In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2012 No: 14

EIMEAR BURKE

Appellant

-v-

DANIEL BUCHER

Respondent

JUDGMENT

(In Court[1])

Date of hearing: May 22, 2014
Date of Judgment: June 9, 2014

Ms. Gabrielle Stewart, Stewart Law, for the Appellant
Mr. Peter Sanderson, Wakefield Quin, for the Respondent

Introductory

1. The Appellant appeals against the Judgement of the Magistrates' Court (Wor. Maxanne Anderson (Acting)) dated April 18, 2014 granting judgment in favour of the Respondent in the amount of $10,854.00. Damages were awarded in respect of arrears of rent due under a lease signed on July 12, 2011 ("the Lease"). She principally contends the Learned Magistrate erred in law in finding that the Lease was a fixed term one year lease, so that when she vacated after less than three months she ought not to have been required to pay her landlord rent for the unexpired term of the Lease.

2. The Learned Magistrate also refused the Respondent's claim for full indemnity costs pursuant to contract and simply awarded costs to the Respondent to be taxed if not agreed. The Respondent cross-appeals against that finding.

The Appellant's Grounds of Appeal

[1] The Judgment was circulated without a hearing with a view to saving costs.

3. The Appellant's Notice of Appeal contained four substantive grounds, which may be summarised as follows:

    (1) The learned judge erred in finding that the tenancy was a yearly tenancy and in declining to apply the principles of construction stated in *Adler-v-Blackburn* [1953] 1 QB 146; [1952] EWCA Civ 1;

    (2) The learned judge erred in finding that the landlord had not breached his covenant of peaceful and quiet enjoyment;

    (3) The learned judge erred in failing to take proper account, in assessing damages of the refusal of the landlord to accept the tenant's offer to find a replacement tenant;

    (4) The decision was against the weight of the evidence.

4. Ground (4) was, sensibly, not pursued. Grounds (2) and (3) appeared on their face to impermissibly invite this Court to interfere with factual findings made at trial, without asserting that the findings were not reasonably open to the Learned Magistrate to reach.

The Lease

5. It was common ground that the property which was the subject of the Lease was an apartment forming part of a house occupied by the Respondent landlord, and that the rental unit was subject to rent control under the Rent Increases (Domestic Premises) Act 1978.

6. The Lease was dated July 12, 2011, but the Appellant moved into the apartment on September 1, 2011. At the end of the month she verbally advised the Respondent she wished to leave and expressed concerns about noise. On October 31, 2011, through attorneys, she gave formal notice of her intention to vacate on November 15, 2011.

7. The body of the Lease simply identifies the parties. The Schedule describes the premises and defines various other key terms, including:

    "*3. THE TERM: ONE (1) YEAR…*

    6.THE RENT: BD$2,600 PER CALENDAR MONTH

    7.RENT DUE DAY: FIRST DAY OF EACH CALENDAR MONTH".

8. The Lease was also expressed to be subject to Special Leasing Conditions, which were set out above the parties' signatures on page 2 of the document, and General

Leasing Conditions which were attached. Special Condition 1 modified the General Conditions to make specific provisions in relation to the payment of rent on the rent due date. Special Condition 2 provided as follows, and was the only clause expressly entitling the tenant to terminate the Lease before the expiry of its full term:

> "*2. If the **TENANT** being non-Bermudian and subject to the provisions of the Bermuda Immigration and Protection Act, 1956 is required by the Bermuda Government or his employer to leave the Islands of Bermuda, then in such event, the **TENANT** may terminate the Lease Agreement by giving the **LANDLORD** three (3) calendar months' notice in writing furnishing the Landlord with satisfactory proof of the requirement for the **TENANT** to leave the said Islands.*"

9. General Condition (a) further provided that the premises were being let "*for the Term*". Having regard to the quoted terms of the Lease, the parties appear to have agreed a fixed term lease for one year which could only be terminated by the tenant without cause before its expiration if she was a non-Bermudian, required to leave Bermuda. This preliminary conclusion flows from a straightforward reading of the unambiguous terms of the Lease.

10. I of course assume (and it appears to have been accepted) that it was necessary to imply a term entitling the tenant to terminate for fundamental breach of covenant on the landlord's part.

