[2019] JMSC Civ 103

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2018HCV03319

BETWEEN	**KARREN GOULBOURNE**	**CLAIMANT**
AND	**ASSOCIATED GOSPEL ASSEMBLIES**	**DEFENDANT**

IN CHAMBERS

Clyde Williams, of counsel, for the claimant

Marc Francis Ramsay, instructed by Marc Francis Ramsay & Company, for the defendant

HEARD: October 31, 2018, & May 17, 2019

CLAIM FOR SPECIFIC PERFORMANCE OF A 15 YEARS LEASE AGREEMENT – CLAIMANT'S INTERIM APPLICATION FOR INJUNCTIVE RELIEF – RENT RESTRICTION ACT – CERTIFICATE OF EXEMPTION – NOTICE TO QUIT OCCUPATION OF PREMISES – FAILURE ON THE PART OF THE TENANT TO PAY RENT WHEN DUE – WHETHER NOTICE TO QUIT IS VALID – PRESUMPTION AGAINST RETROSPECTIVE OPERATION OF LEGISLATION – UNDERTAKING AS TO DAMAGES – FAILURE OF CLAIMANT TO PROVIDE UNDERTAKING AS TO DAMAGES – FAILURE OF DEFENDANT TO PROVIDE ANY UNDERTAKING

ANDERSON, K., J

The application

[1] This is an application which was filed by the claimant on August 31, 2018. By that application, the claimant sought the following relief against the defendant:

> *'An interim injunction restraining the Defendant/Respondent, its servants and/or agents from:*

1. *Re-entering and retaking possession of that part of the premises situated at 15-17 Dunrobin Avenue, Kingston 10, which the Applicant holds on a fixed term lease of 15 years (2009-2024) from the Respondent, which houses the Dunrobin Christian Academy, owned and operated by the applicant.*

2. *Obstructing and/or interfering with the applicant's use and enjoyment of that part of the premises which houses the [Dunrobin Christian Academy].*

3. *Obstructing and/or interfering with the educational and other lawful activities of the applicant on the part of the premises which houses the [Dunrobin Christian Academy] in any manner howsoever, whether, by itself, its servants, agents, or otherwise.'*

[2] The grounds upon which the claimant relies in seeking the relief mentioned above are that:

*(i) The claimant is the holder of a fixed term lease, of premises subjected to the **Rent Restriction Act,** and that there is 6 years left on that lease.*

(ii) The defendant served the claimant a notice to quit, on August 14, 2018, and the period of that notice to quit was unclear.

(iii) The said notice to quit conveyed the defendant's intention to re-enter the premises after the expiration of the notice.

(iv) The said notice to quit stated, as reasons for re-entry, non-payment of rent, which the claimant had paid in full, and that there were persistent breaches of obligations, without particularising same.

*(v) The defendant gave several notices to quit, and the most recent notice followed the defendant receiving an exemption to the **Rent Restriction Act**, for the leased premises, and the defendant has applied that exemption retrospectively.*

*(vi) The layout of the premises makes it possible for the defendant to re-enter that part of the premises and unlawfully forfeit the lease without any breaches of the **Forcible Entry Act.***

(vii) The claimant believes that the defendant is determined to unlawfully terminate the lease and shut down the [Dunrobin Christian Academy] by an unlawful entry.

The claimant's application was supported by the affidavit of Karren Goulbourne, filed on August 31, 2018. The defendant opposed the application, and, on September 10, 2018, filed the affidavit of Peter Garth (the defendant's representative) in response. This application came on for hearing, before this court, on October 31, 2018.

The background

[3] The claimant is the owner and principal of the Dunrobin Christian Academy (the school). The defendant is the registered proprietor of an estate in fee simple of property located on Dunrobin Avenue, Kingston 10. On September 1, 2009, the school, through the claimant, entered into a written lease agreement with the defendant, to solely occupy part of its property at Dunrobin Avenue, Kingston 10, particularly, the portion of that property situated at 15-17 Dunrobin Avenue, Kingston 10, (the premises). The lease agreement allowed the claimant to operate the school on the premises. Prior to the agreement between the claimant and the defendant, the defendant was the previous operator of the school, and subsequently assigned the operation of the school to the claimant.

