INTHE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIMS NO. 2005 HCV 01012 & 2006 HCV 00512

BETWEEN ALBERT SIMPSON CLAIMANT

AND ISLAND RESOURCES LIMITED DEFENDANT

Ms. G. Mullings, instructed by Mullings & Co. for the claimant.

Mr. K. West, instructed by Kipcho West & Co for the defendant.

Damage to Tenant's Property – Cause of Damage- Whether as a Result of Landlord's Default- Security Deposit- Whether a "premium" within the Meaning of the Rent Restriction Act.

Heard February 18 and 19 and May 7, 2010.

Coram: F. Williams, J (ag).

The Issues

The claimant, in this case, claims to have suffered property damage and loss of profits. He blames this damage and this loss on the defendant, who let him into commercial premises to operate a restaurant, knowing, he contends, that the roof leaked. As a result, some of his property was damaged and his business declined dramatically. Additionally, he also sued to recover the sum of approximately four thousand three hundred and thirty-three United States dollars (US$4, 333), that the defendant charged him as a "security deposit". This was done, he contends, in breach of the Rent Restriction Act, which prohibits the charging of such a premium.

The Evidence

For the Claimant

The claimant's evidence is to the effect that, in or about February, 2002, he entered into discussions with Mrs. Ann Ventura, a director of the defendant; and

Ms. Caren Smith, a supervisor of the defendant. His aim was to rent premises at Island Plaza in Ocho Rios, St. Ann to open and operate a restaurant, he having been a restaurateur for upwards of 20 years.

He made an initial payment of one thousand United States dollars (US$1000) and sent the balance to the defendant by way of Western Union. The total paid was some four thousand three hundred and thirty-three United States dollars (US$4, 333). This was in the nature of a security deposit, the arrangement with the defendant being that he was to have the first two or three months' occupancy rent free. This concession was granted owing to the fact that he would need to effect renovations and configure the premises to suit the purpose of his particular business. Additionally, repairs were to be done to the roof of the premises.

He eventually took possession of shops 11-15 at the plaza, effected the necessary renovations and begun business. He did so after being assured by Ms. Smith that he could move in immediately; and on his assumption that the repairs that he had discussed with her had by then been effected.

There was a period of heavy rainfall in or about May of 2002. The result of this was that water entered the shops he occupied at the plaza, through the defective roof. This resulted in damage to fixtures, appliances and equipment in his shops. His business was also negatively affected. Prior to the damage, his restaurant enjoyed some 500 dinner sittings per night and 2,000 breakfast sittings per week.

Leroy Brown, who worked in the claimant's restaurant as a chef, also gave evidence on his behalf. He worked with the claimant in the years 2002 and 2003. The business took a downturn after water came in through the roof and the shops were flooded. The water did not enter the shops through an extractor fan that had been there before the claimant moved in.

For The Defendant

The evidence for the defendant came mainly from its director, Mrs. Ann Ventura. Mrs. Ventura is based in Kingston. She was not in the Ocho Rios area at the time of the heavy rains in 2002; but received reports on the situation there from Ms. Caren Smith.

The claimant was let into possession before the repairs to the roof were effected; however, any damage suffered by him would have been due to minor leaks in the roof.

A security deposit was requested and received in this case, as was customary. It amounted to approximately two months' rent, the monthly rent, with maintenance, being some two thousand four hundred United States dollars (US$2,400). A statement of account was provided to the claimant or his lawyers indicating how the security deposit was applied.

Evidence was also given by Ms. Caren Smith. However, Ms. Smith remained in court for the entire duration of the proceedings before she gave evidence, in spite of the court trying to ensure (before the trial started) that witnesses remained out of court and out of hearing. Counsel for the defendant described this as being due to a "misunderstanding". Regrettably, the result of this is that no weight will be given to her evidence. Even if that were not the case, one is not so certain how valuable to the defendant her evidence would otherwise have been, her evidence being littered with responses such as "I can't recall", "I don't know", and "I don't think so".

Submissions

Written submissions were ordered by the court to be submitted by 4:00 p.m. on February 26, 2010. Only the claimant complied with this order.

A summary of the claimant's submissions are: (i) the security deposit is in breach of section 24 of the Rent Restriction Act and so ought to be refunded; (ii) the claimant's case is more credible than the defendant's; (iii) the fact that the roof was defective puts the defendant in breach of the landlord's implied covenants to keep the premises in a tenantable state of repair and also the covenant for quiet enjoyment. The landlord is also bound to indemnify the tenant for any loss suffered by the tenant as a result of any default of the landlord or his servants or agents.

