In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013 No: 173

IN THE MATTER OF AN APPLICATION TO REMOVE THE JUDGMENT OF THE MAGISTRATES' COURT OF 11TH JANUARY 2013 IN CASE NUMBER 12CV03137 TO THE SUPREME COURT

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 13 OF THE LANDLORD AND TENANT ACT 1974

AND IN THE MATTER OF A CLAIM FOR ARREARS OF RENT

BETWEEN:-

BENJAMIN REGO JR

Plaintiff

-v-

WENDELL HAYWARD

Defendant

JUDGMENT

(In Court)

Date of hearing: 18th September 2013 and 23rd September 2013
Date of judgment: 30th September 2013

Mr Peter Sanderson, Wakefield Quin, for the Plaintiff
Mr Wendell Hayward, the Defendant, in person (on 18th September 2013)
Mr Philip J Perinchief, Phoenix Law Chambers, for the Defendant (on 25th September 2013)

Introduction

1. This is sadly one of many cases before the courts involving arrears of rent which have arisen due to the recession.

2. By an originating summons dated 20th May 2013, the Plaintiff, Benjamin Rego Jr ("Mr Rego") seeks orders:

   (1) That the judgment in the Magistrates' Court proceedings 12CV03137 in the sum of $25,000 be removed to the Supreme Court and joined in this action.

   (2) For termination of Mr Hayward's lease of the property known as The Front Ground Floor, The Stables, 91 Reid Street, Hamilton ("the Property") due to non-payment of rent and charges. This order is sought pursuant to section 13 of the Landlord and Tenant Act 1974 ("the 1974 Act").

   (3) For payment of the arrears of rent not covered by the Magistrates' Court judgment, together with contractual interest. Mr Rego has calculated that at the date of the hearing these stood at $46,762.73. They continue to accrue at the rate of $5,300 per month.

Background

3. The background to the application is set out in the first affidavit of Steve Bowie, dated 20th May 2013. He is the professional services manager of Rego Realtors (Bermuda) Limited, which is Mr Rego's letting agent.

4. Mr Rego owns the Property, which is a commercial premises. The Defendant, Wendell Hayward ("Mr Hayward") is his tenant. On 1st June 2010, Mr Hayward entered into a five year lease of the Property with Mr Rego. The lease was for a monthly rent of $5,300. There were provisions for rental increases on 1st June 2012 and 1st June 2013. However Mr Rego has not increased the level of rent and I shall therefore proceed on the basis that it remains at $5,300. The lease provides for payment of interest on arrears of rent at the rate of three per cent per annum above the base lending rate of the Bank of Bermuda Limited.

5. Paragraph 17 of the lease deals with forfeiture. It provides:

> "*17.1 This Lease comes to an end if the Landlord forfeits it by entering any part of the Demised Premises which the Landlord is entitled to do whenever the rent hereby reserved or any of it shall be unpaid for one calendar month after becoming payable whether formally demanded or not …*
>
> *17.2 The forfeiture of this Lease does not cancel any outstanding obligation of the Tenant or the Landlord.*"

6. In around August 2011, Mr Hayward started to fall behind with his rent. On 30th October 2012 Mr Rego applied to the Magistrates' Court for judgment on the arrears, which then stood at $20,464.25. By the date of the hearing on 11th January 2013 the arrears had increased to $36,364.25. Section 16 of the Magistrates Act 1948 ("the 1948 Act") provides that a court of summary jurisdiction may hear and determine actions only when the amount claimed does not exceed $25,000. Mr Rego therefore agreed to take judgment for $25,000, provided that Mr Hayward acknowledged that he still owed the excess and would promise to pay it by the end of the month. This Mr Hayward agreed to do. Judgment was therefore entered for $25,000.

7. The Magistrates' Court has generated an electronic case history, which Mr Bowie exhibits. It contains the following case action note:

> "*MR BOWIE APPEARS & MR HAYWARD. BC JUDGMENT TO PLAINTIFF IN THE AMOUNT OF $25,000. DEF TO PAY $5,000 ON OR BEFORE 28-FEB-13. DEF TO PAY $850/M STARTING 31-MAY-13. NOTE: MR. BOWIE RETURNS TO COURT AND REQUEST A DEFAULT CLAUSE AND MAY CONTACT THE COURT IN THAT REGARD IF MR. HAYWARD IS IN DEFAULT.*"

8. To date, Mr Hayward has only paid $12,600 of the arrears, which continue to accrue. Mr Rego's attorney, Mr Sanderson, for whose assistance I am grateful, has prepared a schedule of arrears which shows that there have been no rental payments since 1st March 2013. As noted above, Mr Rego has calculated that at the date of the hearing these stood at $46,762.73.