[4] The lease agreement stipulated that the period of the tenancy, which commenced on September 1, 2009, shall expire on August 31, 2024. Further, the lease agreement provides, under the heading 'Payment of Rent' that, *inter alia*, that the rent shall be *'payable monthly in advance on the 1st day of each month commencing from September 1, 2009 in addition to the applicable rate of General Consumption Tax.'* Additionally, that section provides, that *'the lessee hereby covenants to punctually and regularly pay the reserved rent set out above and other moneys payable under this instrument at the times and in the manner set forth.'*

[5] The lease agreement further stated, under the heading 'Breach of Lessee's Covenants' the following:

> *'That if and whenever the said rent hereby reserved or any part thereof shall be unpaid for thirty days after becoming payable or if any covenant on the Lessee's part herein contained shall not be performed or observed, or if the Lessee shall commit any breach or persistent breach of any of its obligations hereunder, or if the Lessee shall commit any act of bankruptcy or make any assignment or composition for the benefit of creditors, then it shall be lawful for the Lessee at any time thereafter to re-enter upon the leased premises or any part thereof in the name of the whole and thereupon this lease shall absolutely determine but without prejudice to any right of action or remedy of the Lessor in respect of any arrears of rent or any antecedent breach of covenant by the Lessee.'*

[6] The lease agreement also stipulated two ways in which the parties may terminate the agreement. Firstly, the defendant may terminate the agreement upon the following term: *'...if the lessee is in breach of terms, or obligations and covenants contained herein and has refused to remedy same after given 30 days' notice in writing to remedy same.'* Secondly, either party may terminate the agreement, *'upon giving to the other party twelve (12) months' notice in writing of intention to terminate.'*

[7] The claimant, in her affidavit filed on August 31, 2018 stated that following the commencement of the lease on September 1, 2009, the school began to experience difficulties in paying its rent in early 2011, and this was due to the decline in enrolment since that time. In September 2012, the school owed rental arrears of $1,650,000.00. The parties had met on September 21, 2012, and negotiated a payment schedule by which it was hoped that the school would be able to clear its arrears. The school, however, was unable to meet its repayment obligation under that arrangement, and saw a further increase in its arrears to $2,100,000.00 by August 22, 2013. This prompted the defendant to serve a notice to quit on the claimant, dated August 22, 2013, which ostensibly required that the school vacate the premises by August 23, 2014.

[8] The claimant stated further that the school's arrears further increased to $2,500,000.00 by April 2014, and on April 17, 2014, the school managed pay this outstanding sum in full. The defendant however, served a subsequent notice on the claimant, dated November 18, 2014, requiring the school to vacate the premises and deliver up possession of same, by December 31, 2015. There was no reason stated in that notice.

[9] The school subsequently fell in arrears with its rental payments and owed the defendant the sum of $1,500,000.00. The defendant then initiated court proceedings in the Parish Court, on June 22, 2015, to recover those sums. On September 8, 2015, the claimant cleared those arrears including the defendant's legal costs of its claim in the Parish Court.

[10] On January 5, 2016, the Rent Assessment Board issued a Certificate of Exemption to the defendant declaring the premises to be exempt from the provisions of the **Rent Restriction Act.** The basis of the exemption, as stated in the certificate, is on the ground that the premises '*is of such a valuation as to warrant being let at $6.00 or more per square foot as at the 31st, August, 1980,'* pursuant to **section 3(1)(e)(ii)** of the **Rent Restriction Act**.

