JAMAICA

Copy

L&T

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO124/98

COR: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE J.A. (Ag.)

BETWEEN	**YOUNIS INVESTMENTS LIMITED**	**PLAINTIFF/ APPELLANT**
AND	**MARK AZAN**	**DEFENDANT/ RESPONDENT**

Gordon Robinson instructed by **Mrs. Winsome Marsh** of **Nunes, Scholefield Deleon & Co.** for the Appellant

Dennis Morrison Q.C. instructed by **Carl Dowding** of **Knight, Pickersgill, Dowding & Samuels** for the Respondent

19th, 20th June 2000 and March 11, 2002

COOKE, J.A. (Ag.)

This is an appeal from a judgment of Mrs. Justice McCalla delivered on November 27, 1997. There are two issues before the Court:

(1) In the award for mesne profits, what was the reasonable rent for premises at 12-14 West Queen Street, Kingston for the period September 1991 – January 1995?

(2) What is the rate of interest that should be awarded as regards the mesne profits?

MENSE PROFITS

In arriving at her assessment the learned judge delivered herself thus:

> "The Court carefully considered the evidence adduced from plaintiff and defendant and the submissions made by Counsel. In particular I considered:
>
> (i) the amount at which the premises were let subsequent to the defendant vacating it.
>
> (ii) the absence of evidence as to whether the premises were assessed prior to November, 1993 bearing in mind the burden of proof which rests on the plaintiff;
>
> (iii) that subsequent to November, 1993 the premises were not controlled.

In my judgment the appropriate figures to be used in calculating mesne profits to which the plaintiff is entitled for use and occupation of the premises are as follows:

September 1991 to March 1992 - $10,000.00 per month
= $70,000.00

This figure was suggested by the plaintiff in the original agreement and is considered to be appropriate in the absence of any agreement for a new tenancy.

April 1992 to September 1992 - $35,000.00 per month
= $210,000.00

as being the lower of 2 figures suggested by the plaintiff in discussions.

October 1992 to November 1993 -$40,000.00 per month
= $560,000.00

December 1993 to January 1995 - $80,000.00
=$1,120,000.00

> Having regard to the evidence adduced by the plaintiff, particularly the evidence of the amount for which the premises were subsequently rented
>
> **Total** $1,960,000.00
>
> Accordingly, Judgment is entered for the plaintiff in the sum of $1,960,000. 00 as damages for the mesne profits".

As the learned judge based her assessment for the period on the "suggested" figure from the plaintiff/appellant, it is necessary to set out the evidence on which she founded her determination. It is a letter dated February 7, 1992 which reads:

> **"YOUNIS INVESTMENT LTD.**
> 12 Orange Street, Kingston, Tel: 922-5992
>
> February 7, 1992
>
> Mr. Mark Azan
> Azans House of Fabric
> 12-14 West Queen Street
> Kingston
>
> Dear Mr. Azan:
>
> I have received your cheque for $53,000.00 which I am holding, of which a receipt was drawn in error by my Accounts Department without my knowledge and consent.
>
> In our meeting in September 1991 and consequent discussions there were three proposals put forward to you. To date you have not informed me as to which proposal you have decided to take.
>
> The proposals were:
>
> (1) To pay $10,000 per month until the end of March, 1992 when you will vacate the store and I will pay for your fixtures or you will remove them.

(2) You will pay nothing until the end of March, 1992, when you will vacate the store and the fixtures presently in the store will become the property of Younis Investments Limited.

(3) You will pay a rental of $35,000 or $40,000 per month and remain in the store.

You said option 3 was unacceptable, so that left options 1 & 2 for your consideration.

If you do not intend to vacate the store as indicated in March of 1992, I want rental of $40,000 per month starting September 1, 1991.

Yours truly

Sameer Younis
Director".