11. Although the Lease contains an arbitration clause, the tenant elected not to apply to this Court under the Arbitration Act 1986 to enforce the arbitration clause after the Magistrates' Court proceedings were commenced against her. The General Conditions also provided with respect to "*Expenses*":

> "*That if the TENANT shall commit any breach of this Agreement by reason whereof the LANDLORD shall incur any outlay fees or expenses (including legal fees and court costs) either before or after the termination of the tenancy the same shall be recoverable by the LANDLORD from the TENANT on a full indemnity basis and without any deduction for any reason as if the same were rent arrears.*"

The Magistrates' Court Judgment

12. The Learned Magistrate delivered a careful nine page Judgment in which she summarised the parties' respective cases and the evidence adduced at trial, as well as the submissions made at the conclusion of the evidence. As regards the term of the Lease, she found as follows (at page 8):

> "*31…it was evident from the evidence given by both the Plaintiff and the Defendant that the intention when entering into the lease agreement …was that the period of the lease would be for one year…Section 4(1)(e) of the Rent Increases (Domestic Premises) Act 1978 clearly state[sic] that in determining*

the nature of the tenancy for the purposes of that Act, regard shall be had to the covenants, terms and conditions of the tenancy….I therefore find that based on the intention of the parties and the period stated in the lease agreement…this was a lease agreement for one year and not a monthly tenancy as argued by the Defendant."

13. She further found that while the tenant offered to find a replacement in the context of seeking to agree a consensual termination of the Lease, the landlord insisted in correspondence that he would only agree to this if a suitable tenant could be found for the remainder of the Lease. No such replacement was found, so the tenant was liable to pay rent for the remaining term of the Lease.

14. The Learned Magistrate made the following findings as regards the landlord's alleged breach of covenant:

> "*36. The Defendant claims that that the Plaintiff's actions or behaviour, compost pile and noise levels amounted to a breach of the covenant for quiet enjoyment of the property. I find that these were relatively minor and not a breach of the covenant for quiet enjoyment. In my view, there can be no question of these issues of small magnitude amounting to a breach on the landlord's part sufficient to entitle the Defendant to treat it as a breach of the lease to terminate the tenancy*."

15. After setting out her findings as to damages in a systematic and concise manner, the Learned Magistrate then dealt with the Plaintiff's contractual claim for costs. She reproduced the relevant clause in the Lease and then concluded (at page 9):

> "*The Plaintiff's claim is therefore for costs on a full indemnity basis. I find that the Plaintiff should be entitled to his legal fees and court costs for the recovery of rent and damages to be taxed if not agreed.*"

Findings: Ground 1 of Appeal

16. Ms. Stewart fairly complained that the trial judge failed to expressly have regard to the decision in *Adler-v-Blackburn* [1953] 1 QB 146 upon which she heavily relied. She also rightly submitted that the trial judge erred in relying on section 4(1) of the 1978 Act as a basis for having regard to the terms and conditions of the Lease for the purpose of determining whether the tenancy was a yearly or a monthly one. However, Mr. Sanderson rightly submitted that the case relied upon by his opponent had no application to the facts of the present case, upon which it was clear that the Lease was for a fixed one year term.

17. As any judgment ought to clearly explain to the unsuccessful party the reason why their case has been rejected, it is unfortunate that the Judgment made no mention of the authority which was the centrepiece of the tenant's case on the term of the tenancy. *Adler-v-Blackburn* was a case which established the principle that where a fixed term lease expires and the tenant remains in possession without negotiating a

fresh lease term, the new 'post-lease' tenancy will be considered to be a tenancy for a term measured by the period set out in the lease with respect to which rent was payable. The rationale for this principle, which of course assumes that the parties have not dealt with this scenario in the initial lease agreement explicitly, was described in the following way by Somervell LJ in *Adler-v-Blackburn* [1952] EWCA Civ 1 (at pages 2-3):

> "*I think that when, as here, a term comes to an end one has, of course, to consider what inferences are properly to be drawn from the payment and acceptance of rent. That is the basis of the presumption. In the cases in the books the rent is expressed to be so much per year and if one takes the extreme case in which the rent being so expressed is to be payable weekly, when the landlord accepts a weekly sum what he is accepting is an instalment of the agreed figure for a yearly rent. One, therefore, sees from that the force of the line of argument which has led the Court in those cases to presume a tenancy for a further year. <u>But in a case like the present where the rent is expressed to be per week I think when the fixed period has come to an end one should net presume anything but a weekly tenancy, namely, a tenancy for the period in respect of which the rent is expressed. It is one of those cases (and there are many) when the law has to do its best to fill up a gap which has been left by the parties.</u>*" [emphasis added]

18. As Mr. Sanderson pointed out, the present case is concerned with what is the initial Lease term, and not with the status of a subsequent tenancy of an uncertain duration. In the present Lease, the parties expressly agreed that if the tenant stayed on after expiry of the one year term, such tenancy would be a monthly tenancy. In these circumstances, and having regard to the specific provisions of the present Lease reproduced above (irrespective of what the subjective intentions of the parties were), it was clearly agreed that the Lease was for a fixed term of one year. I say irrespective of what the subjective intentions of the parties were, because it is a basic rule of contractual interpretation that where the parties have reduced their agreement to writing, the Court's task is to construe the document without regard to what the parties subjectively intended. For example in *Ting-v-Hill* [2004] Bda LR 7 (at page 11), this Court noted that:

