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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E 377/2001

BETWEEN	SINGER SEWING MACHINE COMPANY	APPLICANT
AND	MONTEGO BAY CO-OPERATIVE CREDIT UNION LIMITED	RESPONDENT

Ms. Maliaca Wong instructed by Myers Fletcher and Gordon for the Applicant.

Jack Hines instructed by Audrey Wilson and Company for the Respondent.

Heard 8th July 2004 and 18th November 2005

Campbell, J.

Lease Agreement – Annual Increment –
No Demand – What Constitutes Waiver

1. In 1993 Singer applied for declarations against their Landlord, Montego Bay Cooperative Credit Union Ltd. (Co-op), that a lease for a duration of ten years existed between the parties. Singer also sought an injunction restraining the Co-op from taking any steps to forcibly eject them from premises at Sam Sharpe Square, Montego Bay. The applications were refused in the Supreme Court, however, Singer was successful on appeal. An attempt by Co-op to appeal to the Privy Council was rescinded on 9th October 2000 for failure to prosecute the appeal.

2. On the 10th April 2001 Singer wrote the Co-op requesting "that our present lease be renewed as of 1st October 2001 for a period of ten years." The Co-op refused the request and stated that they expected Singer to "peacefully relinquish possession of the premises." In a subsequent letter, the Co-op identified the reasons for their refusal. The letter stated, inter alia;

1. With regards to the commencement date for the lease, we would suggest a careful reading of the decision by the Court of Appeal.

2. There was never an agreement for renewal for another ten years.

3. The clause in the lease to which you refer is unenforceable.

3. The Clause of the lease in dispute was Clause 3(b). In their letter of 27th April 2001, Singer offered their construction of that clause.

> "Clause 3(b) provides that if the Lessor makes a written request that the lease be extended for a further ten years, provided such request is made at least three months before the expiration of the lease, the Lessee will grant a lease for a further term of ten years, at a rental to be agreed or, failing agreement, to be decided by an arbitrator"

And concluded their letter dated 28th May 2001 in these terms:

> "The Court of Appeal was unanimous that (a) there was a binding lease and (b) that its terms were to be found in the documents described in the (amended) Originating Summons, which included a term for renewal.
>
> The Court of Appeal held that the term for renewal of the lease which was in the letter of July 10, 1991 was accepted by the Credit Union, appeared in the lease drafted by the Credit Union and the lease drafted by Singer, and was therefore a contractual term."

4. In October 2001, the Co-op filed Plaints in the Montego Bay Resident Magistrate Court seeking to recover rent totaling $3,163,166.92 as arrears for the period 1st September 1995 to 31st August 2001.

5. The Co-op's claim for arrears of rental had consequences for Singer's application for the renewal of lease; as the affidavit of Ornell Bedasse, General Manager of the Co-op, dated 15th January 2002, illustrates at paragraph 5;

> "That I am reliably informed by the attorneys-at-law for M.C.C.U. ...that on a proper interpretation of the judgment
>
> ....a).........
>
> b).........
>
> c) ..lease agreement includes a clause giving the applicant a conditional option to renew, inter alia....
>
> It was unnecessary for the Court of Appeal to decide on whether or not the Applicant, having an option to renew, is legally entitled to enforce that right at this time .... <u>The Court did not consider or decide on whether the Applicant had breached the lease agreement ... and thereby lost its right to enforce the option to renew, or had retained that right despite its breach because of conduct on the part of M.C.C.U....</u>" (Emphasis mine)

6. Singer in answer contended that:

1. that the original rental of $34,666.66 remained unchanged until January 1993, when it was increased to $37,040.00;

2. that ever since January 1993 Singer had continued to pay, and Mo-bay Co-op had continued to accept without protest $37,040.00;

3. that as a consequence Singer had believed that Mo-Bay Co-op was not increasing the rent, although it was entitled to do so.

7. Singer filed an Originating Summons dated 10th August 2001. This Summons was part-heard before Mr. Justice Reckord and was later amended. The Amended Originating Summons constitutes the matter before this Court; it states:

(1) A Declaration that on a proper interpretation of the judgment of the Court of Appeal, in suit no. E 1993 S-230 (C.A. No. 22 of 1996), delivered on the 19th day of May 1997, the Applicant is entitled to renew the ten (10) year lease existing between the Applicant and Respondent in respect of premises known as 8 Sam Sharpe Square, St. James and registered at Vol. 1234 Folio 21 of the Register Book of Titles.

(i) (a) A declaration that as a matter of law the Respondent, by its admitted conduct since January 1993, waived and/or abandoned its right to increase the rent, and /or is estopped from so doing.

(ii) Such further relief as this Honourable Court deems fit.

CLAIMANT'S CASE

8. Singer admits to having not paid the incremental rental, but contends that no demand had been made by the landlord. Singer argued that when the first Originating Summons was filed, the question was whether an option to renew existed. When Bedasse affidavit was filed, it was being raised for the first time whether or not, in light of Singer's purported breach of the lease agreement, the option to renew was maintainable. Singer then amended the Originating Summons to raise the question of waiver and or abandonment on the part of the Co-op. Singer admits paying rental at $37,040.00 per annum from January 1993, without

complaint. Co-op's correspondence to Singer up to March 1993, indicate that Singer could not have been in breach at that time. Singer argued that the letter of March 1993 acknowledging that the tenant "has paid his rental promptly" is evidence of conduct on the part of the Co-op that there has been a waiver or abandonment of the Co-op's entitlement to an increased rental. There is no evidence in letters exhibited that spanned a period from 1993 to July 1996 that Singer was ever written to about a breach or that rent was owed. Not until 21st August 2001 in the affidavit of Bedasse, filed in support of an application for arrears of rental in the Montego Bay Resident Magistrate Court, was the matter raised. For eight and one-half years, $37,040.00 was paid as the monthly rental, which the Co-op accepted without protest. This amounts to a waiver or abandonment of the incremental rental.