9. Mr Sanderson submits that a tenant who has been unable to make good on substantial arrears cannot expect the lease to continue, and that a landlord cannot be expected to put up with a tenant who has built up substantial arrears for over a year.

10. Mr Hayward has filed a defence dated 27th June 2013. He does not dispute the arrears, although he explains that he has done his best to meet them. In particular, he paid $5,000 prior to 28th February 2013 and $7,600 in March 2013 in an effort to put him, in his words, "*ahead of the May 31st deadline*". Thus, Mr Hayward submits, he is up to date with his payments of the $25,000 judgment. He accepts that, "*as suggested by the judge, other arrears would be considered on another matter.*"

11. Mr Hayward explains that he is the owner of Shine's House of Music and Entertainment. This is a new and seasonal business which has been badly hit by the recession. He seeks time to trade out of his business' current financial difficulties.

12. By an order dated 4th July 2013 the Court gave directions for the filing of evidence and ordered that agreed dates for the hearing be submitted to the Registrar within seven days.

13. Mr Hayward was not present at that hearing. In an affidavit dated 19th July 2013, Mr Hayward complains that he did not have prior notice of the 4th July hearing, and was in any event off-island at the time. He objects to having the case dealt with in the Supreme Court and states that his lawyer cannot be available until after 1st November 2013.

14. On 13th August 2013 the matter came on for trial. There is a dispute between Mr Rego and Mr Hayward, which I need not resolve, as to whether Mr Hayward had agreed to that date. In any event, he was not present at the hearing, and it appears from correspondence that he was off island. The trial was adjourned to a date to be set by the Registrar in the last week of August or the first week of September, and counsel for Mr Rego was directed to ensure that Mr Hayward was aware of the notice of hearing.

15. On 26th August 2013 Mr Hayward emailed the court repeating his request that the matter not be listed until after 1st November 2013. On 4th September 2013 the Court issued a notice of hearing listing the matter for 18th September 2013, when it came before me. On 17th September 2013, ie the day before the hearing, Phoenix Law Chambers filed a notice stating that they had been appointed to act for Mr Hayward. This was accompanied by a letter stating that they would be unable to deal with the matter until the last week of November 2013.

Preliminary issue: adjournment

16. Mr Hayward therefore seeks an adjournment. I am not prepared to give him one. The trial date has already been adjourned once and he has had a reasonable opportunity to sort out legal representation for today's hearing. Whatever difficulties he may have faced in doing so, they are not sufficient reason to delay this matter further. Particularly as it involves an application for judgment and enforcement in relation to a debt that is not disputed.

The law

Removal of the Magistrates' Court judgment to the Supreme Court

17. Section 24(2) of the 1948 Act provides:

> "*If a Judge is satisfied that a party against whom judgment for an amount exceeding $120, exclusive of costs, has been obtained in a court of summary jurisdiction, has no goods or chattels which can conveniently be taken to satisfy such judgment, he may, if he thinks fit, and on such terms as to costs as he may direct, order a writ of certiorari to issue to remove the judgment of the court of summary jurisdiction into the Supreme Court; and when removed the judgment shall have the same force and effect, and the same proceedings may be had thereon, as in the case of a judgment of the Supreme Court.*"

18. Section 4(1) of the Interpretation Act 1951 provides that in every Act and in every statutory instrument:

> "*'court of summary jurisdiction' means a court composed of a magistrate sitting alone, or, as the case may be, a Special Court composed and sitting in accordance with the Magistrates Act 1948 [title 8 item 15];*
>
> *'Judge' means the Chief Justice, Puisne Judge, or any Assistant Justice*".

19. Thus a judge of the Supreme Court has power to remove a judgment of the Magistrates' Court to the Supreme Court for enforcement in the circumstances outlined in section 24(2) of the 1948 Act.

20. As to the form of removal, section 9 of the Administration of Justice (Prerogative Writs) Act 1978 ("the 1978 Act") provided that the prerogative writ of certiorari, among others, should no longer be issued, although it did not provide that they should be abolished. Section 10 of that Act provided that in any case where the High Court in England would issue an order of certiorari removing any proceedings or matter into the High Court for any purpose, the Supreme Court could make an order removing the proceedings or matter. I take the legislative intent to have been that writs of certiorari should be replaced by orders for certiorari.

21. The 1978 Act was repealed by section 5(1) of the Supreme Court Amendment Act 2009, which added various sections dealing with judicial review to the Supreme Court Act 1905. These included section 65, which provides that on an application for judicial review the orders that the Court may make include an order of certiorari.

22. The present application is not one for judicial review. Nevertheless, the reference in the 1948 Act to a writ of certiorari seems anachronistic. I shall read it to mean an order of certiorari. Either way, the consequences of removal are the same.