The Security Deposit

Section 24 (1) of the Rent Restriction Act states as follows:-

> "A person shall not, as a condition of the grant, renewal, or continuance of any tenancy of any controlled premises, not being a tenancy under a lease, or a renewal or continuance of a lease, for a term of twenty-five years or more, require the payment of any fine, premium or other like sum, or the giving of any consideration in addition to the rent, and where any such payment or consideration shall be paid after the commencement of this Act, the amount or value thereof shall be recoverable by the person by whom it was made or given or his personal representatives".

"Controlled premises" are all those premises not exempted from the operation of the Act by section 3 and regulations and orders made thereunder. There are certain commercial premises that are exempted from the application of the Act under the Rent Restriction (Public and Commercial Buildings- Exemption) Order, 1983, made pursuant to section 3. The relevant Minister may also, by order, pursuant to section 8, declare to be exempt any class of premises specified in

the said order. Such premises are set out in the Rent Restriction (Exempted Premises) Order, 1983. A perusal of these orders does not indicate that the subject premises are, either by themselves or by the class in which they might be said to fall, exempt from the provisions of the Act. They are therefore controlled premises within the meaning of the Act.

The significance of this is two-fold: (i) the first and immediate point is that the charging of a security deposit or a premium in respect of the said premises is in contravention of the Act. (ii) the second point is that all sections of the Act (including section 4 – which deals with implied covenants) apply to the said premises.

It seems to me that the sum required by the landlord and paid by the tenant in this case amounts to "the giving of ... consideration in addition to the rent". Additionally, this consideration is being given as a condition of the grant of a tenancy – there being no lease, as the lease agreement was never signed by the tenant. This sum was being demanded when there was an agreement or understanding between the parties that the tenant was to have at least one month rent free.

No evidence has been presented to this court to show how (if at all) the sum was applied. The claimant must therefore be refunded the sum of US$4,333.00.

The Cause of the Water Damage

From the evidence given by the defendant's director, the defendant wishes the court to find that there might have been only minor leaks to the roof. Additionally, water would have entered the shops through an extractor fan installed by the claimant's predecessor.

On the other hand, the claimant contends that no water entered the shops by way of the extractor fan. All the water that entered came in through the roof and caused considerable flooding and consequential damage.

The version of facts that I accept and on which I base my finding, comes from the witness Leroy Brown, whom I find and accept to be a witness of truth. His evidence, shortly stated, is that no water entered the shops through the extractor fan. The floodi· was occasioned by water coming in through the roof. That is my finding.

I approach the evidence of both the claimant and the defendant warily, as, from all indications, their relatively brief relationship of landlord and tenant has resulted in somewhat protracted and acrimonious litigation. In the court's experience, this sometimes affects the quality and reliability of evidence given.

Even if the water had entered the shops through the extractor fan, however, that would not absolve or relieve the defendant of liability. The evidence is that the claimant was not told about any problems with the extractor fan. Also, on the defendant's evidence, he was told that the building needed to have been re-roofed. This is really an admission that the roof was defective and likely to leak. It would perhaps have been only technical evidence from a roofing specialist that would have eliminated the possibility of damage through this means.

I accept the claimant's submissions to the effect that the evidence points to a breach by the landlord of its duty to repair and its duty to save the claimant harmless from damage and loss caused by its default.

Additionally, however, some liability, in the court's view, must also be attached to the claimant. In the circumstances of being informed before moving in about impending repairs, even after getting a call encouraging him to move in immediately, he should have, rather than acting on an assumption, requested an

assurance that the repairs had been effected. Although he might have been somewhat misled by the invitation of Ms. Smith to move in immediately, some "due diligence" on his part might have helped in reducing, if not eliminating entirely, his losses. For this he should bear twenty per centum (20 %) of liability for his losses.

Damages

Loss of Income and Loss of Profits

The claimant's claim under these heads of damages is based on his evidence of 500 dinner sittings daily and 1,200 breakfast sittings on a Sunday. On a weekly average, there were 2,000 breakfast sittings. He started his business between April and May of 2002. The heavy rains came in May, 2002; and this is the size customer base he says his business generated over the few weeks of its operation. I do not accept this evidence and regard it as an exaggeration to inflate his claim.

