



[2020] JMCC Comm 9

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE COMMERCIAL COURT**

**CLAIM NO. SU2020CD00163**

**BETWEEN                      J WRAY & NEPHEW LIMITED                      CLAIMANT**  
**AND                              JAMI LEVY    DEFENDANT**  
**(T/A SWEET & JUICY RESTAURANT)**

**Recovery of Possession – Fixed Date Claim – Application to strike out claim –  
Whether reasonable grounds for bringing claim disclosed - Commercial tenancy -  
Two notices to quit, one for one year the other 45 days- Premises required to be  
sold- Whether that is use for a business or professional purpose- Whether section  
25 requirements of the Rent Restriction Act satisfied.**

**Kwame Gordon for Claimant instructed by Samuda and Johnson**

**Renee Freemantle for Defendant instructed by Scott Bhoorasingh & Bonnick**

**Heard:                              20<sup>th</sup> May and 5<sup>th</sup> June, 2020**

**IN CHAMBERS:              By ZOOM**

**COR:                              BATTIS J.**

[1] By Fixed Date Claim, filed on the 14<sup>th</sup> April 2020, the Claimant seeks:

- a. An order for immediate recovery of possession of certain premises.

- b. A declaration that the periodic tenancy was lawfully terminated by one year's Notice to Quit dated the 20<sup>th</sup> March, 2018.
- c. Alternatively, a declaration that the periodic tenancy was lawfully terminated by a 45 day Notice to Quit dated 9<sup>th</sup> January 2020.
- d. Damages for outstanding rent and/or mesne profits in the amount of \$1,044,175.00 with interest thereon.

[2] The Defendant entered an acknowledgment of service and, at the adjourned first date hearing of the Fixed Date Claim, applied to strike out a part of the Claim. The application is by Notice of Application filed on the 19<sup>th</sup> May 2020 and is supported by an affidavit sworn to by the Defendant. The grounds of the application, as stated in the Notice of Application, are:

- “ 1. Pursuant to Rule 26.3 (1) (c) of the Civil Procedure Rules [which] empowers the Court to strike out a statement of case which discloses no reasonable grounds for bringing the claim*
- 2. The Claimant has indicated in their supporting affidavits that the reason for the Notices to Quit dated 18<sup>th</sup> March, 2018 and 9<sup>th</sup> January 2020 is that the premises is being sold*
- 3. The said Notices to Quit state that the „premises is reasonably required by the landlord for its own business and professional purposes.“*

4. *The said Notices to Quit therefore do not include a valid reason/ground as required by sections 25 and 31 of the Rent Restriction Act.”*

- [3] The premises in question are commercial premises. It is common ground that the Defendant is a tenant. It is also common ground that there is no exemption certificate granted pursuant to the Rent Restriction Act. The Defendant is therefore entitled to the protection afforded by that Act. Finally, it is common ground that, rent is due and owing although the quantum is in dispute.
- [4] The Defendant relied on written submissions and the Claimant on speaking notes. Each counsel also made oral submissions. I should indicate that the Claimant’s counsel invited me, in the course of his submissions, to enter summary judgment against the Defendant on the basis that it is apparent the Defendant has no real prospect of success.
- [5] The relevant facts are, for the most part, not in dispute. The premises had been let to the Defendant’s parents for many years by the Claimant. After the death of his father the tenancy was continued by the Defendant’s mother and himself. The Defendant says communication was primarily with him. The premises were let for use as a restaurant. The Defendant says he operated a bar and restaurant and a Supreme Ventures outlet also. The Claimant says the rental agreed was \$25,000 per month. The Defendant, on the other hand, says it was \$5,000 per month. He exhibits as JL1 an email, dated 20<sup>th</sup> June 2017, which substantiates this fact. That document also shows that there were arrears which had to be settled by monthly payments of \$25,000.00.
- [6] Paragraph 9 of the Affidavit of Yana Samuels filed on the 14<sup>th</sup> April, 2020, on behalf of the Claimant, states:

*“9. The Claimant is the owner of several parcels of land in Jamaica. In general cases these lands are leased to tenants. In or about the year 2016 the Claimant took a decision to restructure its business and part of this involved a drive to sell some of these lands. It was also decided by the Claimant that steps would be taken to terminate the leases for the lands which were to be sold so that potential purchasers would receive vacant possession.”*

