IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. E315/1998

MARCIA HEMMINGS	CLAIMANT
THE ATTORNEY GENERAL OF JAMAICA	1ST DEFENDANT
COMMISSIONER OF LANDS	2ND DEFENDANT

Mrs. Ursula Khan and Charles Campbell appear for Claimant instructed by Khan & Khan.

Patrick Foster, Mrs. Symone Mayhew and Miss Nicola Brown appear for Defendant instructed by Director of State Proceedings.

Heard: January 26-28 & 30, 2004; February 26, 2004; March 16, 2004 & July 28, 2004.

McCalla, J.

Introduction

The claimant, Marcia Hemmings, has been operating a food and beverage business, known as "Jamaica Gates", on government-owned lands on the Norman Manley Highway since 1982.

In 1990 she entered into a five-year lease, with an option to renew, with the Commissioner of Lands.

She has brought this claim against the Commissioner of Lands and the Attorney General seeking a declaration that she is entitled to a renewal of the lease. She also seeks a declaration that such renewal should be for a period of at least 40 years. Additionally, she claims damages for breach of the agreement or alternatively compensation for the permanent structures she has erected. In May 2003, the court made an order striking out

the Commissioner of Lands as a party to the proceedings and references to "the defendant" now mean the Attorney General, who is appointed by law as the person to be sued in civil proceedings against the Crown.

The defendant is resisting her claim on the ground that she is in breach of certain clauses of the lease agreement and has counterclaimed for recovery of possession and mesne profits.

Claimant's case

In her witness statement, admitted as evidence in chief, Miss Marcia Hemmings sets out the circumstances in which she came into possession of the land on which she operates her business. She states that in 1982, she was looking around for a spot to continue operating her small food and beverage business and she identified such a place near the Harbour View roundabout on the Norman Manley Highway. After obtaining permission from the Jamaica Chamber of Commerce, she commenced operating there in 1982 in a temporary structure and operated her business in temporary structures for a number of years.

Then, after obtaining permission from relevant authorities, she erected sanitary facilities, rest room, store room and kitchen in 1985. These were permanent structures.

The lands being government-owned, she commenced negotiations with the Commissioner of Lands and eventually both parties entered into a lease agreement in 1990 for a term of five years, with an option to renew.

Miss Hemmings said that she had been trying to obtain a long lease but she accepted an initial term of five years after assurances by the Commissioner of Lands that on renewal she would be granted a long term if she developed the property. Other lessees

along the strip had been granted long leases. She relied on those promises and assurances. Consequently, at great expense, she has erected a bar and restaurant of concrete and steel. It must be noted that the application for permission to erect those buildings was submitted in January 1989 and the lease agreement was signed in August 1990. She relies on certain documents she has exhibited, to say that she has obtained the requisite approval in compliance with Clause 2 (iii) of the lease which stipulates as follows:

> "To erect no permanent structure on the leased premises except with the approval of the local Planning Authority."

She has exhibited correspondence concerning her application for renewal of the lease and the refusal of the Commissioner of Lands so to do. She says that she was not served with a notice to quit. She has resisted attempts by government agencies to demolish the buildings and forcibly eject her from the premises. She maintains that she is entitled to a renewal of the lease and remains in possession as a statutory tenant. She has suffered loss because her once thriving business has diminished considerably because of the insecurity of her tenure. She seeks a declaration that she is entitled to a renewal of the lease dated 24th September 1990 and a declaration that such renewal should be for a long term. Further, she claims damages for breach of the agreement and alternatively, compensation for the structures and damages for loss of goodwill and loss of income. Miss Hemmings' son Orlando Gordon, an Accountant, gave testimony relating to the accounts attached to his witness statement and summaries of certain activities carried on at Jamaica Gates during the relevant period.

Miss Hemmings contends that Clauses 4(iv) and 4(v) of the lease agreement do not affect her as they deal with temporary structures. Clause 4(iv) states:

> "The Lessee with the consent of the lessor may erect such temporary structure or structures in accordance with Clause 2(v) PROVIDED THAT such structure or structures are not erected within ONE HUNDRED (100) FEET of the main road's centre line."

and Clause 4 (v) provides that:

> "At the end of the term hereby created, the end of any renewal thereof, or any sooner determination the lessee shall ensure the removal of all temporary structures erected on the leased premises and subsequently restore the leased premises to a state approved by the lessor."