This offer, as I choose to term it, contained in that letter was never accepted by Mark Azan. As far as he was concerned, that letter was an inconsequential aspect of the historical scenery. Mr. Robinson submitted that the figure of Ten Thousand Dollars in the letter was a concession for Mark Azan to vacate the premises by the end of March, 1992. There is force in this submission especially as in his evidence Mark Azan said that between 1991-92 a "fair net rental would be approximately in the Twenty Thousand Dollars ($20,000) a month". I am therefore not disposed to say that the figure of $10,000 per month was a reasonable rent. In respect of the period April to September, 1992 the monthly rental was assessed at $35.000. This was the "suggested' lower figure (see letter supra). However, I am not in agreement with this approach. There was no contract. The "suggestion" by itself cannot be a basis for an award. There must be some evidential foundation. This comment

as to the absence of evidential basis is equally applicable to the periods October 1992 to November 1993 and December 1993 to January 1995.

There is unrefuted evidence that in December, 1993 the "fair market" rent for the subject premises was $100,000.00. This was the opinion of C.D. Alexander Realty Company Limited who are reputable valuation experts. As of March, 1995, the premises were rented to Lui Guo Wei for $110,000 per month. It is my view that the reduction to $80,000 per month for the period after December, 1993 is unwarranted. A reasonable rate of rent as of that time based on the evidence is $100,000 per month. Mr. Robinson sought to persuade the court to work backwards and draw an inference as to what would have been a reasonable rent for the months prior to December, 1993. He was driven to this posture because he was obliged to concede that the appellant had not presented any evidence on which to ground what would be a reasonable rent. To ask the court to draw the requested inference is wholly speculative and unacceptable – even moreso when our economy has been subject to as many vagaries and vicissitudes.

Mr. Morrison sought to support the award of the learned judge by relying on a passage from the opinion of the Board in the Privy Council case of ***Inverugie Investments Ltd. v. Hackett*** [1995] 3 All E.R 841 at p.842 where Lord Lloyd of Berwick said:

> "In the ordinary case where the plaintiff is the landlord of domestic premises, and the defendant is or was the tenant, this creates no difficulty. The reasonable rent is almost always the rent reserved under the expiring lease".

I accept the correctness of those statements. They do not avail the respondent for two reasons. Firstly this is not "domestic" premises. Secondly, even if the epithet "domestic" was applicable, there was no "rent reserved". There could not be, as there was no contract. Therefore in arriving at what is a reasonable rent there must be, as I have said earlier, an evidential base. So now, is there any evidence that the learned judge could have utilized in respect of the pre December 1993 period? There is. It fell from the lips of Mark Azan. The record discloses his testimony under cross-examination as follows:

> "In September of 1991 middle to end what range of rental, would you say premises 12-14 would attract? Based on other rentals in area and I would honestly say good location in terms of size – fair, net rental would be approximately in the twenty thousand dollars ($20,000) a month 1991 – 1992 end of 1991.
>
> In 1992 to 1993-
>
> Rentals in area downtown escalated somewhere in region of thirty thousand dollars ($30,000) in 1993 –
>
> And in 1994 could have been in region of forty thousand dollars ($40,000) to forty five thousand dollars ($45,000) per month with the influx of Chinese"

This evidence was not challenged. So, it was, Mark Azan estimated for

(i) 1991-92 - $20,000 per month
(ii) 1992-93 - $30,000 per month

These are the periods with which I am now concerned. Mark Azan's estimate of $20,000 per month is credible. I take into consideration that as the defendant in the action he may well have been inclined to proffering a conservative estimate. However, when I take note that the figure is twice what I

have accepted as the concessionary rate of $10,000, I am prepared to accept it as reasonable rent. $30,000 per month would seem a reasonable rent for the period 1991-92. There is an increase of fifty per cent. For the period December 1993 to January, 1995 as already indicated based on evidence from C.D. Alexander Company Limited, a reasonable rent is $100,000 per month. I am aware that in comparison with the period 1992 – 1993 the increase in rental does appear alarming, but that is the uncontroverted evidence. Perhaps, "the influx of the Chinese" had a dramatic influence on the increase of the amount of money which could be obtained for rental in that area. My computation for the mesne profit is now set out below. This is dealt with on a yearly basis as far as possible bearing in mind there was no specific contractual period:

September 1991 – December 1991 @$20,000 per month	- $80,000
January 1992 – November, 1993 @$30,000 per month	-$690,000
December, 1993 –January 1995 @$100,000 per month	-$1,400,000
Total	$2,170,000

The award for mesne profits is therefore varied by increasing it to $2,170,000.

