[2013] JMSC Civ 53

INTHE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2008HCV00595

BETWEEN	LINNETTE ROWE-CAMPBELL	CLAIMANT
AND	KEITH FOOTE	DEFENDANT

Ms. Arlene Beckford instructed by Brown, Godfrey & Morgan for the Claimant

Mr. Brian Moodie instructed by Samuda & Johnson for the Defendant

Heard: January 30, February 2, April 19 and 25, 2013

Landlord and Tenant – Agreement to Lease – Whether Enforceable Agreement – Costs of Expansion of Proposed Leased Premises

Straw J

The Parties

[1] The claimant, Linnette Rowe-Campbell, is a business woman and co-owner with her husband, Keith, of House of Styles, a clothing store. Up to June 2006, they operated from locations in Kingston, Mandeville, Savanna-la-mar and Montego Bay.

[2] In June 2006, she was seeking to open a branch in Ocho Rios, St Ann. As a result, herself and her husband met with the defendant Keith Foote, the owner of a plaza located in Ocho Rios known as Little Pub. At that time, the plaza was being rebuilt as it had been destroyed previously by fire. At some point during

the rebuilding process, Mr. Foote decided to operate the complex under a company registered in the name of Little Bay Co. Ltd.

[3] Mrs. Campbell negotiated an oral agreement with Mr. Foote between June and July 2006 to rent shop #12. She paid him the sum of $2,135.840.00 between July to October 2006 which represented rental for one year. The sums paid and dates are listed below and entered into evidence as Exhibits 2 to 5 respectively:

6th July 2006	-	$735,840.00
10th August	-	$700,000.00
14th September	-	$300,000.00
28th October	-	$400, 000.00
Total	-	$2,135,840.00

[4] She is now seeking to recover the said sum with interest as Mr. Foote failed to deliver possession of the said shop on the agreed date. She also refused *to* sign the lease agreement delivered to her subsequently as it contained terms that had not been discussed and agreed on between both parties. Mr. Foote is contending that he did deliver possession of the shop on the agreed date and that Mrs. Campbell was the one who breached the agreement by failing to take possession. He is also contending that she induced him to remodel unit 12 and that he has suffered loss from related expenses as well as loss of rental for the shop between December 2006 to April 2007.

The Claimant's case

[5] Mrs. Campbell states that she paid the several deposits as Mr. Foote had indicated he was having serious financial difficulties and requested the sum in advance in order to facilitate the completion of the shop as quickly as possible. At the time [June to July], he had also told her that her unit would be ready by 1st September 2006 and rent would next be due in September 2007. She stated also that she explained to him that Christmas was one of her two best seasons and he assured her it would be ready for the 6th. Based on these assurances she entered into the oral agreement.

[6] At the time the first payment was paid on the 6th July, work was still in progress. This was so in August also and she made the observation that it would not be ready for the 6th. She requested that her stepson, Robert, visit the location and inspect the site as she went overseas to buy stock for the store. In early September, Mr. Foote pushed back the date to the 1st week in October. She indicated to him that it would make no sense after October as she needed time to fix the shop for December.

[7] She did, however, visit the location on the 14th September and pay a further deposit as requested by Mr. Foote to facilitate the completion of the shop. At that time she told him 'October or else.' She stated that despite his promises, it was not ready for the 1st of October and he promised it would be ready for the 1st November. Mr. Foote sent her a letter dated October 25th which stated that the shop would be ready on 1st November and that rent would begin as of 1st December 2006 [Exhibit 1]. She visited the location on the 28th October and expressed her displeasure at the progress. Mr. Foote told her to get her things together as once he started to asphalt the outside she could take up possession. She also paid her last deposit on that day.

[8] Mrs. Campbell has further testified that Mr. Foote called to say that the date of occupation was pushed back to the 1st December. She explained to him that she was losing money. He later called her in the first week in December to state that the shop was ready. She told him that she could not fix it in time for Christmas and she had other stores to deal with. She visited the location in the second week of January, 2007. Shop #12 was situated on the first floor. She observed that the shops downstairs were occupied but the entire middle floor [apparently the first floor] was incomplete.

[9] She maintains that shop #12 was only completed close to the end of January. However, she did admit under cross-examination that she could have commenced business in January if she had decided to take occupation. On her visit in January, Mr. Foote handed her the draft lease agreement (Exhibit6). She

took the lease with her to Mandeville, perused it and spoke to him a week later about her disagreement with some of the terms.