Defendant's case

The defendant denies that the claimant is entitled to the reliefs claimed and contends that she is in breach of certain terms of the lease. Further, she is not entitled to a renewal of the lease. The defendant relies on the planning approval granted to the claimant and the terms of the lease agreement entered into by the parties. As stipulated in that approval, with the exception of certain buildings, no solid structures should have been erected on the land.

The defendant counterclaims for mesne profits and recovery of possession, alleging that the claimant has breached certain covenants and conditions of the lease. Under the terms of the agreement, a written notice to quit was served on her and she has failed to deliver up the leased premises. She is therefore in possession as a trespasser, the lease having been determined by effluxion of time.

At trial, the defendant was unable to prove, as pleaded, that a notice to quit had been served on the claimant and abandoned that aspect of the defence.

Miss Joy Alexander, Director of the Planning and Development Division at the National Environment and Planning Agency, testified that in 1987, she received a letter

from the Ministry of Agriculture requesting her department's comments on a proposal by Miss Hemmings to lease the land for a period of 25 years with an option to renew.

She responded, stating that her department had no objections provided that certain conditions were met. She also wrote to other governments departments and received responses, which she states were reflected in conditions specified in the lease.

On January 11, 1989, Miss Hemmings applied for permission to erect a bar and restaurant. Her application was deferred as members of the Town and Country Planning Authority were concerned about development along the Norman Manley Highway. Miss Hemmings' application was eventually approved. The approval was granted by the Town and Country Planning Authority (Exhibit 5b) on July 4, 1989, subject to recommended conditions, which included the following:

3. "no solid structures except sanitary facilities, rest room and store room shall be erected on the site;

4. no structure shall be erected less than one hundred (100) feet from the centre line of the road;

5. all buildings being demolished at the applicant's/lessor's expense on the expiration of the lease;.

8. The parking area being laid out as indicated in red on the site layout plan."

The claimant's building application was also approved.

Miss Alexander testified further that in 2003, she visited the leased premises and discovered a number of breaches of the planning and building permission, to wit:

(i) a guard house constructed of concrete at the entrance to the premises;

(ii) two structures to the rear of the premises;

(iii) an extension to the building shown on the approved plan;

(iv) three independent structures shown on the approved plan have been enclosed and covered and additional concrete partitions have been constructed to convert the buildings into one unit;

(v) the main structure has been erected less than 100 feet from the center line of the road, the actual distance being 75 feet.

She stated that Miss Hemmings is in breach of conditions 3, 4 and 8 of the planning permission and she is also in breach of the building approval.

Miss Susan Lyon, a Chartered Valuation Surveyor also testified that she visited the leased premises in 1995. She did not have a copy of the approved plan. She said that she identified five structures which she measured, and prepared a layout plan. She also observed that the lessor was in breach of the planning permission which stipulates that no permanent structure should be constructed within 100 feet of the centre line of the main road.

Claimant's Submissions

The claimant contends that by letter of request dated 28th April 1995, written on her behalf by Attorney-at-Law Mr. I. Wilkinson, she has validly exercised the option to renew the lease. She is also relying on assurances/promises of the lessor made during negotiations leading up to the signing of the lease, that she would be granted a long term on renewal. Mrs. Khan cited the case of **J. Evans and Sons Ltd. v Andrea Merzario Ltd. 1976 1 WLR 1070** where a promise was made to induce the plaintiff to agree to a proposal. The promise was accepted and the agreement was held to be binding.

She also made reference to Esso **Petroleum Co. Ltd v Mardon (C.A.) 1976 2 WLR 583** at page 593, which referred to the case of **Dick Bentley Productions Ltd. And Another v. Harold Smith (Motors) Ltd. 1965 1 WLR 623,627** where it was stated that:

> "... if a representation made in course of dealings for a contract for the very purpose of inducing the other party to act upon it by entering into the contract, and actually inducing him to act upon it, by entering into the contract, that is prima facie ground for inferring that it was intended as a warranty."

She also made reference to the case of **Surrey Shipping Co. Ltd v Compagnie Continentale (France) S.A. 'The Shackleford" 1978 1 Lloyd's Law Rep. 191** where at page 198 the court described the basis of estoppel by conduct thus:

> "That a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs which another has taken to be settled or correct."