[7] It is common ground that a Notice to Quit, dated 20<sup>th</sup> March 2018 and giving 12 months notice to quit, was served on the Defendant. The Notice to Quit gave as its reason for requiring possession: (See Exhibit YS4)

*“The premises is reasonably required by the landlord for its own business and professional purposes.”*

Possession under this notice was required by 1<sup>st</sup> April 2019. The cover letter to this notice is dated 20<sup>th</sup> March 2018 and reads:

*“We would firstly like to express our sympathies for the unfortunate damages sustained to your business assets on February 17 2018 as a result of fire and wish you a speedy recovery to your business.*

*As you were advised during the telephone conversation between you, the undersigned and our Clement Lawrence, Chairman on February 27, 2018, the Four Paths May Pen, Clarendon property on which the building you occupy sits, has been listed for sale with vacant possession. Additionally, we do not intend to take steps to repair or reinstate the building as the damage will not be covered by your insurer and we are not in a position to outlay the costs of repair.*

*We enclose herewith a twelve (12) months" Notice to Quit for you to vacate the premises.*

*Kindly acknowledge receipt of the enclosed by signing and returning the attached copy of this letter."*

[8] The Claimant says, in the same affidavit under reference, that it received an offer to purchase dated 6<sup>th</sup> December 2019 and that the purchaser requires vacant possession. In a 2<sup>nd</sup> Affidavit of Yana Samuels, filed on the 15 May, 2020, the Claimant asserts that a second expression of interest in purchasing the premises has borne fruit. It was anticipated that the sale agreement would be signed by the 22<sup>nd</sup> May 2020. It is a cash sale and vacant possession is to be given. The premises is to be sold along with two others and the intended price for all three is \$320,000,000.00.

[9] The Claimant complains that the Defendant has taken no step to vacate the premises. Further that, when it became apparent that the Defendant had taken no steps to vacate the premises, another Notice to Quit dated 9<sup>th</sup> January 2020 was issued. This notice gave the Defendant 45 days to quit and deliver up possession. It is exhibit YS6 to the Affidavit of Yana Samuels filed on the 14<sup>th</sup> April 2020. The reason stated in this Notice is identical to that stated in the first Notice. Both Notices are addressed to "*Jami Levy t/a Sweet and Juicy Restaurant.*" The letter accompanying the second Notice reads as follows:

*"We write further to our letter dated March 20<sup>th</sup> 2018 enclosing a Notice to Quit and advise that it has been more than a year since we have given you this notice to deliver up possession of the captioned property.*

*To date you have not done so.*

*This is our final and formal notice that you are hereby given forty five (45) days to deliver up possession of*

*the leased premises which you occupy as a tenant as we now require the premises for our own purposes.*

*Should you fail to do so we will be obliged to recover possession through the courts.*

*Kindly acknowledge receipt of the enclosed by signing and returning the attached copy of this letter.”*

- [10] Miss Yana Samuels asserts that, in a telephone conversation with the Defendant on the 17<sup>th</sup> January 2020, he indicated that he had commenced construction of another building on other lands to which he intends to move in the near future. An extension of time was requested and this was refused. The Defendant admits that he did request an extension to vacate, see paragraphs 12 and 16 of the affidavit of Jaime Levy filed 19<sup>th</sup> May 2020. However he denies saying he had commenced construction. He was however actively pursuing an alternate location for his business. He denies owing the amounts due and says only \$45,000 is outstanding for rent, see paragraph 19 of his affidavit.
- [11] The Defendant’s counsel asserts that the portion of the claim related to possession is to be struck out. This is because, as the premises are protected under the Rent Restriction Act, an order for possession cannot be made unless it is based upon a reason to be found in the Act. In particular a reason in Section 25. The evidence, says the Defendant, is that the Claimant wants possession in order to sell the premises. The evidence, in other words, does not support the reason stated in the Notice and supports no reason for possession found in the Act. Various legal authorities were cited.
- [12] The Claimant’s counsel has taken no issue with the authorities cited by the Defendant. Rather, Mr. Gordon submitted, that the sale of the premises formed part of the business and professional purposes of the Claimant. This, he said,

flowed from the fact that a decision had been taken, by the Claimant in or about the year 2016, to :

*“restructure its business and part of this involved a drive to sell some of the lands.”*

It therefore follows ,according to counsel, that the evidence supports the reason stated in the notices and is a reason found in section 25(1) (e) (ii) of the Rent Restriction Act.

