

In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2014 No: 39

(1) HICOLETA FUNDERANNU

(2) FLORINA VARGA

(3) ALEXANDER NICHIFOR

Appellants

-v-

GREGORY MINORS

Respondent

EX TEMPORE JUDGMENT

(In Court)

Date of hearing: April 1, 2015

Mr. Christopher Swan, Christopher Swan & Co., for the Appellants

Mr. Bruce Swan, Apex Law Limited, for the Respondent

Introductory

1. In this matter the Appellants, who were the Defendants in the Magistrates' Court, appeal against the decision of the Magistrates Court (Worshipful Maxanne Anderson, Acting) dated 11th April 2014. The impugned judgment awarded the Plaintiff below rent for the months of November, 2012, and January and February 2013 on the grounds that the tenants vacated without giving the contractually required three months' notice.

Grounds of Appeal

2. The essence of the appeal can be captured from the first two grounds of appeal which read as follows:

“1. The Learned Magistrate erred in Law by ruling that the Defendant was required to give the Plaintiff three (3) months’ Notice to Quit under the Lease and as a consequence owed the Plaintiff rent for the months of of December 2012 until February 2013.

2.The Learned Magistrate erred in Law in that after accepting that the Defendant gave notice to Vacate in November 2012, failed to apply the Landlord and Tenant Act 1974 Section 11(1)(c) to the facts of the case such that the Defendants terminated the Lease by notice and therefore should not be liable for rents for December, January and February. ”

3. The starting point in terms of understanding the legal controversy is to look at section 11 of the Landlord and Tenant act 1974 upon which Mr. Swan relied. Section 11(1)(c) provides as follows:

“11 (1) Subject to any agreement evidenced in writing providing for a different period of notice—

(a)...;

(b)...; and

(c) a tenancy for successive rental periods of a month or less shall be terminated at the end of a rental period by not less than one month's previous notice.”

4. Central to the present appeal is the contention of the Appellants that the notice period prescribed by the statute was not contracted out of by the terms of the relevant lease. It is common ground that the Lease provided for rent payable on a monthly basis but the finding of the Learned Magistrate that the Lease was a fixed term tenancy for one year was challenged, as was her finding that the Lease contained a requirement that three months’ notice of premature termination should be given.

The Lease

5. The Lease itself contains very few clauses which are of relevance to the present appeal. It was by common accord a home-drawn document prepared by the landlord himself. It was dated the 17th day of February 2012 and Section I provides as follows:

“B. the term of the lease shall be from the 1st day of March, 2012 and terminate 28th day of February 2013 with an option to renew giving three months notice prior to termination of the lease.

C. The rent of the premises shall be (\$2400.00) per month for the term of the lease. The rent shall be reckoned from the 1st day and due and payable each month (hereinafter called the 'rent due dates') and it shall not be necessary for the Landlord to demand the said rent at any time."

6. Under Section II, the Lease provides, so far as is relevant, as follows:

"B. In the event that the Tenant or Landlord gives notice to terminate this lease the Tenant permits the Landlord or his agent to show the property for sale or rent , with 24 hours notice, three (3) months prior to termination of the lease." "

7. And finally, in Section IV, the Lease provides:

"A. If the Tenant is a non-Bermudian and his work permit or his right of residency in Bermuda shall be terminated by the Bermuda Government, the lease may be terminated by giving three (3) months' notice in writing to the Landlord or his agent."

8. It was common ground before me that the 3rd Defendant, who was treated for all intents and purposes as a tenant although she did not sign the Lease, gave verbal notice of termination some two weeks before the tenants vacated the premises on 1st December 2012.

The Magistrates' Court Judgment

9. At the conclusion of the trial (the same counsel who appeared before me appeared below), counsel filed written closing submissions and so the Court below was assisted in understanding the respective cases. Mr. Christopher Swan for the Defendants clearly argued that this was a lease agreement which did not contain any notice provisions and, accordingly, it was a lease which could be terminated by either party on one month's notice under section 11(1)(c) of the Landlord and Tenant Act. On the other side, it was argued by Mr. Bruce Swan that in fact the Lease was a one year lease and the notice required to terminate it was in fact three months.
10. The Learned Magistrate gave a considered judgment which ran to 3 ½ pages. Firstly, she summarised the submissions and clearly understood that the Defendants were contending that it was a month to month tenancy and she concluded her findings on that issue by stating in paragraph 18 as follows:

“18. The Defendants’ case is that the lease was a month to month tenancy and that this was confirmed by the clear reference to monthly rent. I disagree. The lease was clear that the duration was from the 1st day of March, 2012 and was to terminate on 28th day of February 2013. It is absolutely evident that this was a one year lease broken down into monthly payments.”

11. She also addressed her mind to the question of notice although it must be said that her findings on the question of notice were not as clearly expressed as they might have been. She says this at paragraph 21:

“21. The 3rd Defendant gave verbal notice to vacate in November 2012. This notice should have been 3 months according to the Lease Agreement. For that reason it follows that the Defendants are liable to pay December, January and February rents. The Plaintiff tried to mitigate his loss, and as he should, proceeded with the process of trying to secure other tenants to occupy the premises as soon as possible.”