[10] The issues surrounding the lease agreement are described in paragraphs 76 to 78 of her witness statement. The areas of concern included the fact that the rental was quoted in $US and not the specified amount of $2 million, a percent of the $2 million would be applied over time to the rent, a maintenance charge of US$500.00 was applicable and an annual increase in rent was included.

[11] She never signed the lease agreement and asked for a refund of her money. Mr. Foote agreed and sent her a cheque for $150,000.00 in June 2007 and a second cheque for the same amount post-dated for June 30. She did not encash any of these cheques as Mr. Foote was seeking to deduct three months rent from the total sum.

[12] Mrs. Campbell has denied that she negotiated for unit #12 to be remodelled to include units #14 and #15. She stated that shop #12 was sufficient for her purposes. She did agree to pay the money without going inside the shop at the time as she did not have access to the store but Mr. Foote told her the size and did the calculations in relation to the sum she was to pay. Although she could not observe the shape of the unit from inside to access the depth, she was able to estimate the width. This transaction was not unusual for her. She did, however, admit that this shop was the smallest of her locations.

[13] Her stepson, Robert Campbell gave evidence supporting the claimant in relation to the state of un-readiness of the location. He visited the site on the 30th November and described, *inter alia* that the pavement was still covered with marl, scaffolding was still up towards the right and left of the building and the security fence was still in place. He denied that the entire plaza was completed on the 30th November and that the first floor was completed.

Evidence of defendant

[14] According to Mr. Foote, negotiations commenced between the principals of House of Styles, Mrs. Campbell and her husband between June and July 2006 for shop #12 which was sixty-five percent ready at the time. However, after they inspected the shop, it was indicated that it was too small and an agreement was reached for #12 to be remodelled to include 14 and 15. The agreement was that the shop would be ready for 1st November 2006. He further stated that the principals paid him the sum of $2,135,840.00 which sums were for the renovation of the shop.

[15] Mr. Foote also stated that the renovations were commenced and pursued diligently and cost in excess of $1million, however, the sum paid by the claimant would represent one year's rent in advance. He did not speak to them about the money to do the work on the building as this would be his expense, not theirs. There is therefore inconsistency in his evidence in relation to the purpose of the payment of the money.

[16] It is his evidence that his company Little Bay, wrote to House of Styles on the 25th October advising them that the remodelled unit would be ready on 1st November and that the payment of rent would commence on the 1st December to which the principals agreed. Although the shop was ready on that date and the keys available for collection, House of Styles did not commence business on that date.

[17] He subsequently made contact with them and was advised that they were not ready and would commence on the 1st February 2007. In January 2007, they erected a banner "House of Styles coming soon ---." He obtained the draft lease in January and gave it to Mrs. Campbell. In mid January, she indicated that she did not want the shop again. By the 9th February, the sign was removed. He made enquiries of the principals and was told that the rent was too expensive and that they had opened a store in Santa Cruz which was the preferred location.

He indicated to them by way of letter dated 22nd January 2007, (Exhibit 7) that he was willing to renegotiate the rent but they failed to pursue the matter.

[18] According to Mr. Foote, his company incurred expenses of approximately $1,165,000.00 as a result of the failure of the claimant to occupy. He admitted that he made an offer to refund the sum of money but thereafter realized that the loss he suffered as a result of the breach exceeded the amount paid. He has asked the court to make the finding that he is entitled to set off sums incurred by him in remodelling and refurbishing the shops as well as the loss of income he suffered in consequence of the rental of one shop instead of three. His losses and expenses are set out as follows:

> [1] Rent for the remodelled unit between December 2006 and March 2007 as the unit was not rented until April 2007. The shop was locked up for four months between December 2006 to April 2007. The rent is US$2,750.00 per month at the rate of J$64.72. The total is $711,920.00.
>
> [2] An additional loss of US $550 per month which he would have earned if the 3 shops were rented separately as he had discounted the rent to attract her business. The total is J$142,384.
>
> [3] Expenses described in relation to cheques tendered into evidence [exhibits 8 to 19] that he paid to various workmen for the expansion of the shop. The total is in the amount of J$628,576. The expenses were much more but he was not able to offer proof as it was difficult to separate these expenses from other material bought for the general construction.
>
> [4] Maintenance of US$500.00 per month for each of the shops for four months which amounts to a total of J$388,320.00.