[13] The law in this area has been settled since the rather surprising decision of the Judicial Committee of the Privy Council in ***Marcus Dabdoub t/a Marc’s v Eli Saba and Carole Saba (1991) 28 JLR 99; [1991] UKPC12***. Save for two typographical errors the headnote, to the Jamaican Law Report, accurately states its ratio decidendi :

*“Sections 25 and 26 of the Rent Restriction Act are independent provisions under which a landlord may seek to terminate tenancy agreements. Section 25(sic) stipulates that a landlord may give 12 months notice to quit provided that he satisfies one or more of the grounds specified. In addition the court will not make an order for possession unless it is considered reasonable to do so. If he chooses to proceed under section 26 a landlord is obliged to give 12 months notice to quit and by virtue of section 36(sic),also has to state the reason for the requirement to quit.In the instant case the respondent chose to terminate the tenancy agreement by virtue of Section 25, listed reasons and the Resident Magistrate on hearing the evidence considered it reasonable to make an Order for possession.”*

I describe the decision as surprising because it had hitherto been the law and practice that a landlord, of commercial premises controlled by the Rent Restriction Act, had a clear choice. Either he gave a one year notice under section 26, in which case no conditions under section 25 need be established before a court

made an order for possession, or, he gave notice under section 25 in which case section 25 requirements had to be proved to the court, see **Golden Star Manufacturing Company Ltd. v. Jamaica Frozen Foods Ltd. (1986) 23 JLR 444** per Carberry JA @ 456 I to 457 A. The Jamaican Court of Appeal explained that the longer, one year (or statutory), notice provided certainty of recovery to the landlord of commercial premises. The tenant receiving such a notice still had the opportunity to apply for an extension of time, see Sections 26 (3) to (8). In the words of Carberry JA at 457C :

*“if a notice under Section 26 had to contain a reason complying with those in Section 25, Section 26 would appear to be otiose and unnecessary for all applications for possession orders would have to be made under Section 25 and the words, „Subject to Section 26,“ would seem unnecessary.”*

[14] When delivering the judgment of the Board, in the Marcus Dabdoub case, Lord Ackner was well aware of the anomaly adverted to by Justice of Appeal Carberry. The law lord stated the following at page 104 F, :

*“As stated above, notwithstanding the deletion of subsection (9), section 26 still provides an alternative procedure, albeit of little, if any, practical value.”*

In other words there is little reason for a landlord of commercial premises to give one year's notice if, at the end of the day, he will have to satisfy section 25 requirements. The Judicial Committee came to this position by reference to the deletion of section 26(9) (which had dissapplied all the provisions of the Act after a section 26 notice was served) and, the creation of Section 31 (1) which states,

*“No notice given by a landlord to quit any controlled premises shall be valid unless it states the reason for the requirement to quit.”*



The court had earlier pointed out that the words "Subject to section 26" were inserted as a preface to section 25(1). Although those words remained in the Act the Judicial Committee concluded that the amendments reflected a change in the previous policy. This notwithstanding that section 31 says neither, that the reason must be one stated in Section 25 nor, that when recovering possession, pursuant to Section 26, the reason as stated in the notice to quit must be proved to the court. As pointed out, in the Golden Star case, the termination of a contract of tenancy is still governed by the common law rules and termination of the tenancy still has to be proved. This is to be distinguished from the section 25 requirements necessary before an order for possession is made. A terminated tenancy, in respect of which no order for possession is made, is called a statutory tenancy, see page 453 D-I in the report of the Golden Star case. I also observe that section 25, of the Rent Restriction Act, does not use the words "reasons for a notice."

