IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008HCV01681

BETWEEN	**CASSANDRA TODD**	**CLAIMANT**
AND	**IVY BARRETT**	**DEFENDANT**

Miss Danielle Archer instructed by Kinghorn & Kinghorn for the Claimant

Mr. Carlton Williams instructed by Williams, McKoy & Palmer for the Defendant

Heard: October 14 & 15, 2010 and January 27, 2011

SIMMONS J (Ag.)

1. The claimant has filed an action in which she claims damages for trespass to property and or in the alternative damages for breach of contract.
2. The claimant alleges that in September 2006 she entered into a rental agreement with the defendant in respect of a room in the defendant's premises situated at 63 University Crescent. At the time she was in the third year of her studies at the University of Technology. She states that the defendant breached this agreement by locking her out of the said room for a period in excess of three (3) days and that this amounted to an interference with her right to quiet enjoyment of the premises.
3. She also claims that the defendant removed her personal property from the room in her absence. The claimant asserts that when she returned to the premises to collect her property

she discovered that certain items were missing. They are as follows:-

i.	Citizen watch	$5,800.00
ii.	Gold ring	$2,800.00
iii.	Gold chain	$4,800.00
iv.	Diamond stud earrings	$22,770.00
v.	Jeans pants	$1,500.00
vi.	Shoes	$6,600.00
vii.	Handbag	$4,290.00
viii.	Flash drive	$6,500.00
ix.	Pictures	$850.00
x.	Soaps	$1,198.00
xi.	Notebooks	$650.00
xii.	Money -	J$16,900.99
		US$1,535.00

Defence

4. The defendant has denied that any rental agreement existed between herself and the claimant. She also denies that she prevented Miss Todd from entering the premises. She denies that the claimant suffered any loss as a result of her removing the claimant's property from the room that was occupied by the claimant.

Evidence

5. It is not disputed that the parties to this action met in September 2006. At that time the claimant was a student at the University of Technology in need of lodging and the defendant who resides in close proximity to the University was known to have provided rental accommodation for students. It is also agreed that the claimant was not provided with a key until the police intervened sometime after she moved into the premises. It is also not disputed that the defendant removed the claimant's property from the room that she had occupied and

that this took place in her absence. The evidence of both parties also confirms that the claimant did not remove her personal effects from the premises until approximately two days after she was requested by the defendant to do so. It has also been admitted that the claimant pleaded guilty to breaching the Rent Restriction Act when she appeared before the Resident Magistrates Court and was admonished and discharged.

6. The claimant in her witness statement asserts that in September 2006 she rented a room in the defendant's home for the sum of eight thousand dollars ($8,000.00) per month.

7. She further states that she was not provided with a key despite having made several requests of the defendant and had to depend on the defendant or someone else at the house to open the grill and the door. Miss Todd alleges that she was locked out of the premises more than once and sometimes had to wait on someone in the household to awaken to let her out in the mornings. This she said, resulted in her either being late or missing her first class on some occasions. This situation culminated in her being locked out of the premises in November 2006 for three (3) days. During that period she states that she had no change of clothes and had to sleep in a classroom on the campus of the University. She further states that she was only allowed to enter the premises with the assistance of the police. At that time she discovered that her clothing and other items had been removed from the room which she had occupied and placed in a passage. When she returned to collect her possessions she discovered that certain items were missing. She vacated the premises but did not seek accommodation in Kingston and instead traveled from St. Ann to the University each day until the end of her course in 2007.

8. The claimant also states that as a result of the state of affairs between herself and the defendant she made reports to the Rent Assessment Board and the Papine Police Station.

9. The defendant on the other hand paints a different picture. She states that when the claimant approached her with a view to renting accommodation she indicated that she did not have anything available. She further states that as a result of the claimant pleading with her she decided to allow the claimant to stay in a room in her house for one month. This arrangement was supposed to be temporary as she would have to share her kitchen and bathroom with the claimant and would need the space to accommodate family members who were coming from abroad. This was explained to the claimant who allegedly agreed with the arrangement.