[11] The defendant then, on April 20, 2016, served upon the claimant another notice to quit and to deliver up possession of the premises by June 30, 2017. At the expiration of that notice to quit, the defendant again brought a claim in Parish Court against the claimant for the recovery of rent and possession of the premises. The claimant had subsequently paid the defendant sums then owing to it as rental arrears. As regards the claim, that was certainly at one time, before the Parish Court, for recovery of possession, there is no evidence in the case at bar as to whether or not the Parish Court has delivered that ruling.

[12] The claimant further stated in her affidavit that she was, again, served with another notice to quit, dated August 14, 2018, which demanded that the school vacate the premises by September 1, 2018. The reasons outlined in that notice to quit are that

the claimant has persistently breached her obligations under the lease agreement and has failed to surrender the premises to the defendant; the claimant owes rent which was over sixty (60) days unpaid, as at August 14, 2018; and, that the premises are required by the defendant for its own commercial use. The defendant, however, gave evidence at paragraph 21 of the Affidavit of Peter Garth, the Vice President of the defendant, that:

> *'As at August 14, 2018, the Claimant was indebted to [the defendant] in the amount of $300,000.00 for outstanding rent for 2 calendar months. The Claimant paid the sum of $300,000.00 on August 15, 2018. Thereafter, the Claimant remained in arrears until September 5, 2018.'*

[13] It was upon the basis of that notice to quit, that the claimant has, on August 31, 2018, filed a claim in this court, and sought the reliefs of specific performance of the lease agreement, and injunctive relief to bar the defendant from re-entering and taking possession of the premises. The claimant, also, on that date, filed this interim application for injunctive relief (mentioned at paragraphs **[1]** to **[2]** above). This application came before me, as mentioned before, on October 31, 2018, when this court made an order, *inter alia,* restraining the defendant from re-entering and/or taking possession of the premises, until this court has adjudicated on the claimant's interim application.

Submissions

Claimant's submission

[14] Counsel for the claimant submitted that there exists, in this case, a serious issue to be tried. This, counsel posited, as the defendant's notice to quit dated August 14, 2018, runs afoul of **sections 25-27** of the **Rent Restriction Act** ('the Act'). Counsel continued his argument that the defendant's notice contravened those sections as the premises are subject to the Act, and thus are 'controlled premises.**'** Further, counsel argued, that at the commencement of the lease agreement, the

premises were subject to the provisions of the Act, and that the said agreement expires on August 31, 2024.

[15] Counsel for the claimant continued his argument that the legal nature and character of the premises, as at the commencement of the lease, is not capable of being changed during the currency of the term. The validity of the certificate of exemption, counsel argued, is not in issue, however the said exemption does not impact on the lease agreement. The exemption, therefore, does not apply retrospectively.

[16] Counsel for the claimant further posited that the notice to quit, dated April 20, 2016, did not state any reasons, contrary to section 31(1) of the Act. Therefore, that notice is void and is of no effect. Counsel continued that the termination clause in the lease agreement, did not comply with section 26(2)(b) of the Act, as a notice to quit cannot be given more than twelve months before the date of expiration of the lease. In other words, counsel for the claimant argued, notice to quit cannot be given before the year 2023. In that regard, counsel relied on **Sydney Yap Young v Alton Rennals** (1985) 22 J.L.R. 33.

[17] Counsel for the claimant also made the argument that the defendant, by its acceptance of the rental payments made by the claimant on behalf of the school, has shown an irrevocable intention to treat with the lease as subsisting. In that regard, counsel placed reliance on **The King v Paulson, et al** [1921] 1 A.C 271. The defendant, counsel argued, has accepted all rents payable to it as at October 1, 2018, and has therefore waived all its rights to forfeit the lease and re-enter the premises. Finally, counsel for the claimant, further argued by urging that the court waive the usual undertaking as to damages, which is typically given by any party seeking injunctive relief.

Defendant's submission

[18] Counsel for the defendant, on the other hand, submitted that the claimant has failed to show that there exists a serious issue to be tried, as the claimant has not shown the cause of action that she intends to pursue against the defendant. Additionally, the equitable relief being sought by the claimant, did not disclose what terms of the lease agreement were breached by the defendant. The claimant, counsel continued, instead was indebted to the defendant and has in fact received a notice to quit.