> "*It was common ground that in construing the Settlement Agreement, this Court must objectively ascertain the intention of the parties as expressed in the agreement, ignoring their subjective intentions and any assertions made in the course of the negotiations which did not mature into contractual obligations. The meaning must not be ascertained in a vacuum, but taking into account the general position the parties found themselves in and the commercial object of the contract in all the surrounding circumstances.*"

19. In the present Lease, the only non-fault based ground for premature termination by either party was if the tenant, being a non-Bermudian, was required by the Immigration Department or her employers to leave Bermuda. <u>In this context</u>, the fact that the rent was expressed as a monthly figure was irrelevant to assessing what the duration of the term of the Lease was. Each case ultimately turns on its facts. Rules of construction developed to deal with resolving matters not expressly dealt with in

leases, have no proper application when construing a document in which the relevant issues have been expressly agreed by the parties.

20. On the other hand, Ms. Stewart was correct to submit that the trial judge erred in construing section 4(1) of the 1978 Act as being relevant to the issue of what the term of the lease was. Section 4(1)'s reference to the "*nature of the tenancy*" appears solely relevant to whether or not a tenancy is "domestic" and therefore covered by the Act. However, I reject the Appellant's contention that the present premises were subject to the special limitations on termination under section 8 of the 1978 Act. Those protections for tenants do not apply to premises also occupied by the landlord, such as the premises in the present case. Section 7 of the Act provides:

> "*(1) Save as is provided in section 8, no tenancy existing on 1 July 1978, or which may thereafter subsist, shall terminate during the continuance in force of this Act:*
>
> *Provided that, subject to any contrary agreement between the landlord and the tenant, this section shall not apply to any tenancy of an apartment in a building a part of which is occupied by the owner where such a building does not comprise more than 3 living units and such tenancy commences after 30 June 1983; and for the purpose of this proviso "living unit" means a part of a building so constructed or divided as to be occupied as a complete dwelling area.*"[2]

21. Although the reasons for her decision on this issue were imperfectly expressed, the Learned Magistrate correctly found that the term of the Lease was one year.

Findings: Appellant's Grounds 2-4

22. It was open to the Learned Magistrate to make the findings which she made in rejecting the Appellant's case that no breach of the covenant of quiet enjoyment occurred. There was a dispute between the witnesses as to whether or not the landlord was excessively noisy and the trial judge preferred the evidence of the landlord to that of the tenant.

23. As to the complaint that in assessing damages insufficient weight was given to the Appellant's offer to assist finding a new tenant, there was no evidence that a suitable tenant offered to the landlord was rejected. The trial judge appears to have accepted the Respondent's evidence that the discussion between the parties about finding a replacement tenant became redundant once the Appellant vacated without a replacement having been found.

24. Grounds 2-3 of the Appellant's appeal are accordingly refused, as is Ground 4, which was obviously hopeless and was not pursued at the hearing.

[2] Having struggled to resolve the competing arguments of counsel on the scope of application of the Act during the hearing, I identified this basis for accepting the Respondent's submissions on this point after reserving judgment. I invited and received supplementary submissions from the Appellant's counsel in this regard.

Findings: the Respondent's cross-appeal for contractual full indemnity costs

25. The Learned Magistrate gave no reasons for rejecting the Respondent's claim at trial for contractual costs on a full indemnity basis. Implicitly, she accepted the Appellant's submissions and rejected the Respondent's. The competing contentions in the Magistrates' Court (which were echoed on appeal) may be summarised as follows:

    (a) the Respondent submitted that he was entitled to costs under the Lease. The application was made in closing submissions and was not explicitly part of the pleaded case. The particulars of Claim did however claim $1190 in respect of "*Legal Fees to Date*", and concluded with: "*Legal Fees at Court To be determined at court*";

    (b) Mr. Sanderson placed reliance on *Mansfield-v-Robinson* [1928] All ER Rep 69, which held that a contractual agreement as regards costs was enforceable in relation to arbitration proceedings in which the arbitrator had a statutory discretion with respect to costs;

    (c) Ms. Stewart responded that the case relied upon by Mr. Sanderson was distinguishable, and that the Court's jurisdiction in respect of costs was limited to the jurisdiction conferred by statute. Accordingly, only the fixed fees prescribed under rule 3 of the Court Fees and Expenses Rules 1972 as read with the Third Schedule to the Magistrates' Court Rules 1973 could be awarded.