THE DEFENDANT'S CASE

9. The Co-op contends that Singer "has breached a term and condition of the lease set out in the schedule attached to the lease by not paying the required increased rental and this is a breach of both section (1) and section (3) and this precludes the Plaintiff (Singer) from exercising the option to renew the lease.

The issue of the renewal of the lease did not arise for determination by the Court of Appeal.

The Co-op asserts that there is no evidence of abandonment or waiver of the Defendant's right to increase rental, and the Plaintiff cannot assume that the Defendant has done so or intends to do so.

The Defendant further contends that there is no requirement for the Defendant to remind the Plaintiff each year that increase rental is due.

THE WAIVER

10. The Court of Appeal in **National Water Commission v Balteano Duffus Appeal No. 91 of 2002** delivered on the 20th December 2004, recently had occasion to examine the principle of waiver. It came about in this way, an officer of a public entity, National Water Commission, complained of having been dismissed from his post, dispite having applied for and obtaining retirement benefits.

Harrison, J.A. said at page 14 of the Judgment:

> "I wish to make some general observations about the doctrines of estoppel, waiver, election, approbation and reprobation. All share a common foundation in a simple instinct of fairness, and in particular, the perception that as between two parties to a transaction or a legal relationship it is or may be unfair for one party (a) to adopt inconsistent positions in his dealings with the other.

In examining the principle of waiver, the learned judge stated;

> "The doctrine of waiver has been described by Brennan J in The Commonwealth v Verwayen (1990) 170 C.I.R. A 394 and page 421 as; 'a unilateral release of abandonment of a right.'"

In Banning v Wright (1972) 2 All E.R 987 Lord Hailsham in describing this doctrine said at page 998;

'In my view, the primary meaning of the word 'waiver' in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted.'"

11. In **Jamaica Flour Mills Ltd. v Industrial Dispute Tribunal National Workers Union** **Privy Council 66/2003, delivered 23rd March 2005**.

The Appellants had contended before the Privy Council that the cashing of cheques has constituted a waiver of the employee's statutory rights. Secondly, the employees denied that such an act constituted a waiver.

The Privy Council held that before there could be a finding of waiver, there was first required to be an objectively ascertained intention to waive the employee's rights. Secondly, the person contending waiver must himself believe that there was an intention to waive the rights and must have altered his position based on that belief.

12. Was there an objectively ascertained intention to waive the Co-op's right to the increase? I would think so, the Credit Union has legal representation and the lease agreement would have been subjected to anxious scrutiny while the declarations were being sought in the Supreme Court and the Court of Appeal. It is reasonable to assume that the Credit Union was aware of its entitlement to the annual increase. The rental was the subject of correspondence, with Co-op

commending Singer for prompt payment of rent. Up to the filing of the Amended Originating Summons, there had been no annual increase for a period of eight and a half years. The Co-op could not enforce an action for recovery of arrears beyond six years. A landlord must bring his action within six years after the rent has become due. See s. 36 Limitation of Actions Act. Therefore, he could not recover for the first two and a half years. The Co-op's act of allowing two and a half years of rent to become irrecoverable is an unequivocal act of abandonment.

13. The strict common law rule is that there must be a demand for rent; to avoid the strictures of the common law, the usual formulation in lease agreement is "whether lawfully demanded or not."

14. Did Singer believe that the Co-op intended to waive the increased rental?

I find that from January 1993 until the 21st day of August 2001, there was no claim, protestation, or any act on the part of the Co-op indicative of an interest in the increased rental to which the Co-op was entitled. I further find that, not only was there no claim made, but the correspondence between the parties indicate an acceptance on the part of the Co-op about this state of affairs. The Co-op's letter of 23rd April, 2001, refusing Singer's application for a renewal of lease, advised that Singer should "peacefully relinquish possession of the premises of the Credit Union. There was no mention then of any arrears. Surely if the Co-op had not

abandoned the rent increase, then a letter which seeks to determine the lease would be expected to seek to recoup the arrears of rental.

It is my view that the actions of the Defendant in accepting payment from Singer at the rate of $37,040.00 per month from January 1993 without complaint provides conduct from which Singer could reasonably presume that the Defendant had abandoned its right to require the increase in rental provided for by the lease agreement. I find that the Defendant's letter of March 1993, in which the Defendant acknowledges the prompt payment of rental, to a reasonable observer, would signal the Co-op intention to abandon its right to an increase. The conduct of the Co-op in the claims brought against the Claimant represents that an increase in rental was not an issue, as the first Originating Summons sought declarations as to whether there was an option to renew the lease without any mention of the increase.

15. Did Singer alter its position as a result of that belief?

Singer, as a retailer of furnishings and appliances, would be expected to factor expenses incurred in making a sale into the sale price of each unit it sells. Having done so for the first eight and one half years, the basis of rent being $37,040. Singer's pricing mechanism has therefore been adjusted to accommodate this rental. It would be unfair for the Co-op to adopt an inconsistent position in relation to the rent.

There would be an irrecoverable lost to Singer, were the Co-op to be allowed to aver that such rental should be increased.

I therefore hold the view that the Defendant is estopped from contending that Singer was in breach of the Agreement due to non-payment of the annual increments in rental. The declaration sought in the Amended Originating Summons are granted.