10. The defendant further states that the claimant was not given a key because someone was always at home and the arrangement was only for one month. She explained that the claimant was only given a key after the intervention of the Rent Assessment Board and the police. That key, according to the defendant was never returned to her and the locks were changed after the claimant collected her possessions.

11. With respect to the eight thousand dollars ($8,000.00) collected from the claimant, the defendant avers that this sum was a contribution to electricity, water and the use of the bedroom, bathroom and kitchen and not rent although the receipts (exhibits 2 and 3) refer to the sums paid as rent. The defendant made a note on the back of exhibit 3 as follows:

> *"The first payment was made on the 15th October, but was returned because of the fact that the tenant was asked to leave. One month was given to 12/11/2006 and as a result of advice from the police the rent was taken*

and the date for the tenant to leave the premises is now November 2nd 2006."

12. There are two issues for determination in this matter. Firstly, whether the relationship of landlord and tenant existed between the parties. Secondly, whether the defendant committed a trespass in respect of the claimant's property.

Submissions

13. With respect to the first issue counsel for the claimant submitted that such a relationship did exist between the parties. In support of this argument, Miss Archer referred to a letter written by the defendant to the claimant in October 2006 (exhibit 1), in which she states *"Your rental payment and date will be next week October 13 Friday"*. It was submitted that the defendant who was a former lecturer in English was not a lay person and would therefore understand the nature of a rental agreement. In addition, counsel argued that the defendant was experienced in letting premises to student tenants and as such would be accustomed to writing receipts. In this regard counsel referred to receipts dated the 15th September 2006 (exhibit 2) and the 24th October 2006 (exhibit 3) in which the sum collected is described as rent.

14. Miss Archer also relied on the fact that the defendant pleaded guilty to a breach of section 27 of the Rent Restriction Act. That section makes it an offence for a landlord to forcibly remove a tenant from premises or to do anything *"...calculated to interfere with the quiet enjoyment of the premises by the tenant or to compel him to deliver up possession of the premises."* She cited the case of ***Virgo v. Nam Claim No. 2008HCV00201*** in which the claimant sued the defendant for negligence arising out of a motor vehicle accident. The defendant denied liability and the claimant applied for summary judgment. The claimant sought to adduce evidence that the defendant had pleaded

guilty to careless driving. The court examined a number of authorities. The fact that the defendant had admitted fault at the scene of the accident and liability was accepted by his insurers was used to determine the weight that should be attached to his explanation as to why he pleaded guilty. The court took note of the following comments made by Morris, L.J. in ***Dummer v. Brown and Anor. [1953] 1 All E.R. 1158***:-

> *"It seems to me therefore, that once the learned judge was satisfied by the evidence before him he had satisfactory proof that the second defendant had made an admission of negligence, and that admission was such as to entitle the plaintiff to judgment."*

15. Mr. Williams on the other hand submitted that in order to determine whether a grant amounts to a licence or a lease regard must be had to the substance of the arrangement and not just the form. He emphasized that the relationship between the parties is to be determined as a matter of law and not the label that the parties put on it. In support of his argument he referred to ***Cobb and another v. Lane*** **[1952] 1 All ER 1199,** in which the Court held that the issue of whether a relationship of landlord and tenant has been created is to be determined by the intention of the parties. Specific reference was made to the judgment of Denning, L. J. who after referring to previously decided cases stated as follows:-

> *"the question in all these cases is one of intention. Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land, which he could assign or sublet, and he could not part with possession to another."*

He submitted that in order to determine the nature of the interest held by the claimant the following factors must be examined;-

i. the relationship between the parties;
ii. whether the interest could be assigned; and
iii. the degree of control exercised by the defendant over the property.