23. Mr Sanderson addressed me on the alternative footing that under section 12 of the Supreme Court Act 1905 the Supreme Court had inherited the power of removal that was vested in one or more of its predecessor courts by reason of section XXII of the English Judgments Act 1838. However that basis for its power of removal has been superseded and impliedly repealed by section 24(2) of the 1948 Act.

24. Section 62(1)(b) of the Supreme Court Act 1905 provides that Rules of Court may be made by the Chief Justice under the Act for the procedure in connection with the transfer of proceedings from any inferior court, such as a Magistrates' Court, to the Supreme Court. However, certainly in relation to Magistrates' Courts, no such Rules have yet been made.

Estoppel and abuse of process

25. The Court raised of its own motion the question of whether Mr Rego is estopped from seeking to recover the amount in excess of $25,000 outstanding as at the date of the Magistrates' Court judgment, and further or alternatively whether his doing so is an abuse of process.

26. As to estoppel, the Court of Appeal in Bermuda has applied English common law principles in such cases as Thompson and Thompson v Thompson [1991] Bda LR 9 and Thyssen-Bornemisza v Thyssen-Bornemisza [1999] Bda LR 14. These principles were summarised recently

by the Court of Appeal of England and Wales in Spicer v Tuli [2012] 1 WLR 3088. This was a strong Court which included two future members of the United Kingdom's Supreme Court. Lord Justice Leveson, who gave the judgment of the Court, stated at paragraph 16:

"*It is common ground that the principles of estoppel arising out of court proceedings are grounded on the underlying principle that there is a public interest in the finality of litigation, and that a person should not be unjustly harassed by a revival of proceedings that have already been disposed of. These principles must be applied to work justice and not injustice:* see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] 1 AC 853, 947, per Lord Upjohn, approved in Arnold v National Westminster Bank plc [1991] 2 AC 93 , 107. It is thus open to courts to recognise that in special circumstances the inflexible application of estoppels may work injustice: see Arnold v National Westminster Bank plc, at p 109. Estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process: Arnold v National Westminster Bank plc, at p 110.*"

27. Lord Justice Leveson went on to consider at para 17 the situation where a litigant withdrew a claim. He cited with approval para 41 of the judgment of Lord Justice Dyson, another future member of the United Kingdom's Supreme Court and now Master of the Rolls, in AKO v Rothschild Asset Management Ltd [2002] ICR 899:

"*In my view, what emerges from these authorities is that there is no inflexible rule to the effect that a withdrawal or judgment by consent invariably gives rise to a cause of action or issue estoppel. If it is clear that the party withdrawing is not intending to abandon the claim or issue that is being withdrawn, then he or she will not be barred from raising the point in subsequent proceedings unless it would be an abuse of process to permit that to occur.*"

28. Lord Justice Leveson commented:

"*It must, however, be borne in mind that res judicata, cause of action estoppel and issue estoppel are all creations of judge-made law, and that judges have been careful not to lay down absolute limits to the rule. Since the fundamental purpose of both cause of action estoppel and abuse of process are the same, it is no surprise that Dyson LJ preferred the more flexible principles of abuse of process to a supposedly rigid application of cause of action estoppel. In my judgment, Dyson LJ made no error in para 41 of his judgment. I would respectfully adopt his approach.*"

29. As to abuse of process, the relevant principles were summarised by Lord Bingham in the House of Lords in Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1 at 31 B and D:

> "*The underlying public interest is the same* [as in cause of action and issue estoppel]*: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. ... It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.*"

Termination of lease

30. Section 13 of the 1974 Act deals with termination of a lease for breach of a tenant's obligations. It provides:

> "*(1) Without prejudice to the foregoing provisions of this Part, a landlord may apply to the court for an order to terminate the contract of tenancy where—*
>
> *(a) the tenant is in breach of an obligation under the contract of tenancy;*
>
> *(b) the contract of tenancy is terminable by its terms in the event of the bankruptcy or liquidation of the tenant and that event has occurred; or*
>
> *(c) the contract of tenancy is terminable by its terms on the occurrence of any other event and that event has occurred.*
>
> *(2) Subject to subsection (3), the contract of tenancy continues, and the rights and obligations of the parties remain enforceable, unless and until the court makes an order under subsection (1).*

(3) When dealing with an application made under subsection (1) the court shall have regard to all the circumstances, and particular shall consider whether—

(a) the landlord acted reasonably in instituting proceedings, and in particular whether he informed the tenant of the breach;

(b) the tenant has had a reasonable opportunity or has taken reasonable steps to remedy the breach (if capable of remedy); and

(c) the tenant during the currency of the proceedings has continued to observe his obligations under the contract of tenancy.

