



IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2009: No. 399

BETWEEN:

RONALD FREDERICK TERCEIRA

Plaintiff

-and-

(1) HAROLD MICHAEL TERCEIRA
(2) NADINE JOY DECOUTO
(3) KARON MARIE TERCEIRA
(4) CAROL-ANN TERCEIRA
(5) DAVID ALAN LIVINGSTON TERCEIRA
(6) LINDA CLAIRE WILKINSON

Defendants

EX TEMPORE RULING
(In Chambers)

Date of hearing: October 23, 2012

Mr. Alan Dunch, MJM Ltd., for the Plaintiff

Mr. David Kessaram, Cox Hallett Wilkinson Ltd., for the Defendants

Introductory

1. The Defendants in this action apply by Summons dated March 21st, 2011 for an Order clarifying the term “lease for life” pursuant to my Judgment dated February 4, 2012¹. That Judgment gave judgment in favour of the Plaintiff following a very contentious family dispute. The terms of the Judgment envisaged that he would, for the remainder of his life, be entitled to use that portion of the property known as 5 Marsh Lane which the Plaintiff’s business had habitually occupied so that the equity that he was

¹ [2011] Bda LR 5; *Harold Terceira et al-v- Ronald Terceira* [2011] CA (Civ) 17 (17 November 2011).

entitled to would be satisfied and in a practical way the dispute between the parties in relation to the Property would, as far as possible, be brought to an end.

2. My Judgment envisaged that the parties would be able to work out the details of the lease and did not, unfortunately, anticipate the dispute which ensued in working out those terms². The disputes which have been put before the Court fall into two categories. The first is the dispute as to the physical portions of the premises the Plaintiff is entitled to continue to occupy. The second dispute concerns the incidents of the lease in terms of the lessee's financial obligations to contribute to the maintenance and other outgoings in relation to the Property.
3. What was actually said in paragraph 93 of my Judgment was this:

“93. In my judgment the minimum required to satisfy the Plaintiff's equity in all the circumstances is to declare that the only equity to which he is entitled and which has not been satisfied is his right to use such portion of 5 Marsh Lane as his business has habitually occupied and/or is currently³ occupying (whichever is the larger space) under a lease for life for nominal consideration on terms that permit him to sub-let the relevant space if desired. This finding is made on the basis that the Plaintiff is entitled to retain or retain the benefit of all rents received in respect of the Property up to and including March 31, 2011. Although a more logical cut-off date appeared to me to be the date of the present Judgment in conceptual terms, for practical reasons it seems sensible to allow the parties sufficient time to put in place new administrative arrangements in relation to third party tenants.”

The space the Plaintiff is entitled to occupy

4. The only real dispute in terms of the area of the premises concerns one portion of the upper floor of 5 Marsh Lane, the south-east unit which was for many years rented but which at the date of the Judgment⁴ was in fact vacant. Mr Kessaram argues that this part of the premises was not at the relevant time, namely the date of the commencement of the trial in fact occupied by the business of the Plaintiff. I accept that if one looks at that question in a very technical way that one would be bound to conclude that the Plaintiff's business (Gulfstream Graphics) was not in fact occupying that space.

² However, Paragraph 4 of the Order drawn up to give effect to the February 4, 2011 Judgment provided: “*The parties shall have liberty to apply in relation to any issues that might arise with respect to implementation of this Order.*”

³ Paragraph 1(a) of the February 4, 2011 Order stated: “*that portion of Property that his business customarily occupied or was occupying at the date of the commencement of the trial herein, whichever is the largest, including the right to sublet*”.

⁴ And at the “commencement of the trial”.

5. However, looking at the matter more practically, as Mr Dunch invites the Court to do, it seems obvious that the Plaintiff whether acting in his personal capacity or on behalf of Gulfstream Graphics, which as it seems to me in some sense involved in the renting of the premises (although there is no evidence before the Court that the precise legal entity which entered into rental agreements from time to time was Gulfstream). And from a practical perspective it seems to me that vacant space under renovation by the Plaintiff was being occupied at the date of the commencement of the trial by the Plaintiff and/or his company for commercial purposes.
6. It seems to me that it would cause great uncertainty and confusion and undermine the main purpose of the Judgment if the Court did not simply leave the Plaintiff to occupy that portion of the premises which his brother Michael is not using which would achieve a 75%/25% split. I find that the Plaintiff is entitled to that 75% portion.

Outgoings

7. When it comes to the question of responsibility for the outgoings, I have great sympathy for the Plaintiff as regards the inequities of his being required to have a commercial relationship with the Estate in respect of 5 Marsh Lane whereas, as regards 3 Marsh Lane and the other residential properties, it appears that the Defendants are getting what Mr Dunch described as “a free ride”.
8. Again, the dominant purpose of this Judgment was to create finality and clarity as to precisely what the Plaintiff’s rights were in respect of this commercial property. And so I find that the Plaintiff should be liable to pay a *pro rata* share of the land tax, electricity, water and other maintenance charges which would normally be payable by a commercial lessee in respect of the space in question⁵.

Conclusion

9. The Court has been put in a difficult position in seeking to resolve this dispute and I have adopted a somewhat rough and ready approach which involves giving the Plaintiff more space than he might perhaps on a very technical analysis have been entitled to. I have sought to balance this by requiring him to meet the outgoings on normal commercial terms, accepting that he might have certain other remedies to pursue as Mr. Kessaram suggested⁶ in his capacity as a 1/7th beneficiary of the Estate if he is dissatisfied with the way the Estate is dealing with other properties.
10. I should also confirm that the term of the lease should also be structured in such a way as to be most beneficial for the Plaintiff’s own estate. If that means that rather than being expressed as a lease for life it should be formulated as a lease for a fixed

⁵ I.e. including insurance.

⁶ This suggestion was made in opposition to the Plaintiff’s submission that the Court should take these concerns into account in the context of the present application and decline to order such usual commercial terms.

term which is determinable by the Estate on the death of the Plaintiff, that would be consistent with what was contemplated by my Judgment.

11. No Order as to costs.

Dated this 23rd day of October, 2012 _____
IAN RC KAWALEY CJ