26. These arguments were advanced in the Magistrates' Court on February 11, 2013. Coincidentally, on February 12, 2013, the very next day, I delivered judgment in *Bada-v-Capcar Enterprises Ltd.* [2013] Bda LR 12; [2013] SC (Bda) 13 Civ (12 February 2013), a case which concerned the taxation of contractual full indemnity costs. This was a case where the Defendant counterclaimed for, *inter alia*, "*(d) Costs incurred on a full indemnity basis pursuant to Contract in enforcing the terms of the Contract and this action*" and the relevant contractual clause was set out in the pleadings (paragraph 3). The enforceability of the contractual full indemnity costs clause was not disputed. I concluded as follows (at paragraph 22):

> "*…having regard to the highly persuasive case of Gomba Holdings Ltd-v-Minories Finance Ltd [1993] Ch 171, which was not cited before the Learned Registrar, I am bound to find that the approach she adopted to the instant taxation was wrong in law and/or principle. Applying the correct principles, which do not appear to have been considered by the Bermudian courts in any published judgment in recent times (if at all), I exercise my discretion as follows. I find that no or no sufficient grounds have been made out which would justify depriving the Appellant of its contractual entitlement to be fully indemnified for the costs of enforcing its contractual rights. The mere fact that the total amount claimed could be considered unreasonable for the purposes of exercising the taxing discretion applicable to an indemnity costs basis taxation does not suffice*

to deprive the Appellant of its contractual right to a full indemnity. This would require some exceptional findings such as:

(a) the time claimed to have been spent on one or more items was not in fact spent;

(b) the hourly rate used to prepare the Bill did not reflect the true terms on which the Appellant's attorney was hired; and/or

(c) the total amount of the Bill was clearly grossly inflated."

27. In my judgment there is no conflict whatsoever between the statutory regime for costs, whether in the Magistrates' Court or any other court, and a valid contractual clause conferring on one or both parties more generous rights than are available under statute. Every Bermuda mortgage has a contractual costs indemnity provision in favour of the mortgagee, as a result of which this Court in mortgage foreclosure proceedings generally makes no formal order for costs, it being accepted that the mortgagee can for convenience deduct its costs from the sale proceeds, subject, no doubt, to the right of the mortgagor to refer any disputes about quantum to the Court for resolution. As Salter J observed in *Mansfield-v-Robinson* [1928] All ER Rep 69, in a passage upon which Mr. Sanderson relied in support of his cross-appeal (transcript, page 4):

> "*With regard to the discretion of a judge in regard to costs, which is given by Ord 45, r1, of the rules of the Supreme Court, it is common practice that parties constantly make their own agreements in regard to the costs of proceedings in the High Court and county courts and such agreements are perfectly valid and enforceable.*"

28. The Respondent landlord clearly had a contractual right to damages in respect of legal costs, according to the Lease, "*as if the same were rent arrears.*" The Learned Magistrate erred in rejecting this claim, apparently on the basis that the Court's only jurisdiction was shaped by the statutory costs regime. I have carefully considered whether the decision on costs could be supported on other grounds; and the only point which appeared in the course of the hearing of this appeal which might have been taken by the Appellant was that the claim was inadequately pleaded. However, on closer scrutiny of the pleadings and the appeal record, it is clear that:

(a) although the landlord's Particulars of claim did not make reference to the expenses clause explicitly, "legal fees" were plainly claimed by way of damages, as opposed to as ordinary legal costs;

(b) the landlord not only formally produced in evidence the Lease, but also a Wakefield Quin invoice. Ms. Stewart objected (on the grounds that costs should be taxed in the ordinary way) and Mr. Sanderson insisted: "*Lease*

states that legal costs are recoverable (see Lease)".The trial judge reserved her decision on this aspect of the landlord's claim; and

(c) the contractual claim for legal fees was, accordingly, adequately pleaded and the subject of full argument in the Court below.

29. The Respondent's cross-appeal is allowed. The claim for $1820 ("*Legal Fees to Date*") and $3,290 ("*Legal Fees at Trial*"), as set out at page 6 of the trial Judgment, was not disputed on quantum grounds. That part of the Judgment of the Magistrates' Court which rejected this aspect of the landlord's claim is set aside and the Respondent is awarded by way of damages in respect of legal fees incurred at trial the additional amounts of $1,820 + $3,290=$5110. It follows inevitably from this finding, that the Respondent is entitled to recover the costs of the present appeal on the same contractual full indemnity basis, to be taxed if not agreed.

Conclusion

30. The Appellant's appeal against the decision of the Magistrates' Court awarding judgment against her in the amount of $10, 854 is dismissed.

31. The Respondent's cross-appeal seeking to set aside the Learned Magistrate's rejection of his claim for $5110 in respect of legal expenses as contractual damages is allowed. The Respondent is awarded this additional sum by way of damages, together with his legal costs of the present appeal, to be taxed by the Registrar on a full indemnity contractual basis, if not agreed. For the avoidance of doubt, the trial judge's Order awarding the Respondent costs to be taxed if not agreed is set aside.

32. I will hear counsel, if necessary, in relation to the terms of the final Order drawn up to give effect to the present Judgment.

Dated this 9th day of June, 2014 _____

IAN RC KAWALEY CJ