[19] Counsel also argued that the lease agreement, as between the parties, came to an end on June 30, 2017, following the notice dated April 20, 2016. This notice, counsel continued, was served in accordance with the terms of termination contained within the agreement, that either party may terminate the agreement by serving twelve months' notice.

[20] Following June 30, 2017, counsel argued, the claimant remained in the premises as a monthly tenant. The claimant was then served with a notice dated August 14, 2018, and at the end of this notice period, the claimant had a duty to deliver up the premises. Counsel argued further that, although there were reasons given in the notice dated August 14, 2018, the defendant had no duty to give reasons as the premises are not subject to the provisions of the Act.

[21] Counsel for the defendant also submitted, that the Rent Restriction Exemption Certificate, does not apply to the lease itself, but in fact applies to the premises, pursuant to section 12 of the Act. Therefore, the defendant is at liberty to re-enter the premises as long as such entry is not forceful.

[22] Counsel for the defendant also argued that the balance of convenience lies in favour of the defendant as, should the injunctive relief as sought is granted, then the claimant will be in possession indefinitely. Counsel submitted, that if this court finds that there are serious issues to be tried on the merits of the substantive claim,

then damages would be an adequate remedy to compensate the claimant, and therefore an injunction ought not to be granted. Finally, counsel argued, that a waiver of the undertaking as to damages would not be equitable.

[23] It must be stated, as regards the specific submissions made by the parties' counsel, both orally and in writing, that I have considered all of same very carefully and to whatever extent I may not have addressed same, no disrespect to counsel was intended. Instead, that was due to my desire for brevity.

The issue to be determined

[24] The issue to be determined in the present interim application before the court, is whether the claimant should be granted injunctive relief to restrain the defendant from re-entering and taking possession of the premises, pending the conclusion of the trial of this claim.

The law and analysis

[25] In order to resolve the issue at bar, it is necessary to review the law as it relates to injunctive relief, as expounded upon, in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** [2009] UKPC 16. There, at paragraph 16 of the judgment, the following was stated:

> *'The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result.'*

[26] The Privy Council then went on to state, also at paragraph 16 of the judgment, what is meant by '*whether granting or withholding an injunction is more likely to produce a just result,'* to mean the following:

> *'…that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious*

> *issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.'*

[27] The Privy Council, at paragraph 17 of the judgment, further stated that:

> *'In practice it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.'*

Further, the Privy Council also stated at paragraph 18 of the judgment, other matters which the court may consider as follows:

> *'the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will tum out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.'*

[28] Following upon the principles expounded above, I am constrained to consider the question of whether or not there exists serious issues to be tried, which would form a part of the basis upon which an injunctive relief may, or may not be granted. It is to be borne in mind that, in respect of a civil claim, the burden of proof lies solely upon the claimant, and that the standard of proof is upon a balance of probabilities. In this regard, it is the claimant's submission, that the Certificate of Exemption, granted by the Rent Assessment Board on January 5, 2016, did not apply retrospectively and therefore did not invalidate the lease agreement between the parties, which it is to be recalled, took effect as of September 1, 2009.

[29] There was no dispute, and indeed, it was common ground as between the parties, that the lease agreement was subject to the provisions of the Act, and that position remained undisputed up until the granting of the Certificate of Exemption by the Rent Assessment Board. It was within that background, that counsel for the claimant submitted that the notices to quit dated April 20, 2016, and August 14, 2018 did not comply with **section 25 to 27** of the Act, as the Certificate of Exemption did not apply retrospectively and does not affect the lease agreement.