[19] Mr. Brian Moodie, counsel for the defendant, has submitted that the court should make the finding that he is not indebted to Mrs. Campbell or, in the alternative that the sums above which amount to J $1,871,200.00 should be set off against the funds deposited by her.

[20] Mr. Foote disagreed with the evidence from the claimant and her witness that the plaza was not ready in November 2006. He stated that all the downstairs shops were occupied and all upstairs were completed. He admitted, however, that the car park was not paved but was rolled to be paved and that this was the position up to 30th November. He explained that there was some 'touching up' of the plaza continuing but shops had been delivered to tenants and they were fixing up for Christmas.

Lease

[21] In relation to the draft lease document, he admitted that in the letter dated 25th October, he did not invite them to execute the lease as it was not ready. He had discussions with them in December about commencing business on 1st February 2007and delivered the lease to Mrs. Campbell in January. There was no work in process at that time on the premises. He also admitted that he did not discuss every item in lease with her and that it was only given to her at that time as he got the draft agreement late.

Analysis of the evidence

[22] There are two major legal issues to be determined. Firstly, was there a valid oral agreement between the parties? It is clear to this court that Mrs. Campbell paid just over $2 million dollars to Mr. Foote between July and October because she wished to facilitate her occupation of the premises as quickly as possible. I accept therefore that she had been given a date for possession prior to the 1st November.

[23] It is also clear to this court that the shop was not ready on 1st November 2006. Mr. Foote himself has admitted that the driveway was not paved up to the 30th November. I do accept also the evidence of Robert Campbell as to the state of readiness at that general time. It is hardly feasible that the claimant would not have taken possession and prepared the shop for Christmas if she had been given possession. She had been eager to take possession and had made her last deposit on the 28th October. I note also that she commenced operation of a

shop in Santa Cruz in that very month of November. Although she had expressed that she wanted it earlier, it is apparent that she was willing to and agreed to wait for possession up to 1st November.

[24] One would also have expected that the lease agreement would have been presented to her at the time possession was offered. It was not given to her until two months later. I find that this fact is cogent evidence in support of the claimant's contention in relation to the state of readiness.

[25] I do find the claimant's evidence concerning this issue to be more credible. I accept that she examined the location in January and while it does appear that she may have been contemplating going into possession at that time or at the beginning of February, it is clear that once she received and perused the lease agreement, she decided that she would not proceed.

Issue of Expansion

[26] The second issue for determination is whether the parties contracted for unit #12 to be expanded.

I do have strong reservations concerning her evidence that there was no agreement to expand unit 12. She said unit 12 was large enough to accommodate the needs of her shop and that there was no agreement to incorporate units 14 and 15. Mr. Moodie has submitted that there could be no other motivation for paying the sum in advance except that it would be used for the purpose of expansion. Although she has denied that this was the reason, it is somewhat incredible that she would continue the payment of the various deposits up to 28th October, especially when it was becoming obvious that the deadline of the 1st November could not be met. Mr. Moodie has also submitted that she is not credible when she states that she reached an agreement on space and the payment of significant sums without an appreciation of the dimensions.

[27] Mr. Foote testified that he took one year's rental in advance from any tenant who wanted modifications. This is in accordance with prudency. While it is true that it

is only unit 12 that is referred to in the lease document, the three shops had been remodelled to form one and I do not believe that Mr. Foote is fabricating this evidence. I note also, that on her evidence, unit #12 [in its original condition] would have been her smallest location. So there is some credence to Mr. Foote's evidence that she had said it was too small. I accept therefore that the adjustments were requested by Mrs. Campbell.

The Law

[28] It is Mr. Moodie's submission that Mrs. Campbell breached the oral agreement for the lease when she refused to take occupancy in December 2006 and communicated this to Mr. Foote in mid January 2007. On the other hand, Ms Beckford, counsel for the claimant, has submitted that there was no agreement for a lease as the parties were still negotiating and no agreement had been solidified. She stated that there must be unequivocal and unconditional acceptance without variance of any sort between it and the proposal and communicated to the other party [**Beesly v Hollwood Estates** [1961] Ch 105.]

[29] An agreement for a lease in its simplest terms is essentially a contract between the parties, whereby one party agrees to grant and the other agrees to take a lease. To constitute a binding contract there must have been a proposal or offer to take a lease followed by an unequivocal and unconditional acceptance of the said offer supported by the relevant consideration. It is also essential that there is '*consensus ad idem*' between the parties to the contract.