Rate of Interest

In dealing with this issue the learned judge had this to say:

> "On the question of the rate of interest to be awarded plaintiff's Counsel has submitted that this is a commercial case and accordingly interest should be awarded on the basis of the cases he cited. Counsel for the defendant has made reference to the relationship which existed between the parties to say that this is not a commercial case.

> In these circumstances I would exercise my discretion in granting interest on the sum of $1,960,000 to which I find the plaintiff is entitled, at the rate of 25% per annum on outstanding amounts from the 1st of September, 1991 to today with costs granted to plaintiff to be agreed or taxed".

Since the mesne profit has been varied upwards to $2,170,000 the interest ought properly to be computed on this amount. It seems $360,000 paid by the respondent should be deducted.

The first question to be settled is whether or not this is a commercial case. These premises are in the hub of the clothing and dry goods business section of downtown Kingston. It is a section of quite vibrant business activity. Hence, "the influx of the Chinese". The purpose for which Mark Azan occupied the premises was to conduct business therein. This would certainly point to this being a commercial case. However, it was contended that the relationship between the parties was such that the transactions between them were not of a commercial nature. This view was based on the fact that as between their respective families there was a close bond of friendship. Mark Azan refers to Sameer Younis the major shareholder of the appellant as "Uncle Sammy". It would appear that at the start of Mark Azan's business career "Uncle Sammy" was quite helpful to him. "Uncle Sammy" provided him with a generous credit term from two of his companies, A.A. Younis Limited and Neva Garment Company Ltd. In Sameer Younis' opinion, Mark Azan "performed well". He now operated Azan's House of Fabric. In 1987 a signed agreement was struck between the parties in respect of 12-14 West Queen Street. The Agreement is now produced:

"YOUNIS INVESTMENT LTD
21 Orange Street, Kingston. Tel 922-5992

April 27,1987

AGREEMENT BETWEEN MARK AZAN AND YOUNIS INVESTMENT LTD. ON PREMISES 12-14 WEST QUEEN STREET

(1) Rent of $1,000 per month will commence on January 1, 1988 and will continue until September 1, 1991

Option to renew lease for four years at a negotiable rate with a minimum of $10,000 per month.

Mark Azan to pay land tax and all utilities

Mark Azan also has the first option to buy the entire complex if it is being sold..."

Mark Azan would be constructing a building on those premises. During the construction of that building, Mark Azan's entreaties to uncle Sammy pertaining to his difficulties did not fall on unreceptive ears. In fact the rent to be paid by Mark Azan was not enforced. However, this waiver does not negative the commercial nature of the relationships. The letter of February 7, 1992 (supra) demonstrates that despite the initial friendly disposition by Uncle Sammy to Mark Azan the relationship between the parties was in respect of 12-14 West Queen Street one of business. By February of 1992 lawyers had become involved. The submission that it was not a commercial case because of the family relationship and the fact that there has been some forbearance on the part of the appellant does not find favour with me. This is a commercial case.