[30] The Certificate of Exemption was granted pursuant to **section 3(1)(e)(ii)** of the Act. **The Rent Restriction Act (Public and Commercial Buildings-Exemption) Order, 1983**, ('the Order'), is an Order made pursuant to **section 3(1)(e)(ii)** of the principal Act. Section **3(1)(e)(ii)** of the Act states, so far as is relevant:

> *'3(1) This Act shall apply, subject to the provisions of section 8 to all land which is building land at the commencement of this Act or becomes building land thereafter, and to all dwelling-houses and public or commercial buildings whether in existence or let at the commencement of this Act or erected or let thereafter and whether let furnished or unfurnished:*
>
> *Provided that this Act shall not apply to-*
>
> *(a) ...*
>
> *(b) …*
>
> *(c) …*
>
> *(d)…*
>
> *(e) a public or commercial building which, pursuant to an application by a landlord for a certificate of ex- emption, an Assessment Officer certifies –*
>
> > *(i) exceeds one thousand square feet in area and is, for the time being, designed to be used primarily as a warehouse; or*
> >
> > *(ii) is of such a valuation at the prescribed date as to warrant being let at such standard rent (exclusive of any amount payable for service) as the Minister may, by order, prescribe; or*

(iii) is constructed after 31st August, 1980, or having been in construction before that date, is completed thereafter;

(iv) is constructed prior to the 31st August, 1980 and purchased, in a transaction at arm's length, by another person after that date but not later than the 31st October, 1982.'

[31] **The Rent Restriction Act (Public and Commercial Buildings-Exemption) Order, 1983**, **regulation 2**, states the following:

> ***'***2. *Any public or commercial building which an Assessment Officer certifies would have been of such a valuation at the 31st day of August, 1980, as to warrant being let at that date at a rent of-*
>
> *(a) 6.00 or more per square foot, where such building is in the urban and suburban districts of the Corporate Area (as defined in the Second Schedule to the Kingston and St. Andrew Corporation Act); or*
>
> *(b) …*
>
> *is exempt from the provisions of the Act.'*

As stated before, the defendant applied for, and was granted the Certificate of Exemption of the premises, from the provisions of the Act. That exemption was granted, pursuant to the provisions laid out above.

[32] There are two questions, at this juncture, that must be considered. Those questions are as follows: (i) If the Certificate of Exemption is applied to the lease agreement which was entered into, between the parties, would it be, being applied, retrospectively? And, (ii) were the statutory provisions and subsidiary regulations pertaining to a Certificate of Exemption, intended to have retrospective effect.

[33] In considering the first question, it is the claimant's case, that, to allow the Certificate of Exemption to apply retrospectively, means that it would apply, in circumstances where the parties, were not in dispute that the premises were subject to the Act, during the time prior to the exemption certificate having been granted and where the parties had contracted on the basis of a fixed term lease which would not expire prior to 2024. I accept that this is a contention which, on a

balance of probabilities, at this stage, has merit and accordingly, I am also of the view, that to apply the certificate of exemption to the lease agreement between the parties would be, to apply same, retrospectively.

[34] Having answered the first question in the affirmative, consideration must now be given to the second question, which is, were the statutory provisions and subsidiary regulations pertaining to a Certificate of Exemption, intended to have retrospective effect? The scope of the effect of the Certificate of Exemption is outlined in the provisions stated above. Therefore, consideration must be given to whether those statutory provisions are of retrospective effect. Guidance on whether or not a statutory instrument applies retrospectively, are thoroughly outlined in the erudite judgment of Morrison, JA (as he then was) in **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12 at paragraph 69:

> *'[69] Based on this survey of the authorities, it appears to me that the proper approach to the question posed by this appeal is to be found in the following principles:*
>
> *i. The determination of the question of whether an Act of Parliament was intended by the legislature to have retrospective effect is primarily one of construction of the language of the particular statute, having regard to the relevant background (which includes the particular mischief which it was sought by Parliament to correct).*
>
> *ii. In construing the Act, the first and most important consideration is the natural and ordinary meaning of the words used by the legislature. If there is an indication in the Act in clear and unmistakable terms that it was intended to have retrospective effect or operation, then it is the duty of the court to give effect to the plain meaning of the Act accordingly.*
>
> *iii. Even where the language of the Act does not reveal in clear and express terms what Parliament intended, an implication of retrospection may nevertheless be derived from a reading of the Act as a whole (such as, for example, where it is necessary to give reasonable efficacy to the Act).*

