms. Wright, and referred to above, concerning when she first met the defendant.

From the defendant's evidence, it seems to me that there was, if anything, nothing more than mere "puffing", as to the quality of occupants who would be in the shopping center. More importantly, there was nothing in the defendant's evidence which indicated that, assuming such other prospective tenants as she alleged, that they were going to take up occupancy at any particular time or more importantly, that she in any way relied upon such representations. There was, incidentally, evidence that a branch of the National Commercial Bank was later opened in the shopping centre. The defendant's evidence is that despite the condition of the roadway and the shopping centre still being "under construction", she started to refurbish the shop and to outfit it with "high end" products with brand names like Gucci and St. Laurent. She also testified that she outfitted her shop beautifully, and it included a "mood-enhancing corner". According to the defendant's own evidence, the slowness in the turnover of stock at the shop led to her being able to pay her rent only "from time to time". Further, the cost of the rent and maintenance together severely affected the viability of the business carried on by the defendant. These factors seem to me to be far more critical to the problems which the defendant encountered, and have nothing to do with any representations.

Karl Aird was a witness who impressed me with his candour, and as one who was sympathetic to the defendant. He denied any suggestion that he had levied distress on the goods of the defendant and I hold that, as a matter of law, there was no distraint and I accept the evidence of Mr. Aird as being, on a balance of probabilities, far more credible than the defendant, in respect of the way the contents of the store were dealt

with. I also feel I can place no weight on the evidence of Mr. Uther Brown given that he was only seeing the goods and fixtures in question several months after the eviction had taken place. There is no connection which the court can reasonably make given the considerable lapse in time, between the damage, if any, and the plaintiff's responsibility therefor.

In light of the foregoing I find, that the defendant has failed, on a balance of probabilities, to prove the case on her counter-claim, both in respect of its allegations concerning the representation, and the specific claims for damages. Specifically I find the following facts :-

a) There was no evidence to support a finding that there was any misrepresentation inducing entry into the contract

b) There is no credible evidence in support of the claim for special damages, and the testimony of Karl Aird is to be preferred to that of the defendant on a balance of probabilities. It is trite law that a claim for special damages must be strictly proven.

See **ROBINSON AND COMPANY LIMITED V JACKSON AND LAWRENCE [1969] VOL. 11 JAMAICA LAW REPORTS PG. 450**. See especially the judgment of Hercules J.A. (Ag) (as he then was), at paragraphs B-F on page 453, in discussing the judgment of Fox J. in an assessment of damages.

> "Then he proceeded to deal with general damages and awarded £1,000 under this Head—a total judgment of £2,313 4s. 9d.
> There is no doubt that the respondent can be entitled to damages for loss of earnings he has suffered by reason of his injury up to the date of trial as part of his special damages. But those damages must be pleaded and strictly proved. In ***Hayward v. Pullinger & Partners, Ltd.*** (5), Lord

> Devlin in dealing with special damage stated ([1950] 1 All E.R. at p. 582):
>
> "I think the true position is that, unless they are contained in the statement of claim, evidence leading to damage in respect of which damages are claimed cannot technically be relied on that trial."
>
> Then in the case of ***Bonham-Carter v. Hyde Park Hotel, Ltd.*** (6) Lord Goddard, C.J., declared ((1948), 64 T.L.R. at p. 178):
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> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.'
>
> They have to prove it."
>
> Indeed the learned trial judge recognized this principle and set it out at pp. 24, 25 of the record as follows :
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> "For as Lord Macnaghten said in ***Ströms Bruks Akite Bolag v. Hutchinson*** [1905] A.C. at pp. 525, 526), 'special damages are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly.' In my judgment, the plaintiff's claim falls within the ambit of this test, and of the definition laid down by Lord Macnaghten, and was therefore properly pleaded as special damages."

I accept the evidence of Karl Aird as a credible witness, in preference so that of the defendant, in respect of damage to property, that is, the mannequins and a broken glass shelf. Even in the face of this admission, I have no evidence as to the cost of the damaged items, and can make no award therefore. It is interesting to note that the defendant herself gave no evidence on the alleged damage to the surveillance camera. This was only mentioned by Mr. Uther Brown, but then, he conceded he had no expertise in the area of this type of technology, and so there is no proven loss here.