Defendant's submissions

Mr. Foster has submitted that the lessee is in breach of paragraph 2(iii) of the lease agreement where she covenanted as follows:

> "The lessee hereby covenants with the lessor to erect no permanent structure on the leased premises except with the approval of the local Planning Authority."

In relation to the Claimant's evidence that she was given promises/assurances in negotiations leading up to the signing of the lease, Mr. Foster argued that the lease embodies all the terms of the agreement. Parol evidence cannot be received to contradict, vary add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract. **Bank of Australasia v Palmer (1897) A C 540 at page 545.** He submitted further that the court ought to rely

on a sketch plan prepared by Mrs. Alexander when she visited the premises in 2003 as to areas which were not included in the approved plan. He submitted that the layout plan done by Miss Susan Lyon also demonstrates those breaches and at no time did the claimant suggest that the buildings indicated on the plan are not present on the land; that Miss Lyon's evidence of the permanence of the structures ought to be accepted.

In response to the claimant's submissions on estoppel, he also said that an important feature of promissory estoppel is that it does not create a cause of action. It is a shield and not a sword. **Combe v Combe (1951) 2 K B 215 at page 224** and **Inwards and Others v Baker (1965) 1 All ER 446.**

Mr. Foster said that the claimant in defence to the defendant's counterclaim had admitted that the lease commenced in April 1990; that clause 1 of the lease states that the lease was for a period of five years commencing on the 1st day of April 1990. It follows that the lease would have expired at the end of March 1995. September 24, the date mentioned at the beginning of the lease, is not the date of commencement as both parties have erroneously stated.

When the claimant applied for renewal in May 1995, the lease had already expired. This was no minor error which could be overlooked as in the case of **Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.[1997] 3 All E R 352** but rather a major non-compliance. Moreover, the evidence of Mrs. Alexander as well as the expert witness report of Mr. Edward Chambers establish that the claimant was in breach of the planning permission in relation to erection of solid structures and also construction within prohibited distances from the main road.

It is also the defendant's contention that the renewal clause is invalid as the rent was not agreed; the option would be unenforceable and consequently the relevant clause would also be unenforceable. He relied on a passage in **King's Motors (Oxford) Ltd. v Lax (1969) 3ALL ER 665**. There, the option provided that it was for a further term "at such rental as may be agreed between the parties." At pages 666-667 Burgess, V.-C said:

> "The argument for uncertainty is that as the rent was not agreed and was left to be agreed; unless the parties were - if you like to put it that way – to play the game together and agree, the contract is not enforceable and is void for uncertainty. In substance it amounts to no more than a contract to enter into a contract which is always given as the classic example of an agreement which is unenforceable."

Was there an inducement for the claimant to sign the lease?

In considering this question I have regard to the evidence that it was Miss Hemmings who, through her industry, identified idle land owned by government to continue a small business she had previously operated elsewhere. After she established a thriving business on the land she sought to obtain security of tenure.

The correspondence shows that she wanted to obtain a long lease and the Commissioner of Lands sought advice from various government departments. Some of them had certain concerns, including road development in the area. Both parties eventually signed the lease as presented by the Commissioner of Lands.

I find that the lease was acceptable to the claimant and she signed it accordingly. The claimant had previously returned a lease unsigned because an important provision was missing. There was no inducement on the part of the Commissioner of Lands. The **Esso Petroleum Co.** case relied on by Mrs. Khan is distinguishable. All overtures were made by the claimant in relation to the lease and in the circumstances of this case it is

very unlikely that Miss Hemmings would not have signed the lease but for the assurances given. I find that the lease embodies the terms and conditions entered into by the parties.

Is the claimant in breach of clause 2 (iii) of the lease? (to erect no permanent structure)

The lease clearly prohibits the erection of permanent structures on the premises except with the approval of the relevant authorities. Clause 4(iv) prohibits the erection of "temporary structure or structures", hence the claimant's assertion that as there are no temporary structures on the premises, clause 4 (iv) has not been breached. Also, there has been no breach of the requirement for the removal of temporary structures "at the end of any renewal or sooner determination" of the lease. However, the planning approval, Exhibit 5(b), stipulates that "no structure" should be erected on the premises less than 100 feet from the centre line of the road. The lease agreement cannot override the planning approval granted and I accept the evidence of Mr. Edward Chambers, the expert witness. His sketch plan admitted in evidence shows that the main structure and the guardhouse are not within the distance permitted.