> *iv.* ***Unless it appears plainly or unavoidably from the language of the Act, or by necessary implication, that it was intended to have retrospective effect, there is at common law a prima facie rule of construction against retrospectivity, that is to say that the court is required to approach questions of statutory interpretation with a disposition, in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect.*** *(Highlighted for emphasis)*
>
> *v.* *This prima facie rule of construction is based on simple fairness, thus giving rise, whenever questions of retrospectivity arise, to a single, indivisible question, which is would the consequences of applying the Act retrospectively be so unfair that Parliament could not have intended it to be applied in this way.'*

[35] The first and most important consideration, then, is the natural and ordinary meaning of the words of the Act. This is the first and most important consideration as there is a strong presumption in law, that a statutory instrument is not to have retrospective effect. This presumption, as stated above, is on the premise of fairness. I am of the view that, those provisions of the Act and the Order, do not indicate, in clear and unmistakeable terms that a Certificate of Exemption was intended by Parliament to have retrospective application.

[36] The Certificate of Exemption is evidence of the premises being exempt from the provisions of the Act. It is true that that Certificate of Exemption, was granted on January 5, 2016, by the Rent Assessment Board. At first glance, however, it appears that the Certificate of Exemption applies, as of the date it was issued, that is, January 5, 2016, and not prior. This observation, seem to me even more apparent upon a further examination of **section 3(1)** of the Act which was set out above. I will again set out that provision for emphasis:

> *'3(1) This Act shall apply, subject to the provisions of section 8 to all land which is building land at the commencement of this Act or becomes building land thereafter, and to all dwelling-houses and public or commercial buildings whether in existence or let at the*

commencement of this Act or erected or let thereafter and whether let furnished or unfurnished:

Provided that this Act shall not apply to-

(a) ...

(b) …

(c) …

(d)…

(e) a public or commercial building which, pursuant to an application by a landlord for a certificate of ex- emption, an Assessment Officer certifies –

(i) exceeds one thousand square feet in area and is, for the time being, designed to be used primarily as a warehouse; or

(ii) is of such a valuation at the prescribed date as to warrant being let at such standard rent (exclusive of any amount payable for service) as the Minister may, by order, prescribe; or *(Highlighted for emphasis)*

(iii) is constructed after 31st August, 1980, or having been in construction before that date, is completed thereafter;

(iv) is constructed prior to the 31st August, 1980 and purchased, in a transaction at arm's length, by another person after that date but not later than the 31st October, 1982.'

[37] The specific wording of **section 3(1)(e)** above, shows that the Certificate of Exemption applies to the premises upon the granting of the certification in accordance with the provision. The Assessment Officer examined that the premises are of such a valuation at the prescribed date as to warrant being let at a standard rent, and granted the Certificate of Exemption accordingly. To my mind, therefore, the claimant's argument that the exemption does not affect the lease agreement, entered into on a date, prior to the exemption being granted, is one that on the balance of probabilities, also has merit.

[38] Counsel for the defendant also argued that, the Certificate of Exemption, only applies to the premises and not to the agreement. I am of the view, however, that the Act applies, to the premises and, concurrently, to the lease agreement. The Act was primarily designed to protect the lessee of premises. The argument that the Act applies to the premises and not to the lease agreement, is a mistaken one, as the intention of the Act was for the Act to apply concurrently to both the lease and the premises.