16. Counsel for the defendant argued that the relationship between the parties in this matter was personal in nature as the defendant had only let the claimant into her premises on compassionate grounds. He submitted that in light of the decision in the case of ***Shell- Mex and B P Limited v. Manchester Garages Limited*** **[1971] 1All ER 841**, exclusive possession is not a decisive factor in determining whether the relationship of landlord and tenant existed between the parties and that in such cases the court must examine the circumstances to determine whether a personal privilege had been given to the party claiming to be a tenant.

17. With respect to the nature of Miss Todd's interest, it was argued that she did not possess something which could be assigned as she could not take persons into the house or come and go as she pleased. The terms of the arrangement therefore, did not allow her to have rights over the property.

18. With respect to the documentary evidence in this matter in which the word "rent" was used by the defendant , Mr. Williams submitted that based on the case of ***Rhodes v. Dalby*** **[1971] 2 All ER 1144** , this was not a determining factor where it could otherwise be explained. In that case the court held that no tenancy had been created despite the use of the word *"let"*. Counsel also referred to ***Isaac v. Hotel De Paris Ltd.*** **[1960] 1 All ER 348** in which it was held that the relationship between the parties was that of licensor and licensee *"...even though there*

was exclusive possession by the appellant and acceptance of the amount of the rent by the respondent company." The court found that the circumstances and conduct of the parties showed that all that was intended was for the appellant to have a *"personal privilege"* of running a bar at the hotel.

19. Mr. Williams also asked the court to examine all of the circumstances and to recognize that as in ***Isaac v. Hotel De Paris Ltd.*** lay persons may place the wrong label on a relationship.

20. Counsel also referred to the case of ***Wells v. the Mayor, Aldermen, and Burgess of Kingston-Upon-Hull LR 10 CP 402*** at ***408*** in which the principle laid down by Hill, J. in *Smith v. Overseer of St. Michael, Cambridge 3 E. & E. 383* was cited with approval. He submitted that where the contract is merely for the use of the property in a certain way and on certain terms while it remains in the possession of the owner it is a licence. In this regard he relied on the case of ***Corey v. Bristow* [1876-77] 2 App C 262 at 276** in which Lord Hatherley stated that in order for a person to have exclusive occupation of premises *"...the person so occupying should have the right unattended by a simultaneous right of any other person in respect of the same subject matter."*

21. With respect to the proceedings in the Resident Magistrates Court for a breach of the Rent Restriction Act in which the claimant pleaded guilty, it was submitted that this could not be taken to mean that a landlord and tenant relationship existed between the parties. Counsel also indicated that Mrs. Barrett when questioned about those proceedings stated that she pleaded guilty to removing the claimant's property from the room. In any event the claimant was admonished and discharged after she explained the circumstances to the presiding Magistrate.

Tenancy or licence

22. It is settled law that in order for a tenancy to exist the tenant must enjoy exclusive possession. However, the fact that someone enjoys exclusive possession does not mean that a tenancy has been created. Regard must be had to the substance and not the form of the agreement or the label that the parties choose to put on it.

23. In relation to exclusive possession section 5(1) of the ***Rent Restriction Act*** states:-

Where –

(a) a tenant has the exclusive occupation of any accommodation (in this section referred to as "the separate accommodation");

(b) the terms as between the tenant and his landlord on which he holds the separate accommodation include the use of other accommodation (in this section referred to as "the shared accommodation") in common with another person or other persons, whether or not including the landlord; and

(c) by reason only of the circumstances mentioned in paragraph (b), the separate accommodation would not apart from this subsection be a dwelling –house as defined by this Act, the separate accommodation shall be deemed to be a dwelling-house as so defined, and the following provisions of this section shall have effect."

It is clear from the foregoing that there can be exclusive possession of a room in a house. It must now be determined whether the claimant had exclusive possession of the room which she occupied as certain rights will automatically accrue under the law.