Miss Hemmings presented her application to erect a bar and restaurant in January 1989. This was, as the plan exhibited shows, a building to be erected of concrete and steel. At that time she already had certain permanent structures on the premises. The relevant authorities were aware of this, hence the condition of the planning approval, Exhibit 5(b), that no solid structures were to be erected except those stipulated.

On the same document (Exhibit 5b) dated July 4, 1989 there appears the following notation:

"The Town and Country Planning Authority hereby grants permission for the proposed building development as illustrated on the plan date – stamped by TPD 11.01.89".

Further, Exhibit 5 (approval for building application) states that the Town Planning Department, Kingston & St. Andrew Building Division, on September 11, 1989 granted approval for plans of the proposed building/structure at Norman Manley Highway. Indeed Exhibit 4 (record of site inspection) shows that Milton Richards, a building Inspector at the Town Planning Department, had carried out an inspection of the site in August 1989 and made notations.

It is clear that the claimant obtained permission to construct the bar and restaurant pursuant to her application and I so find.

However, a guard house constructed of concrete has been erected There are also two structures constructed to the rear of the premises, one described as a stage area, the other as a jerk pit. The existence of the additional buildings is not denied. Nor is it being contested that certain work has been done in relation to the approved buildings. Some building breaches alluded to by the defendant may well have been waived as visits had been made to the premises by authorized persons and there is no correspondence or allegation relating to such breaches. It does not appear that any action was taken in respect of those breaches. It was the claimant who brought a claim seeking relief as she alleges that because of the actions of the defendant, her once thriving business had declined substantially. However, the claimant is not conceding that there are any breaches, and has not pleaded waiver and acquiescence.

I find that the defendant has established by credible evidence that the claimant is in breach of the lease in respect of constructing permanent structures without the approval of the relevant authorities and also constructing within prohibited distance.

Is the option to renew clause valid?

Mrs. Khan maintains that not having been pleaded, it is not an issue which this court ought to entertain.

I am in agreement with Mr. Foster's response that, as this is a question of law, there is no requirement for pleading.

Clause 3(ii) of the lease is to the following effect:

> "that the Lessor will on the written request of the the Lessee made not less than three (3) months before the expiration of the term hereby created and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on behalf of the Lessee hereinbefore contained grant to it a renewal of the lease from the expiration of the said term for a further term which shall be agreed upon by the parties and containing the like covenants and provisions as are herein contained SAVE AND EXCEPT the amount of rental which shall be subject to re-negotiation and this present covenant for renewal."

The case of **King's Motors,** (supra), clearly establishes that such a clause is void for uncertainty.

Mrs. Khan argued that there is an exception where there is provision for arbitration. She referred to Clause 4(ii) which states that:

> "Any dispute or question whatsoever arising from this lease the same shall be referred to arbitration in accordance with the provisions of the Arbitration Act or any statutory modification thereof for the time being in force."

In my view it is enough to dispose of that submission by stating that in bringing this claim resort to arbitration was waived. Moreover, the court made a specific enquiry

at the commencement of the trial and both parties indicated that they had waived the right to proceed to arbitration.

The question as to whether the claimant had sought to exercise an option within the time stipulated is therefore no longer relevant as I find that the option to renew clause is unenforceable, being void for uncertainty.

On the evidence it appears that both parties treated the lease as having commenced in September 1990 which would mean that the claimant had sought to exercise her option within the stipulated time. However, the clause is not enforceable and in any event, the Commissioner of Lands was justified in not renewing the lease because of the building breaches alluded to.

Is the defendant entitled to Mesne profits as claimed?

The cases of **Inverugie Investments Ltd. v Hackett (1995) 1 WLR 713 and Swordheath Properties v Tabet and others (1997) 1 WLR 285** relied on by Mr. Foster in support of the defendant's entitlement to mesne profits, are distinguishable from the claimant's case. I agree with Mrs. Khan's submission that Miss Hemmings remains in possession as a statutory tenant. The defendant is not entitled to mesne profits. She is liable only for the rent specified in the lease.

Is the defendant entitled to recover possession?

The contractual relationship between the parties has ended. Even if the 5-year term expired in September 1995 as the claimant maintains and not in March 1995 as the defendant contends, the claimant is in breach of the lease agreement and the option to renew is unenforceable for reasons already given. The defendant is in my opinion entitled to an order for possession.

Is the claimant entitled to damages for loss of goodwill and loss of earnings?