[39] The defendant further contended that the notice to quit, dated August 18, 2018, and which expired on September 1, 2018, required the claimant to give up possession of the premises. In that regard, consideration must be given to **sections 26** and **31** of the Act. Those sections read as follows:

> *'26.-(1) Subject to the provisions of this section, the landlord of any public or commercial building may terminate the tenancy by notice in writing given to the tenant specifying the date at which the tenancy is to come to an end (hereinafter referred to as "the date of termination").*
>
> *(2) A notice under subsection (1) shall not have effect for the purposes of this Act unless it is given-*
>
> *(a) not less than twelve months before the date of termination specified therein, and*
>
> *(b) in the case of premises leased to the tenant for a fixed term of years, not more than twelve months before the date of expiration of the lease.*
>
> *…*
>
> *31 (1) No notice given by a landlord to quit any controlled premises shall be valid unless it states the reason for the requirement to quit.*
>
> *(2) Where the reason given in any notice referred to in subsection (1) is that some rent lawfully due from the tenant has not been paid, the notice shall, if the rent is paid before the date of expiry of the notice, cease to have effect on the date of payment.'*

[40] Outlined at **sections 26** and **31** are obligations that the Act places upon a landlord who wishes to re-possess rented premises from a tenant. The defendant's notice to quit, dated August 18, 2018, which demanded that the school vacate the premises by September 1, 2018, may, to my mind, properly be viewed as being legally improper, having regard to **Section 26(2)(a)** and **(b).** The notice to quit only specified a period of one month, whereas, the Act specifies a mandatory period of not less that twelve months, before the date of termination of the fixed term lease, and failure to comply, means that the notice to quit would be invalid.

[41] In consideration of the above principles, I am of the view that the claimant has shown that there exists serious issues to be tried. I also find that the balance of convenience, as expounded upon in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd,** *op. cit,* lies in favour of the granting of the injunctive relief, as the granting of the injunctive relief will produce a more just result, than would be the case, if the injunctive relief as sought, were not to be granted.

[42] I am also of the view, that unlike the case with the defendant, damages would not be an adequate remedy for the claimant, if the injunction is not permitted to remain in effect until the conclusion of the trial of this matter. Damages would not be an adequate remedy for the claimant, unlike the defendant, as the defendant's losses may be quantified solely in monetary terms. On the other hand, if the injunctive relief as sought, is not granted, then the claimant stands to suffer losses greater than may readily be quantified in monetary terms, such as, the damage to the school's reputation should its operation cease abruptly as a consequence of the defendant's actions, and that, while still having her substantive claim before the court, which claim is one that discloses serious issues to be tried.

[43] Counsel for the claimant submitted that the court should dispense with the undertaking as to damages in the event that the court is minded to grant the interim injunctive relief. Counsel for the defendant, on the other hand, submitted that, to do so, would not produce an equitable result. It is to be recognized that this court is empowered, by virtue of **Rule 17.4(2)** of the **Civil Procedure Rules**, to direct

that a party may, at this court's discretion, not be required to give the usual undertaking as to damages, upon the granting of injunctive relief. Therefore, it is a matter that is solely within the discretion of this court, whether or not to require an undertaking as to damages, upon the grant of injunctive relief.

[44] The undertaking as to damages, in practice, serves to require the claimant to pay any damages subsequently found due to the defendant as compensation if the interim injunctive relief cannot be justified at trial. A perusal of the law as regards the granting of an undertaking as to damages by an applicant for injunctive relief, shows, that there are certain cases in which the court may grant interim injunctive relief without requiring an undertaking in damages. One example where this was done is **F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry** [1975] A.C 295, where the Crown applied for an injunction to enforce what was prima facie the law of the land.

[45] The claimant's impecuniosity, should not be a bar to their pursuit of injunctive relief. The court may, to that end, in certain cases, where the merits are strongly in favour of the claimant, in the exercise of its discretion, still decide to grant injunctive relief, accepting the risk that the undertaking may not be honoured if called upon in due course. In that regard see: **Wentworth Graham v The Jamaica Stock Exchange** [2017] JMCA Civ 29, paragraph 245.