24. Under the ***Rent Restriction Act,*** once it is established that a tenancy has been created, whether orally or in writing, "*...the landlord and the tenant shall be deemed to have inserted the covenants set out in the First Schedule and shall be bound by those covenants.*"

Among these covenants is the following:-

> "*the landlord agrees –*
>
> *to permit the tenant on his paying the rent and fulfilling his other obligations under the tenancy peaceably and quietly to occupy and enjoy the premises without any interruption by the landlord or any person rightfully claiming under or in trust for him...*"

25. The claimant in her evidence states that at she could not gain access to the house and by extension, the room without the aid of the defendant or any of the other persons who resided at the premises. This situation obtained from the 16th September 2006 to the 23rd October 2006, when she went to the premises with the police and was given a key. She also states that she was not permitted to have visitors and had to return to the house by a certain time each day. Whilst it is true that she was eventually given a key the other constraints still remained. The question arises as to whether someone who is subject to such constraints can be said to have exclusive possession.

26. The conduct of the defendant does not appear to be consistent with the creation of a tenancy. In fact, when questioned by Mr. Williams with respect to her understanding of the relationship of a landlord and tenant, the defendant stated that the persons to whom she rents her annex have their key and could come and go as they pleased. The Claimant was not renting the annex but was being allowed to occupy a room in the house and was not provided with a key when she

moved in and in addition was subject to certain restrictions. In fact, Mrs. Barrett in her evidence indicated that she had never allowed anyone to live in her home and had to run an extension cord to provide light in the room which Ms. Todd occupied. Mrs. Barrett also seemed to place great importance on the absence of a written agreement.

27. The contents of exhibit 1 are also very relevant to this issue. It states as follows:-

"Attention: Miss Cassandra Todd

October 6 2006.

In September 2006 (last month) you came to me in distress from Utech seeking accommodation re housing. You explained that you had to leave your then place because the temporary accommodation had expired. After a few visits I was moved with compassion and offered you temporary accommodation until you could find a place. I explained that although I had never had anyone sharing house with me, I would do it because of your situation.

You were given a furnished room, with shared bathroom and kitchen and including utilities.

In addition you were given certain rules and conduct which were expected and to which you readily consented. The arrangements did not work as well as I expected especially concerning your coming in late at nights.

I explained to you that my husband is a kidney patient on dialysis and certain things that could be detrimental to his health.

In the last week or so you have been coming in late after 11 p.m. or midnight.

I regret that I must ask you to find alternative accommodation elsewhere as I will definitely not be able to keep you any longer. Other inconveniences include the kitchen and bathroom space too limited to accommodate you.

Your rental payment and date will be next week October 13 Friday. Please move out your things by then as no further extension will be given.

Sgd.: Ivy Barrett (Mrs.)

28. Miss Todd admitted receiving the above correspondence but denied that its contents were indicative of the terms and conditions under which she occupied the premises.

29. Having considered the evidence of the parties I accept the defendant as a witness of truth. It is my finding that although the words "rent" and "tenant" were used by the defendant when writing the receipts, the contents of exhibit 1 clearly indicate that there was never any intention to grant exclusive possession to the claimant. Miss Todd was given a personal privilege as described in ***Cobb and another v. Lane*** and ***Isaac v. Hotel De Paris Ltd.*** I also accept the explanation given by the defendant in respect of her plea of guilty in the Resident Magistrates' Court. It is therefore my finding that the claimant was a licensee and not a tenant.

30. With respect to the claim for trespass to property, Mr. Williams submitted that if the relationship of landlord and tenant did not exist between the parties, the defendant did no wrong when she removed Miss Todd's belongings from the room as long as she took reasonable care to prevent damage.

31. Mr. Williams also submitted that if in fact, Miss Todd's property was damaged as a result of any negligence on the part of the claimant no special damages should be awarded as no receipts have been produced where the claimant herself says

that they are available. He emphasized the principle that special damages must be specifically proved.