Finally with respect to the stock, the purported inventory to ground the claim of the defendant, was prepared almost two (2) months before the eviction. There is regrettably no objectively reliable direct evidence given on behalf of the defendant in relation to her

counterclaim for loss of stock. Indeed, Mr. Bailey in his closing, conceded he could not pursue a claim in relation to loss of stock.

c) There was no "constructive seizure". I do not accept the submission that there was "constructive seizure" of the defendant's property (as submitted by Mr. Bailey), the effect of which was to establish "distress". There is no evidence that the plaintiff, through its agents, levied distress upon the goods of the defendant.

d) The eviction of the defendant from unit G 107 of the Bay West Shopping Centre was the result of a lawful Notice To Quit dated June 24, 1998 (Exhibit 6) which terminated the tenancy as of July 31, 1998, (the defendant being in arrears with her rent), and lawfully effected under the terms of the plaintiff's agreement with the defendant and in conformity with the Rent Restriction Act, being exempt from the provisions of that Act. Nor do I accept, as a matter of law, as Mr. Bailey submitted, that an eviction if done negligently makes it wrongful. No authority was cited for this proposition.

e) The validity of the Exemption Notice, exempting the property from the provisions of the Rent Restriction Act, I hold to be established. Insofar as that Act is concerned, I find that the exemption notice issued by the Rent Assessment Board on April 14, 1998 properly exempts the plaintiff's property from the application of the Rent Restriction Act. I accept that there was an application for the exemption before Ms. Wright took up her position in 1996, and therefore before the plaintiff received her key in April of that year. I also agree that, having provided for exemption from the operation of the Rent Restriction Act to be certified in the way it has, parliament had

> provided the basis for the court to accept the certificate without going behind the certificate. I accept plaintiff counsel's submission that, not being bound by the Rent Restriction Act, the plaintiff was entitled to use its common law remedy to re-enter into possession and to recover possession on the basis of the Notice to Quit which had expired and the tenant's default in not paying her rent.

Dealing specifically with the issue of whether the plaintiff, having taken control of the defendant's stock and moveable effects, had made itself a bailee of that property, I am of the view that it had. However, I accept the submission that the only duty owed by a gratuitous bailee is to act with "reasonable care". Having accepted the evidence of Karl Aird as to the way the plaintiff's property was secured between the eviction and the return of that property, I find on evidence that there had been no negligence on the part of the plaintiff.

In light of the above, I give judgment for the plaintiff in the sum of $682,069.66 on its claim, as well as on the counterclaim. On behalf of the plaintiff, it was submitted that the court should also grant interest on the claim at commercial rates of interest. As authority for the court's right to do so, Mr. Brooks cited **BRITISH CARIBBEAN INSURANCE COMPANY LIMITED v DELBERT PERRIER SCCA 114/94**. In that case, Carey J.A. stated the following:

> The question which is posed is, on what basis should a Judge award interest in a commercial case. I do not think that it can be doubted that where a person has been found to have failed to pay money which he should have, it is only right that he should pay interest to cover the period the money has been withheld.

Accepting that the award of interest is based upon the principle of *restitutio in integrum*, Carey J.A. continued:

> If *restitutio in integrum* is the rationale for the award of interest, then the rate at which the plaintiff can borrow money must be the rate to be set by the judge in his award.

Mr. Brooks cited the Statistical Digest and "Economic Statistics", both publications of the Bank of Jamaica, which gave a history of interest rate levels during the period from the time of the eviction to the time of trial. The average rate over the period worked out at 23.8%. I am satisfied, based upon the statistical data which has been presented in the submissions, that interest at the rate of twenty four per cent (24%) per annum from August 31 1998, the end of the month in which the re-entry took place, to today's date, the date of the judgment, should also be awarded.

Costs are also awarded to the plaintiff to be agreed, or if not agreed, taxed.