[46] In respect of this claim, the claimant's evidence is that the school began to experience difficulties in paying its rent in early 2011, and that this was due to the decline in the student enrolment since that time. In the years that followed, those financial difficulties, seemingly, did not improve, and the result being that the school fell in arrears on the payments of its rent. To my mind, it seems, by this evidence, that the claimant, by virtue of the financial difficulties faced by the school, and in all likelihood will continue to face, will not be in a position to honour any undertaking as to damages. Indeed, she has instead sought that same be waived. It is my view that, to require the school to give an undertaking as to damages, in

these circumstances, would not likely produce a result, which best accords with justice.

[47] Contrary to the submission of defence counsel, to require the claimant to give an undertaking as to damages, in a circumstance wherein the defendant has not given any undertaking at all, and in light of the difficult financial position of the school, would likely produce an inequitable result. Equity is fairness writ large, and for the defendant to require an undertaking as to damages by the claimant, where the defendant has not given any cross-undertaking, does not seem to achieve fairness.

[48] The learned authors of the text: *Sweet and Maxwell on Injunctions, 11th edition,* at page 28, give a useful explanation of the purpose of an undertaking as to damages:

> *'If the claimant obtains an interim injunction but subsequently the case goes to trial and he fails to obtain a final order, the defendant will meanwhile have been restrained unjustly and will generally be entitled to damages for any loss he has sustained. The practice has therefore grown up, in almost every case where an interim injunction is to be granted, of requiring the claimant to undertake to pay any damages subsequently found due to the defendant as compensation if the injunction cannot be justified at trial.*
>
> *The same principle is followed if, instead of an interim injunction being granted, the defendant has undertaken to the court not to do the act or acts complained of pending final determination of the case. Despite the superficially voluntary nature of such an undertaking, the unjustified damage to the defendant if the claim fails at trial is just the same as if an interim injunction had been granted. The claimant will therefore be required to give a cross-undertaking in damages'*

[49] As outlined in the learning above, the defendant may elect to give an undertaking, instead of the interim injunction being granted, to not commit any of the acts presently complained of, by the claimant. In such a case, fairness would require that the claimant also give a cross-undertaking as to damages, in the event that the defendant was unjustly restrained, albeit, voluntarily. This, to my mind, would produce an equitable result, instead of the defendant gaining the benefit of the claimant's undertaking as to damages, and would entail good practice.

[50] I am of the view, that this claim is one in which this court can properly exercise its discretion to dispense with the usual undertaking as to damages, bearing in mind that: (i) the defendant has not given any undertaking, either to not do the acts complained of, or as to damages, and (ii) the financial difficulties of the school. It would be unjust for the claimant to not benefit from the grant of interim injunctive relief, in circumstances where she has a claim with, what can perhaps best be described as, 'a realistic prospect of success' – as that quoted term is defined in the case: **Fiesta Jamaica Ltd. v National Water Commission** [2010] JMCA Civ. 4, page 31 – albeit that the claimant has not given any undertaking as to damages.

Conclusion

[51] In concluding therefore, the claimant has made out her case for the granting of injunctive relief, as there exists serious issues to be tried as it relates to the effect in law of the notice dated August 14, 2018, and the effect of the Certificate of Exemption upon the lease agreement. The claimant, in respect of those issues, has shown that her substantive claim, which currently subsists before this court, is not frivolous, and justice would demand that the status quo be preserved until the final determination of this claim.

Orders

1. The defendant is restrained from re-entering and retaking possession of that part of the premises situated at 15-17 Dunrobin Avenue, Kingston 10, or obstructing and/or interfering with the applicant's use and enjoyment of that part of the premises, in any manner howsoever, whether, by itself, its servants, agents, or otherwise, until the trial of this claim has been concluded and subject to this court's final orders, in respect of this claim.

2. Costs of the claimant's application for court orders, which was filed on August 31, 2018, are awarded to the claimant, with such costs to be taxed if not sooner agreed.

3. The claimant shall file and serve this order.

…….

Hon. K. Anderson, J