32. Miss Archer submitted that the real issue in this matter is not whether the relationship of landlord and tenant exists between the parties but whether having committed a trespass to the property of the claimant what, if any, damages should be paid. She stated that, the important factor is that the items belonging to Miss Todd were removed and not how they were packed. She emphasized the point that even if the items were not taken by the defendant it has been admitted that other persons in the house would have had access to them in the area in which they were placed.

33. Counsel referred to **Markesinis and Deakin's Tort Law, 5th edition pages 436-437,** in which it was stated that *"any direct interference with possession of goods amounts to a trespass."* The learned authors went on to discuss whether liability is based on actual damage or whether the tort is actionable per se. The view was expressed that it may be possible to distinguish between deliberate touchings which are actionable per se and unintended or careless acts of touching which require damage. It was suggested, that where no damage is suffered damages would be nominal.

34. Miss Archer submitted that in the instant case the touching was deliberate and therefore actionable per se. She also pointed out that Miss Todd has claimed for the loss of some items like the money, for which there would be no receipts. She argued that although she could find no authorities to assist the court in assessing damages where no actual damage has been proved, nominal damages would not be appropriate. She suggested that cases on false imprisonment may provide some guidance for the court in respect of the claimant being locked out of the premises as some compensation must flow from the

inconvenience suffered by the claimant. The sum of five hundred thousand dollars ($500,000.00) was suggested as reasonable in the circumstances.

35. Mr. Williams submitted that in respect of trespass there must be an interference with possession and Mrs. Barrett did not interfere with Miss Todd's possession of her property. In the circumstances it was submitted that no sum should be awarded to the claimant.

Trespass to Goods

36. Trespass to goods is an unlawful disturbance of possession of goods by seizure, removal or by a direct act which results in damage to the said goods. The subject matter of trespass to goods must be a personal chattel which is the subject of lawful possession. In an action for trespass the claimant must prove that he had actual possession or a right to possession of the chattel. In the absence of special damage the claimant may recover general or nominal damages. If the act of trespass is intentional it is no defence that the defendant had an honest but mistaken belief that he had the right to perform the act.

37. The claim for damages for trespass in this matter is based on two factors. Firstly, the alleged deprivation of the claimant of her property for the three days she alleges she was locked out of the premises and secondly, the Claimant's loss after the removal of her possessions from the room she had occupied.

38. In order for the claimant to succeed on the first limb, the court has to be satisfied that the claimant was in fact locked out of the premises and that the actions of the defendant are sufficient to ground an action for trespass. Miss Todd in her witness statement indicates that on the 13th November, 2006 the defendant told her that she wasn't to use anything in the house as she did not live there anymore. She states that she went to classes and returned at midday to find that her food

items had been placed on an old stove at the back of the house. The defendant then asked her to remove all her possessions from the premises. The claimant did not accede to the wishes of the defendant but only took two pairs of jeans and left to go to school. She states that when she returned at 9:00 p.m. the lock on the grill had been changed and she was not let into the house. Two (2) days later the claimant went to the police and the Rent Assessment Board. Having been locked out of the premises she did not see the Defendant until she was finally allowed to enter the house with the assistance of the police to retrieve her clothing and other items.

39. Under cross examination, Miss Todd stated that she returned the key that same day as it was of no use to her as the lock to the grill had been changed.

40. It is at best unclear under what circumstances this key was returned, as the claimant maintains that she was locked out that night and the defendant did not answer when she knocked. How and when could the key have been returned to the defendant if Miss Todd did not see her until days later? I am not satisfied as to the truthfulness of the Claimant on this issue.

41 The defendant's account that the claimant failed to return the key to the premises after she had collected her possessions and removed from the premises is more credible. The defendant's evidence is that she subsequently had to change the locks.

