

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. 1997/C 413

BETWEEN	CHISHOLM & CO. REALTY LTD.	PLAINTIFF
A N D	JAMOMES DEVELOPERS LTD.	1 ST DEFENDANT
A N D	JAMOMES INVESTMENTS LTD.	2 ND DEFENDANT
A N D	ERROL HANCHARD	3 RD DEFENDANT
A N D	PATRICIA HANCHARD	4 TH DEFENDANT

Mrs. C. Davis for the Plaintiff.

M. Frankson instructed by Gaynair & Fraser for the Defendants.

Heard: 3rd, 4th and 21st March, 2003

M. Cole-Smith, J. (Ag.)

This is an action for recovery of debt.

The plaintiff Chisholm and Company Realty Limited leased premises located at 4 Caledonia Crescent, Kingston 5 to the first and second defendants, Jamomes Developers Ltd. and Jamomes Investments Limited. The third and fourth defendants Errol Hanchard and Patricia Hanchard guaranteed the obligations of the first and second defendants with regard to the Lease Exhibit 1. Mr. James Chisholm, is the Managing Director of the

plaintiff company and is authorized to give evidence on behalf of the company.

The guarantee was signed by the third and fourth defendants Exhibit 2.

The lease was signed on the 1st March, 1995 and the rent was \$60,000 per month.

By agreement rent from 1st October, 1995 was increased by 10% which amounts to \$66,000 monthly.

By agreement rent from 1st October, 1996 was increased by 15% which amounts to \$75,900 monthly.

On the 12th May, 1997, the third defendant wrote to the plaintiff Exhibit 3. This letter states that a balance of \$575,645.09 was owing for rent as of 1st May, 1997 and that interest at the rate of 47% per annum was accruing from that date.

The letter in part states:

Paragraph 2

"As partial security toward the \$575,645.09 past due and owing, we herewith pledge to you irrevocably all the office furniture, office equipment and air-condition units in the building at 4 Caledonia Crescent, Kingston 5 as from today May 12, 1997."

Paragraph 3

"All the office furniture, office equipment and air-condition units pledged herewith are free of all encumbrances, and, we hereby give you our irrevocable undertaking that none of our assets shown on the schedule attached hereto shall be not removed from Caledonia Crescent, Kingston 5 until you are paid in full the said amount of \$575,645.09 plus interest on or before May 31, 1997 or at least 60% of this amount by May 31, 1997."

Paragraph 4

"We understand and know that removal or any damage to any of the items pledged to you and listed on the schedule hereto or any damage to the building would be regarded as criminal activities."

For the months June, July and August, 1997 rent was unpaid. This amount was \$75,900 monthly and totalled \$227,700. The defendants vacated the premises in August, 1997.

There was a telephone bill Exhibit 4 for \$3,400.06 which was unpaid and the plaintiff paid it.

There was a water bill for \$64,841.87, Exhibit 5 which was unpaid and the plaintiff paid it. The defendants based on the Statement of Claim are liable for \$20,366.29.

By virtue of the Lease Exhibit 1 the defendants were to maintain all air-conditioning units and lighting fixtures in the premises. There was an outstanding balance of \$26,344.90 payable to Freeze Well Air Condition, Exhibit 6 and this was paid by the plaintiff.

There are invoices for electrical work and material for \$4,964.87, Exhibit 7 and this was paid by the plaintiff.

The plaintiff asked the third defendant repeatedly to pay the rent owing and remove the furniture out of the building but he did not. Furniture was in all the rooms throughout the building.

On 21st December, 2000 plaintiff wrote to all the defendants Exhibit 8A asking them to pay what is owing and remove the furniture which was pledged as partial security. This letter states that the goods prevented the building from being leased to others and that they are responsible for loss of income up to the date of the letter and until the goods are removed from the premises.

The letter Exhibit 8A also informed them that warehouses are available at \$60,000 per month for twelve (12) months minimum period at their expense and they should pay the first and last months and a deposit. In addition they should pay \$60,000 to pack and transport the goods.

The plaintiff did not receive a reply and by letter dated 5th November, 2001 Exhibit 8B wrote to the third defendant and sent a copy of the letter dated 21st December, 2000.

Plaintiff states that because of the furniture in the premises it is unable to rent and being familiar with the renting of commercial premises in Kingston and St. Andrew the rental would be \$75,900.

Plaintiff also claims rent from September, 1997 to the present which is 67 months at \$75,900 monthly that is from 1st September, 1997 to 1st March, 2003 at 47% per annum.

Mrs. Davis for the plaintiff submits that it is uncontested that the defendants failed to pay the sum as they agreed and all the plaintiff did was to keep his side of the bargain. In the circumstances what the plaintiff did was reasonable where rent was not paid. Plaintiff is entitled to charge the defendants a reasonable sum for the retention of the furniture in the premises which is \$75,900 per month which is the 1996 rate. Plaintiff and the defendant agreed in Exhibit 3 that the interest would be 47% of the sum due and asks Court to allow the sum of 47% which was agreed between the parties.

Mr. Maurice Frankson for the defendants agrees:

Telephone bill	\$ 3,400.06
Water bill	20,366.29
Rental to May	575,645.09
Rents June, July and August, 1997 @ \$75,900 per month	227,700.00

He submits that the Court ought not to make any award in respect of the sixty-seven months because the plaintiff could have returned the furniture to the defendants and still sue them and rent his premises. He could have ejected the furniture and sued the defendants and if he suffered any loss it was as a result of his own doing. He also submitted that any interest plaintiff would be entitled to is at a rate of 3% and certainly no more than 6%.

The fundamental issue to be decided is whether or not the plaintiff is entitled to recover any amount in respect of the period 1st September, 1997 to March 2003 at 47% interest per annum.

In cross-examination the plaintiff states that he would not have returned the furniture until the money was paid.

Mr. James Chisholm, the Managing Director of the plaintiff states that he is a Realtor and by extension he should be an astute businessman.

In cross-examination Mr. Chisholm, the Managing Director of the plaintiff admitted that he rented part of the premises for three months at a rental of \$50,000 per month and that he sold some of the furniture that was pledged as partial security and realized the sum of \$58,000 which he used to pay for security.

The plaintiff should have mitigated his loss by disposing of the furniture or returning them to the defendants within a reasonable time bearing in mind that the furniture was pledged to him as partial security.

Although there is no direct evidence as to when the premises were rented for the purpose of the recovery I find from the circumstances that it was probably rented in September, October and November, 1997. This I find reasonable that the plaintiff should have realized by November, 1998 that he should have mitigated his loss.

I therefore find the defendants liable for the

Telephone bill	\$ 3, 400.06
Water bill	20,366.29
Air conditioning bill	26,344.90
Electrical bill	<u>4,964.87</u>
	\$55,076.12

Interest at 6% per annum from 20th May, 1997 to 21st March, 2003

Rental up to May, 1997	\$575,645.09
------------------------	--------------

Interest at 47% per annum from 1st May, 1997
to 21st March, 2003

Rental June, July and August, 1997 at \$75,900 per month with interest at 47% per annum from 1 st June, 1997 to 21 st March, 2003	\$227,700.00
--	--------------

Twelve (12) months rent from 1st December, 1997 to 1st November,
1998 at \$75,900 per month = \$910,800 - \$58,000 realized from sale of the
furniture = \$852,800. \$852,800 with interest at 34.71% per annum based on
Commercial Interest for 1998 in the Statistical Digest 2000 from the 1st
December, 1997 to 21st March, 2003.

Costs to the plaintiff to be agreed or taxed.