[15] The decision of the Judicial Committee of the Privy Council is binding on this court and is the law of this land. It means that, on the facts of this case, whether the Claimant relies on the one year notice or the forty five day notice is immaterial. In either case the Claimant will at trial have to prove that :

- a) The reason stated in the notice is one to be found in Section 25 of the Act.
- b) The factual situation is such as to establish the said reason.
- c) It is reasonable for the court to make the order and that less hardship would be caused by granting the order for possession than by its refusal (the balance of hardship test)

[16] The Defendant's application to strike is pursuant to Section 26.3 (1) (c) of the Civil Procedure Rules which provides :

*“ In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the Court- (a)....*

*(b) ....*

*(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or “*

The question for this court is therefore whether reasonable grounds exist for bringing the claim. The issue is normally determined by reference to the pleadings, see ***City Properties Limited v New Era Finance Limited [2013] JMSC Civil 23*** (unreported judgment delivered on the 17<sup>th</sup> January, 2013) .This is a Fixed Date Claim. There are no Particulars of Claim filed but, by the time of the hearing before me, there were two affidavits in support. These affidavits therefore are part of the “pleaded,” if you like, case against the Defendant. I am entitled to consider them when answering the question posed.

[17] In that regard I am satisfied that there are no reasonable grounds for bringing a claim for possession. This is because, although the notices say that the premises are reasonably required by the landlord for its own business and professional purposes, the pleaded case asserts that possession is required in order to be able to sell with vacant possession. The relevant provision of the Rent Restriction Act is section 25 (1) (e)(ii) which reads :

*“Subject to section 26, no order or judgment for the recovery of possession of any controlled premises, or for the ejectment of a tenant therefrom, shall, whether*

*in respect of a notice to quit given or proceedings commenced before or after the commencement of this Act, be made or given unless –*

*(a) – (d)*

*(e) the premises being a dwelling house or a public or commercial building are reasonably required by the landlord for –*

*(i) ...*

*(ii) use by him for business, trade or professional purposes; or*

*(iii) ...”*

It seems to me that premises can hardly be required for “use” if it is to be sold. Furthermore there is nothing in law preventing a land owner selling premises which are occupied. The terms of a lease may have a covenant, against sale or transfer of the lease, but that is a matter of contract between the landlord and his own tenant. There is therefore a difficult, if not impossible, case to make that possession is “reasonably required” for such a purpose. It is of course to be noted that requiring possession of premises, in order to be able to sell it with vacant possession, is not a stipulated basis for an order for possession within section 25.

[18] It is also important to observe that section 25 does not expressly refer to “reasons” stated in a Notice to Quit. The section restricts the circumstances under which a court may make an order for possession. That is why Section 25 (1) has the following words, which I underline for emphasis:

*“Subject to section 26 ...no order or judgment for the recovery of possession .... or for the ejectment of a tenant ....shall , whether in respect of a notice to quit given or proceedings commenced before or after the commencement of this Act ,be made or given unless...”*

The section applies in situations where notice to quit was given as well as where none was required. It is for the person seeking to recover possession to establish that one or more of the circumstances listed in section 25 exists. In this matter, on the Fixed Date Claim and the affidavits filed with it, the Claimant will be and has been unable to establish any of those. Possession, in order to be able to sell property, is not one such circumstance. To recognise the sale of property as use of it, for a business or professional purpose, would be to drive the proverbial horse and carriage through section 25. Even tenants of residential premises may thereby lose the protection afforded them by that section. The landlord may contend that he bought the premises as an investment and, now wishes to reorganise his investment portfolio, by selling the residential premises. He therefore requires possession for a business, trade or professional purpose. This was not Parliament’s intent and such a strained construction is unwarranted. It is, in any event, rather artificial to say the landlord intends to “use” premises he intends to sell.

[19] I feel constrained to observe that persons of commerce may be troubled by this result. To so severely restrict the circumstances, in which owners of commercial premises may recover possession, can be a fetter on investment. This may well be the reason why an alternative one year notice, giving rise to a right to an order for possession without Section 25 strictures, was at one time thought necessary. Parliament has not however seen it fit to reverse the effect of the judgment of the Privy Council. This may mean that I am wrong and that Parliament, and the business community, are happy with that decision and its consequences.

[20] In the result, and for the reasons stated in this judgment, the claim for possession is struck out as it discloses no reasonable cause of action.

**David Batts**  
**Puisne Judge**