The defendant was unable to establish that the claimant had been served with a notice to quit. She seeks damages for loss of earnings and loss of goodwill. I am in agreement with Mr. Foster's submission that even if the claimant were entitled to damages in relation to the above, special damages have not been pleaded and proved as required. The evidence adduced by Mr. Orlando Gordon does not provide a proper basis on which this court could award such damages. That evidence amounts to no more than projections, unsupported by documentation and cannot be relied on by the court to award damages.

Is the claimant entitled to compensation for loss of approved structures?

This is a matter which the court has given anxious consideration.

Mr. Foster has submitted that condition 5 of the planning approval (Exhibit 5b) which states that all buildings be demolished at the applicant's/lessor's expense on the expiration of the lease obliges the claimant to remove the structures at her expense; she is therefore not entitled to compensation and the structures have now become fixtures.

At the time the lease agreement was signed, Miss Hemmings had already been granted approval to erect the bar and restaurant. That construction is therefore approved and falls within the exception of the clause prohibiting the erection of permanent structures. As previously stated, the clause which deals with removal refers to temporary structure or structures and there are no temporary structures on the land. Although I find that there was no inducement on the part of the Commissioner of Lands for

Miss Hemmings to sign the lease, I have regard to the evidence that:

a) She was seeking to obtain a long lease

b) The Commissioner of lands was reluctant to grant a long lease because road improvement was contemplated

c) The relevant authorities had no objections provided certain conditions were adhered to

d) Planning approval was granted subject to buildings being a certain distance from the centre line of the main road

e) A condition relating to distance is stated in the lease but is in respect of temporary structures

f) Miss Hemmings' application to build a bar and restaurant had been approved before the lease was signed

g) There was an inspection of the work being done

h) Miss Hemmings insisted on the clause relating to permanent structures being included in the lease

Although the claimant states that the terms of the lease were acceptable to her and that is why she signed it, and the court has found that she was not induced to sign it, if assurances were given, as pleaded by her and alluded to in her evidence, would she be precluded from relying on them? Having regard to the above mentioned factors, the court accepts the evidence that Miss Hemmings was given assurances/promises that she would be granted a long term if she developed the property. Those assurances/promises do not create a cause of action. However, she can rely on them as the defendant has

counterclaimed for recovery of possession and by virtue of the provisions of 18.1 (2) and 18.2 (1) of the Supreme Court Rules 2002 such counterclaim is to be treated as if it were a claim.

I find that Miss Hemmings relied on assurances/promises that she would be granted a long term on renewal and it was in those circumstances that she erected a bar and restaurant, of concrete and steel, which were approved in 1989. In **Surrey Shipping Co.** (supra), Donaldson, J., had this to say:

> "If a man so conducts himself that another could reasonably regard a particular state of affairs as existing or settled, the only question is whether or not in all the circumstances it would be just and fair to allow him to resile."

In my judgment, it would not be fair and just for the defendant to recover possession without compensating the claimant for the approved structures. The Rent Restriction Act, to which Mrs. Khan referred, also applies. Section 25(7) of the Act states thus:

> "In granting an order or giving judgment under this section for possession or ejectment of building land, the court may require the landlord to pay to the tenant such sum as appears to the court to be sufficient as compensation for damages or loss sustained by the tenant, and effect shall not be given to such order or judgment until such sum is paid."

I find that Miss Hemmings is entitled to compensation for the bar and restaurant she constructed with the approval of the relevant authorities. I cannot rely on the valuation submitted by the C.D. Alexander Company Realty Limited as that valuation does not take into account the building breaches referred to. The valuation submitted by Chang Rattray & Co. is of greater assistance. It places a value of 5 million dollars on all buildings and 4.460 million dollars on buildings not approved. However, additional work

was done by Miss Hemmngs on the approved structures and she is not entitled to compensation for that enhancement. In the circumstances, I would discount the 4.460 million dollars by approximately 15 percent and arrive at a value of 3.7 million dollars as compensation.

Conclusion

For reasons stated herein, the claimant is refused the reliefs sought on her claim. On the defendant's counterclaim, the claimant is ordered to quit and deliver up possession of the premises by 31st March 2005. The defendant is ordered to pay the claimant the amount of 3.7 million dollars as compensation for loss of her approved structures. The counterclaim for mesne profits fails. Judgment is awarded accordingly. The Court makes no order as to costs.