(4) If it is made to appear to the court that the tenant is in breach of his obligation to pay rent, and has been in arrears repeatedly, the court may if it sees fit order termination of the contract of tenancy notwithstanding the payment to the landlord or into court before the hearing, of all arrears of rent and costs, provided that upon accepting payment of all arrears of rent and costs or upon withdrawal of such arrears and costs from the court, the landlord has informed the tenant in writing that action will not thereby abate.

(5) The court may if it sees fit stay execution upon an order for termination of a contract of tenancy, subject to such conditions as it thinks fit.

(6) Subject to subsection (5) there shall be no right to apply for or obtain relief after an order for termination of a contract of tenancy has been made by the court.

(7) Subject to section 7, any reference in any contract of tenancy, or in any statutory provision, to a right or power of re-entry or forfeiture shall be construed as a reference to the right to make an application to the court under this section."

Findings

31. Mr Rego has obtained judgment in the Magistrates' Court for $25,000. This amount exceeds $120. Although I did not hear evidence as to Mr Hayward's personal means, I note that the judgment is for quite a large amount; that the court ordered payment by instalments; that as of the date of judgment the arrears of rent stood at $36,364.25; and that the arrears have continued to accrue and now stand at $71,762.73 (ie at $36,364.25 plus $25,000). In those circumstances I am satisfied that Mr Hayward does not have goods or chattels which can conveniently be taken to satisfy the judgment. If he did,

then I think it likely that he would have realised them and applied the proceeds to reduce the arrears.

32. I am therefore satisfied that I have jurisdiction to remove the judgment of the Magistrates' Court to this Court. I shall make an order of certiorari accordingly. I further order that the Magistrates' Court proceedings be consolidated with the instant proceedings. It is sensible case management that one court should be responsible for enforcement of all the arrears of rent. I see no downside for Mr Hayward, as Mr Rego is entitled to apply to this Court in any event to recover arrears that are not covered by the judgment in the court below.

33. I have considered whether, having obtained judgment for $25,000 in the Magistrates' Court, Mr Rego is barred from seeking to recover the balance of arrears outstanding at that date by reason of estoppel or abuse of process. I find that he is not. It is not disputed that when judgment was entered he expressly maintained that the balance of arrears remained due and owing and that the Magistrates' Court acknowledged that he was free to pursue that claim.

34. Mr Sanderson has indicated that Mr Rego does not seek interest on the Magistrates' Court judgment. It is therefore unnecessary for me to work out how much of that judgment was composed of interest.

35. In the premises I grant Mr Rego's claim for judgment for arrears of rent in the sum of $46,762.73, and for such further arrears of rent, which remains payable at a rate of $5,300 per month, as may accrue prior to the termination of the lease. Of the said $46,762.73, $43,321.96 is principal and $3,440.77 is interest. Interest at the contractual rate will be payable on the principal. Mr Rego should obtain an order, which I anticipate will be by consent, crystallizing the principal due at the date of termination.

36. As to termination, Mr Hayward is in breach of his obligation to pay rent under the lease. I am satisfied that Mr Rego as landlord has acted reasonably in instituting proceedings, and that he has informed Mr Hayward

of the breach. I am also satisfied that Mr Hayward has had a reasonable opportunity to remedy the breach, but that the breach is ongoing as arrears of rent continue to accrue. The reference in the lease to the landlord's rights of forfeiture and re-entry is to be construed as a reference to the right of the landlord to apply to the Court for an order to terminate the lease.

37. I shall therefore make an order terminating the lease. However, having been addressed by both parties on the issue, I shall suspend the implementation of the order until the end of 18th October 2013. If, on or before that date, Mr Hayward has (i) paid in full the judgment debt of $46,762.73, plus any further arrears of rent that may have accrued, together with the outstanding contractual interest, and (ii) paid $9,250, which is the amount payable by that date under the terms of the Magistrates' Court judgment (ie $5,000 plus 5 instalments of $850), the order for termination shall remain suspended until further order of the Court.

38. I was initially minded to require that Mr Hayward pay both judgment debts in full as a condition of the stay. But upon reflection this would not be fair to him. Mr Rego has treated the $12,600 paid by Mr Hayward subsequent to the Magistrates' Court judgment as going towards arrears of rent other than those covered by the judgment. But Mr Hayward intended that it should go towards paying off the judgment. If the monies were applied in this way, he would be in compliance with the repayment terms set by the Magistrates' Court. I shall therefore permit him to continue paying off that judgment by instalments.

39. An order suspending the termination of the lease is subtly different to the order contemplated by section 13(5) of the 1974 Act staying execution upon an order for termination. Under the former the lease remains in force whereas under the latter the former tenant becomes merely a licensee. I make the order under the Court's inherent jurisdiction to control its process.

40. I award Mr Rego the costs of and incidental to this application. Costs generally follow the event, and there is no good reason in this case to depart from that principle.

Dated this 30th day of September, 2013 _____

Hellman J