42. In these circumstances I accept the evidence of the defendant that the claimant had a key to the house up to the time when she removed her possession. In ***Hartley v. Moxham (1842) 3 Q. B. 701*** it was decided that the locking of a room in which the claimant had his goods is not a trespass to those goods. In that case the defendant let apartments in his house to the plaintiff. The parties had a dispute and the defendant locked one of the rooms in which "certain wares and

merchandise" of the plaintiff were housed and kept the key. The plaintiff brought an action for trespass and seizure. The court held that this was not sufficient seizure to maintain an action for trespass. In light of this decision Miss Todd may have had some difficulty convincing the court that she was entitled to damages.

43. With respect to the second limb, it has been admitted that the goods were removed and placed in an area to which persons other than the defendant had access.

44. Miss Todd has asserted that she discovered that certain items were missing after Mrs. Barrett removed her personal effects from the room and placed them in the passageway. She has claimed for the loss of those items. However she has failed to provide the court with relevant receipts despite giving evidence that those receipts are available. She testified that she told her attorneys that they were available but she neglected to provide them with the receipts. When she was asked by Mr. Williams whether she could produce them the next day she said *"I can't bring the receipts tomorrow. I have to work tomorrow."* On what basis therefore if her evidence is believed should the court award damages?

45. It is accepted that special damages must be specifically proved. Such damages are not presumed by law to be a direct consequence of the actions of the defendant. In ***Bonham-Carter v. Hyde Park Hotel Ltd. (1948) T.L.R. 177*** Lord Goddard, C.J. said:

> *"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 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 those damages' They have to prove it."

This principle was followed in ***Murphy v. Mills (1978) 14 J.L.R. 119.*** In that case an award for loss of earnings was disallowed on the basis that the plaintiff failed to provide documentary proof. The onus is on the plaintiff to prove his loss strictly. However, this requirement has to be considered in light of the circumstances of each case. This approach was adopted by Bowen, L.J. in ***Ratcliffe v. Evans (1892) 2 QB 524.*** In that case the principle was stated in the following terms:-

"As much certainty and particularity must be insisted on both in pleading and proof of damages as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principle. To insist on more would be the vainest pedantry."

That approach was adopted by Wolfe, J.A. (Ag.), as he then was, in ***Walters v. Mitchell (1992) 29 J.L.R.*** He stated:

"without attempting to lay down any general principles as to what is strict proof, to expect a sidewalk or push cart vendor to prove her loss of earnings with the mathematical precision of a well organized corporation may well be what Bowen, L.J. referred to as 'the vainest pedantry".

46. Miss Todd is clearly not in the same position as the sidewalk vendor referred to in ***Walters v. Mitchell***. She has clearly stated that she has receipts for some of the missing items but has failed to provide any such documentation. The only items which could be considered would be the sums of money, pictures, notebooks, jeans pants, soaps, flashdrive and handbag which she allegedly lost.

47. The issue of whether or not the claimant should be compensated for the loss of those items depends on her credibility. Her evidence has to be considered against the background of the circumstances in this case. The parties to this action have had a turbulent history. It is admitted that the claimant took the police to the defendant's house on at least four occasions and has made more than one report to the Rent Assessment Board. She has also alleged that someone threatened her on the defendant's behalf. In spite of this, the claimant made no effort to secure her valuables when she was asked on the Wednesday by the defendant to remove her possessions from the house. Instead she only took two pairs of jeans. She does however explain that she had nowhere to store her possessions. But how much storage would be required for money? There is also no indication that she had made a report to the police about any missing items, despite her evidence that she was assisted by the police on the day that she removed from the defendant's home. Nor is there any evidence that Mrs. Barrett was questioned by the police or by Miss Todd in the presence of the police with respect to any missing items.

48. In light of these circumstances I am not convinced that the claimant is being truthful in respect of the loss of the items claimed. I find on a balance of probabilities that the defendant is a more credible witness, and where her evidence conflicts with that of the claimant I accept the evidence of the defendant. Judgment is therefore awarded to the defendant with costs to be taxed if not agreed.