In determining the rate of interest this court in ***British Caribbean Insurance Company Limited v Delbert Perrier*** SCCA No. 114/94 delivered on the 20th May, 1996 laid down the guidelines to be followed. Carey J.A. said:

> "This leads me to venture the rate which a judge should award in what may be described as commercial cases. It seems to me clear that the rate awarded must be a realistic rate if the award is to serve its purpose. The judge, in my view, should be provided with evidence to enable him to make the realistic award. In the case just cited, evidence, was in fact led by the plaintiff but I can see no objection to documentary material being properly placed before the judge. Statistics produced by reputable agencies could be referred to the judge to enable him to ascertain and assess an appropriate rate. If, as I suggested in ***Long Yong (pcl) v Forbes Manufacturing & Marketing Ltd.***[1986] 40 WIR 229 that it is desirable that a claim for interest should be included in the prayer, then that would remind the parties that evidence can be adduced at the trial. In summary, the position stands thus:
>
> (i) awards should include an order for the defendant to pay interest;
>
> (ii) the rate should be that on which the plaintiff would have had to borrow money in place of the money wrongfully withheld by the defendant; and
>
> (iii) the plaintiff is entitled to adduce evidence as to the rate at which such money could be borrowed."

The learned judge has not stated whether or not she regarded the case as a commercial one. She has not provided the basis on which she arrived at the interest rate of 25% per annum. Coincidentally, and perhaps no more than that, the interest rate awarded in the ***Perrier*** case (supra) which was a commercial case was 25%. This case was cited by the Plaintiff. I am inclined to the view

that the learned judge considered the case a commercial one. This inclination is prompted by my experience that judges of the Supreme Court tend to be quite conservative in the award of the rate of interest. As such, an award of 25% could be considered rather high unless the learned judge considered the case to be a commercial one. My views which will now be expressed are based on the assumption that the learned judge regarded the case as a commercial one. If she did not, my conclusion would be the same.

In this case at the trial, the plaintiff adduced evidence as to the rate at which the money withheld could be borrowed. The evidence was from the plaintiff's bank – C.I.B.C Jamaica Ltd. See ***Tate & Lyle v GLC*** [1981] 3 All E.R 717 at 722. There was no challenge as to the rate of interest contained in the tendered evidence. In awarding the rate of interest the learned judge seemed to have ignored this evidence. The evidence tendered shows the interest rate on a monthly basis. The lowest which was for November, 1992 was 27.5% which is more than 25% which was awarded. In awarding interest at 25% the learned judge was in error. In arriving at the award of interest I will be doing so on a yearly basis in the same manner as I approached the reasonable rent computation.

Accordingly, I will award an average interest rate for the designated periods according to the manner of my computation. Thus for the period September 1991 to December 1991 the rate of interest is 29% per annum, for the period January, 1992 to November 1993 the rate of interest is 40% per annum. For the period December 1993 to January 1995 it is 46% per annum,

and thereafter 40% per annum until November 27, 1997, the date of the judgment in the Court below. The appeal is allowed, and the appellant is to have the costs of the appeal, such costs to be agreed or taxed.

DOWNER, J.A.:

I concur on the basis that the mesne profits should be varied upwards to $2,170,000 and that the rate of interest be as stated by Cooke, J.A. (Ag). Since $360,000 was paid by the respondent, this amount should be deducted from the mesne profit.

PANTON, J.A.:

I have read the draft of the judgment of Cooke, J.A. (Ag). I agree that the appeal should be allowed by increasing the award for mesne profits and the rate of interest as proposed by him.

ORDER:

DOWNER, J.A.:

Appeal allowed. Judgment in the court below varied as under:

The plaintiff to recover from the defendant -

(1) **Mesne Profits:**

September 1991 – December 1991 @ $20,000 per month
= $80,000 plus interest at 29% per annum

January 1992 – November, 1993 @ $30,000 per month
=$690,000 plus interest at 40% per annum

December 1993 – January 1995 @ $100,000 per month
=$1,400,000 plus interest at 46% per annum
Less payments made to the plaintiff by the defendant of $360,000

(2) From February, 1995 to the date of judgment in the Supreme Court (27th November, 1997) interest at the rate of 40% per annum.

(3) Costs of the appeal to the appellant to be paid by the respondent to be taxed if not agreed.