There is an additional consideration here as well. This claim is also predicated on a set of reports on the accounts of the claimant's business, prepared by one "W.A. Brown, Freelance Accountant". The defendant did not file a counter-notice requesting that the maker of the reports be called. In light of this, the claimant's submission is that, pursuant of Rule 28.19 of the Civil Procedure Rules, the defendant is deemed to have admitted the authenticity of this document. However, being the ultimate "gatekeeper" of what evidence is admitted or not; and, perhaps more importantly on this point, being the arbiter as to how much weight, if any, is to be attached to an exhibit, the Court has some concerns about these documents.

In the first place, the court does not know of the qualifications or experience of the person who prepared the report. The report, which relates to a technical area of professional practice, is purporting to have been prepared by someone who

certainly has not been certified by the court as an expert. A witness statement has not been filed. Neither has the person attended the trial for the court to raise any questions it might have had; or for cross-examination by the defendant.

The report also shows a net profit of $2,785,289 for the period April to June, 2002. It lists items damaged "as at April 2002". If the damage occurred in April and was as severe as the claimant asks the court to accept, how could there have been a profit for this period – especially given the relatively short period of operation? Would the figures for this period not have served a more useful purpose if they were disaggregated?

These are some of the concerns that make the court most uncomfortable in placing much weight on these reports. Much more evidence would have been necessary to substantiate a claim under this head. The court finds that the evidence here is insufficient for it to make an award under this head.

Items Allegedly Damaged

The Further Amended Particulars of Claim lists these items. It does not, however, (as might be expected) list the corresponding cost or loss. For this information, the exhibits have to be referred to. Some of the items, numbering 11 in all, are listed as set out hereunder:-

(i) All carpets; (ii) leather sofa; (iv) three (3) jeans suits; (v) six (6) pairs drapes/curtain; (viii) wall paintings; (ix) eight (8) cushions; (x) ceiling with artwork. In paragraph 19 of his witness statement dated December 5, 2006, the claimant says that these items "were damaged or destroyed". Which items were damaged and which destroyed (meaning rendered irreparable)? Certainly, if an item is damaged and capable of repair or restoration, without much difficulty, it would be unjust to compensate a claimant with the cost of replacement. The repair or restoration cost could be just a fraction of the replacement cost. The only information that is before the court is that contained in the said exhibits prepared

by W.A. Brown. Those exhibits list the items and corresponding figures under the heading "Damage (sic) Assets As At April 2002".

In light of the insufficiency of evidence in respect of these items, no award can be made in respect of them.

The other four (4) items are: (i) three (3) coffee tables; (ii) two (2) 27" televisions; (iii) one (1) 64" television; and (iv) vintage electronic piano/organ.

With the exception of the vintage electronic piano/organ, no receipt, invoice or quotation has been provided for any of these items. The claimant did say that many of his receipts were destroyed when the premises were flooded. But then, the claimant has not given any evidence as to the prices he paid for these items or what prices they would likely go for today. In these circumstances, no award can be made for any of these items.

The question of compensation for the vintage electronic piano/organ is also not free from difficulty – caused also by the state of the evidence. So that, although there is an invoice indicating that a new one would cost some £8,999, the question arises as to whether this is the sum that the claimant should receive. For example, in what condition was the old one? Is this one of the items that were damaged, or among those destroyed? Was it really a "vintage" item; or simply "old"? Was it inspected by a competent technician whose conclusion is that it cannot be repaired; or is it just that it no longer works and that is the claimant's conclusion? Even accepting that, being an electronic item affected by water damage, it is not likely to be capable of repair, in the context of the vagueness of the evidence, the court could not see its way to awarding (doing the best it can in the circumstances), more than £5,000.

Finally, there is no clear evidence on the exact date or dates on which these heavy rains fell, causing the damage. The evidence varies between some time in

April, 2002, and some time in May, 2002. For the purpose of calculating interest on special damages, some specific date will have to be used. For that purpose, the date the court will use is May 15, 2002.

Orders

There will therefore be judgment for the claimant as follows:-

(i) In claim number 2006 HCV 00512, the sum of US$4,333, with interest thereon at the rate of 6% p.a. from May 15, 2002 to June 21, 2006; and at 3% p.a. from June 22, 2006 to May 7, 2010.

(ii) In claim no 2005 HCV 01012, the sum of £4,000, being 80% of the sum of £5,000, with interest thereon at the rate of 6% p.a. from May 15, 2002 to June 21, 2006; and at 3% p.a. from June 22, 2006 to May 7, 2010.

(iii) Costs to the claimant to be taxed, if not sooner agreed.