[30] In the Privy Council's decision of **Rossiter v Miller** [1878] 3 Appeal cases 1124, Lord Blackburn (page 1151) expressed this requirement in the following terms:

> *---It is necessary part of the plaintiff's case to show that the two parties had come to a final and complete agreement, or if not, there was no contract. So long as they are only in negotiation either party may retract; or though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remains to be settled afterwards, there is no contract. The parties in such a case are still only in negotiation.*

[31] The minds of the parties must therefore be settled as it relates to matters cardinal to every agreement for a lease and also on other matters that may be pertinent to the particular bargain. In **Hill and Redman's Law of Landlord and Tenant,** the cardinal terms essential to every lease agreement are listed as follows [page 536]:

[a] The identification of the parties as Lessor and lessee.

[b] The commencement and duration of the term of the lease.

[c] The premises to be leased.

[d] The rent or consideration to be paid.

[32] In the present case, the parties had commenced negotiations between June and July 2006. The claimant has asserted that the agreement was that the premises would be ready for occupation in September 2006. The defendant stated that the parties agreed for the 1st November 2006. It is clear, however, that the claimant had expressed that she needed the premises long before the Christmas season. The parties would therefore have been looking at a commencement date before that time. However, the commencement of the lease was contingent on the completion of the construction of the premises.

[33] For reasons previously stated, I accept that the shop was not ready for the November deadline. The parties would therefore have had to renegotiate for a fresh commencement date. There is no evidence to suggest that this was December as the claimant had made it clear that she needed the premises before that month. There is some evidence that she was considering January or February, however, once she received the draft lease, the negotiations ceased. A cardinal term essential to the agreement was never settled after 1st November i.e., the commencement of the lease.

[34] In **Harvey v Pratt** [1965] 2 All ER 786, it was held that where the date for the commencement of the lease is not clear, there can be no agreement for a lease. There is also no binding contract for a lease unless the rent to be payable under

it or the machine for calculating the rent is agreed as part of the bargain [**Buswell v Goodwin** [1971]1 WLR 92].

[35] I do accept that the parties had renegotiated for the commencement of possession on the 1st November. However, there is no evidence of agreement after that date. Although the draft lease was delivered in January 2007, it is clear that it contained terms which had not previously been discussed with Mrs. Campbell. Mr. Foote has admitted this and his letter of the 22nd January 2007 is indicative of the fact that the parties were still in negotiations as it relates to the calculation of rent. There was therefore no *'consensus ad idem'* and I agree with Ms Beckford's submission that there was no enforceable agreement. Each party would therefore have been at liberty to opt out of the agreement without any substantial penalty imposed by the law. For the obligation of rent to be paid, there must be a valid agreement in place and since there was none, Mrs. Campbell would be under no obligation to pay rent to Mr. Foote. She would therefore be entitled to recover the sums paid which represented one year's rent in advance.

Whether the Defendant is entitled to recover sums expended to remodel/expand unit 12

[36] Counsel for the claimant has submitted that there is no evidence to lead one to conclude that there was an agreement for Mrs. Campbell to pay for any renovations. This is certainly true as Mr. Foote himself has stated that he requested the money [equivalent to a year's rental] in order to facilitate the expansion but that the expense would certainly be his to bear.

[37] The case of **Brewer Street Investments Ltd v Barclays Woollen Co. Ltd** [1953] 2 All ER 1330 from the English Court of Appeals does provide some assistance in the determination of this issue. During the course of negotiations for a lease, the defendants [the prospective tenants] requested the plaintiffs [the landlords] to make certain alterations to the premises before they entered into occupation. The defendants had also agreed by letter to accept responsibility for

the cost of the work. When negotiations broke down, the plaintiffs sought to recover from the defendants the cost of such work.

[38] Apart from the fact that the defendants had agreed to accept responsibility for the alterations, there are also other significant differences with the case at bar. In **Brewer**, the alterations were not completed before negotiations broke down. The uncompleted work of alteration was abandoned. The work that was being claimed for was the making and fitting of an extra door to a lift. It would therefore be of no benefit to the plaintiff. Lord Denning in his judgment [page 1335] considered the costs to have been wasted as it was done to meet the special requirements of the defendants and *prima facie* it was for their benefit and not for the benefit of the plaintiffs:

> *If and in so far as it is shown to have been of benefit to the plaintiffs, credit should be given in such sum as may be just, but subject to such credit, the defendants ought to pay the cost of the work, because in the first place they agreed to take responsibility for it.*

[39] Although the decision in **Brewer** turned on the facts that the defendants had agreed to take responsibility, the court considered certain principles that may be of guidance in the present circumstances. Lord Denning suggested [page 1334] that once the alterations were complete the plaintiff could have sued for price as on a completed contract, however, they could not have sued for damages for breach of contract because the defendants were not guilty of a breach. Both parties had differed on a point on which there had been no agreement i.e. an option to purchase which led to the breakdown of the negotiations.