The merits of the appeal

12. Mr. Christopher Swan for the Appellants fairly argued that it was difficult to understand on what precise basis the Lease was construed as requiring three months’ notice. Having reviewed the Lease agreement, I find that the Lease was rightly found to be a one year fixed term lease and no convincing argument was advanced before me as to why this finding of the Learned Acting Magistrate should be disturbed.
13. Reference was made in the course of argument to my own decision in the case of *Burke-v-Bucher* [2014] Bda LR 59. Before a copy of this decision was obtained, it was argued that because the rent was expressed to be paid on a monthly basis, the agreement could not be regarded as a fixed term one. However, the relevant principles articulated in that case (where the issue was whether or not after the expiry of a fixed term lease the resulting tenancy was a yearly tenancy or a monthly tenancy) were that it is only relevant to the resulting tenancy after the expiry of the lease how the rent is described in the agreement. The principle derives from the case of *Adler-v-Blackburn* [1953] 1 QB 146.
14. In *Burke-v-Bucher*, the lease agreement in that case had a term of one year, the rent was expressed as \$2600 per calendar month, the rent was due on the first day of each calendar month and this Court found that this was a fixed term lease for one year. So I find no reason of principle for ignoring what I consider to be the clear terms of the Lease in this case. They provide quite clearly for a one year term with rent paid monthly with various provisions that suggest that the tenant, subject to the termination

provisions contained in the Lease, should have a right to stay there for one year; and that the landlord should expect the tenant to be there for one year. However, the crucial question remains what period of notice was required.

15. It seems to me that once it is accepted that this was a one year fixed term lease, the commercial sense or direction of the agreement tends to weigh against the view that one months' notice could be given to terminate this agreement. It makes no commercial sense that parties would enter into a fixed term one year agreement with an option to renew and then either party is able to give one months' notice. But that commercial background notwithstanding, it is still necessary to construe the Lease and see whether the Lease itself does provide for a notice period other than the one month that would apply under section 11(1)(c) of the Landlord and Tenant Act, unless the Lease provides otherwise. In my judgment it is ultimately clear that the relevant notice period is in fact three months. And that arises as a matter of construction of Section IIB in the context of the agreement as a whole.
16. Three months is mentioned in three places; and before coming to Section IIB, it is necessary to appreciate the other two references in their context. Three months prior to the termination of the Lease, the termination being the 28th day of February 2013, one year after the commencement of the Lease on 1st March 2012, the tenants are entitled to give three months' notice of their desire to exercise their option to renew. That is the first three months period. The other three month period is the period which applies where the tenants, assuming they are non-Bermudian, lose their right of residency. In those circumstances, which one might imagine are somewhat extreme, IVA provides that "*the lease may be terminated by the Tenant giving three (3) months' notice in writing*".
17. And so it is against that background that one comes to construe the somewhat inelegantly expressed provisions of Section IIB, which it is worth reproducing again:

"B. In the event that the Tenant or Landlord gives notice to terminate this lease the Tenant permits the Landlord or his agent to show the property for sale or rent , with 24 hours notice, three (3) months prior to termination of the lease."

18. Mr. Christopher Swan for the Appellants vigorously argued that this clause did not expressly say that either party can give notice of termination and, if they do so, must give three months' notice. I agree that this clause does not, very literally read, provide that in terms. However, courts construing legal instruments must as far as possible try to give efficacy to clauses and extract a practical meaning from the clause looking at the contract as a whole. There are, I suppose, two competing constructions. One is that Section IIB merely requires there to be a three month period prior to termination of the agreement during which the landlord or his agent can show the property. The

other meaning is that in fact the tenant or landlord must give three months' notice of termination, and during that three month period the tenant must allow the landlord or his agent to show the property for sale or rent. In my judgment, it is impossible to make sense of this clause as a practical clause and to adopt the construction contended for by the Appellants' counsel. Because the clause would rarely be operative according to its terms if in fact it were possible for either party to give only one months' notice of termination; the three months' period simply makes no sense.

19. And so for those reasons I find that the Learned Acting Magistrate was right to conclude that the relevant Lease provided for either party to terminate the agreement on three months' notice. It follows that that the notice period of one month provided for in section 11(1)(c) did not apply because the parties had provided for a contrary notice period in their Lease agreement. Mr. Bruce Swan for the Respondent (the Plaintiff below) accepted that any ambiguities were to be resolved against his client, the landlord. But I agree that although the provisions of Section IIB are somewhat awkward, there is ultimately no ambiguity in the relevant provisions.

20. The only remaining question to consider is whether the Learned Acting Magistrate was correct in awarding three months' damages. Reading her Judgment in a generous way, it may well be that she felt, reading the Lease agreement in a very technical way, that because the tenants did not vacate until the 1st of December, the rent was accordingly due. This is what she in fact says in paragraph 20 of her Judgment:

“20. The Defendants and the Plaintiff also stated in evidence that the Defendants were still in possession of the premises on 1st December 2012. It follows then that December 2012 rent is due according to I(C) of the Lease Agreement.”

21. I have difficulty with accepting that it is a proper interpretation of the Lease agreement to suggest that not only is there a requirement to give three months' notice, but the notice period is in some way abridged if after notice is given the tenants are still in possession at the beginning of the next month. That construction would result in a situation where notice could be rendered nugatory, it seems to me. In this case, two weeks' notice was given and the tenants should have been given credit for that two weeks' notice. And accordingly while I uphold the main findings of the Learned Acting Magistrate, I find that her award of three months' rent in lieu of notice should be set aside and the total award should be reduced by the sum of \$1200 representing half of one months' rent.

Disposition of appeal

22. Subject to that variation of the award, the appeal is allowed to that extent¹ but otherwise dismissed.

[Counsel were heard on costs]

23. The Respondent is awarded 85% of his costs of the appeal, to be taxed if not agreed.

Dated this 1st day of April, 2015

IAN R.C. KAWALEY CJ

¹ I.e. the original award of \$7200 is reduced to \$6000.