[40] Lord Denning expressed [page1334] that only the law could resolve their rights and liabilities in the new situation either by means of implying terms or by asking on whom the risk should fall. An important point to consider would be the reason why negotiations broke down [page 1335]:

> *If it were the fault of the landlords as, for instance, if they refused to go on with the lease for no reason at all, or because they had demanded a rent higher than*

> *that which had been already agreed then they should not be allowed to recover any part of the cost of the alterations. ----- it was their fault that the defendants were deprived of it. On the other hand, if it were the fault of the defendants ----- as, for instance, if they had sought a lower rent than that which was agreed, then the defendants should pay the cost -----. They promised to pay for the work and they should not be able to break their promise through their own fault-----.*

[41] *Lord Denning* acknowledged that in the particular case it could not be said that either party was really at fault. He answered the query as to whom should the risk fall when negotiations break down without the default of either [page 1335]:

> *In my opinion the prospective tenants ought to pay all the costs that have been wasted. The work was done to meet their special requirements, and prima facie it was for their benefit and not for the benefit of the plaintiff If and in so far as it is shown to have been of benefit to the plaintiffs, credit should be given in such sums as may be just ----.*

Is either party at fault for the breakdown?

[42] Mrs. Campbell stated that the lease quoted the rent in US currency, rather than J$2 million. Secondly, that a percentage of the $2 million would be applied overtime to the rent. Thirdly, maintenance fee of US$500.00 was stipulated and an annual increase in rent was included. As I stated previously, Mr. Foote has admitted that he did not discuss all of the terms with her. It is my opinion that the issue of maintenance and any annual increase would be new issues that the parties had not previously agreed on.

[43] In relation to the issue of the rent, I do accept that Mr. Foote had calculated the first year's rent on the basis of US$2,750.00 per month at the prevailing exchange rate of J$64.72 to US$1.00. The annual rent would have therefore been J$2,135,760. That sum is approximately $80.00 less than the deposit paid by Mrs. Campbell. The quotation of the annual rent in $US would not therefore be an attempt to demand more rental. The issue of a fixed $US rate, however, would also have been a matter for the parties to discuss and agree.

[44] I am of the opinion that there is no evidence that could lead me to conclude that either party is to be blamed for the breakdown. The parties obviously did not contemplate such a breakdown. Up to the time that the draft lease was presented, Mrs. Carnpbell evinced a willingness to still enter in the lease agreement. It is clear also that the alterations were for her benefit. However, I cannot come to the conclusion that there is no credit accruing to Mr. Foote. Mr. Foote has a larger unit to rent. Such a rent is calculated based on the dimensions of the space. It has been rented since April 2007. He stated that the expense would have been his to bear and there was no agreement as in **Brewer** that Mrs. Campbell would stand the cost. He did not borrow money from the bank to do the renovations as he had her deposit. I do accept, however, that he expended money that he would not have had to and this was not for his benefit. The magnitude of the remodelling was not part and parcel of the general construction of the complex. It was specific to the needs of Mrs. Campbell.

[45] However, I take into consideration that the expenses would certainly have been worked out over a period of time from the steady rental of the particular unit and that the unit has been rented from April 2007. Also, Mr. Foote has had the benefit of the money advanced by Mrs. Campbell [interest free] since 2006.

[46] Having considered all of the above, I am of the opinion that Mr. Foote should have some relief in the interest of justice. His safety net in relation to the expenses would be that the unit would have been rented for at least a year. He would have been prepared to wait for Mrs. Campbell to take possession in February 2007. I am prepared therefore to set off the amount of $104,762.00 for the months of February and March. I arrive at the above figure by dividing the expenses of $628,576.00 by 12 which is approximately $52,381.00.

Mrs. Campbell is therefore entitled to receive $2,031,078.00. I will also be declining to award any interest on the sum representing Mr. Foote's expenses in relation to the expansion.

[47] Judgment for the claimant in the sum of $2,031,078.00 with interest of 6% from April 1, 2007 to April 24, 2013 on the sum of $1,507,264.00.

Costs to be agreed or taxed.