IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CD00251

BETWEEN	**JOYCE VASSELL (In her personal capacity and by way of Power of Attorney for Joselyn Vassell)**	**CLAIMANT**
AND	**GARMIC VENTURES LIMITED**	**DEFENDANT**

Contract-Lease unsigned by landlord- Deposit, rent and, half costs paid by tenant- Whether lease enforceable against landlord – Evidence - Counter notice under Evidence Act not served-Whether documents admissible - Observations on the hearsay rule in civil proceedings.

Denise Senior-Smith, Dameta Gayle-Franklyn instructed by Oswest Senior-Smith and Co. for Claimant.

Kevin Williams, Gordon McFarlane instructed by Chancellor & Co. for Defendant

Heard: 6th,7th, 8th, December 2021,4th February,18th March and, 17th June 2022.

IN OPEN COURT

CORAM: BATTS, J.

[1] On the first morning of hearing, the parties advised that, there had been no attempt made to agree documents to be put in evidence. This was contrary to an order of the Honourable Miss Justice Barnaby, made on the 4th October 2021, for documents to be agreed if possible and if not, for notices and counter notices to be filed by certain dates. I therefore adjourned until 2:00p.m. to allow the parties

an opportunity to comply with Barnaby J's order. When we resumed a substantial bundle of documents had been agreed and became exhibit 1.

[2] This did not prevent further loss of time because objections were taken as counsel, on one side or the other, endeavoured to put into evidence documentation which had not been agreed. In one instance counsel attempted to prove a document through a witness who, was neither its maker nor its receiver and, denied ever having seen the document before. On another occasion counsel objected to a document being put in evidence although no counter notice under the Evidence Act had been served. I reiterate what I said in ***Dorrett Gayle Willis v Attorney General of Jamaica et al [2017] JMSC Civ. 17*** **(unreported judgment dated 9th February 2017)** at paragraph 8:

> *"The profession needs to be reminded that Section 31E allows for the admission into evidence of a statement if the maker could have given direct oral evidence of the facts stated. The section requires that a 21-day notice be served on the other parties. The parties so served have a right to serve a counter-notice requiring that the maker be called. If a counter-notice is served the party intending to tender the statement need not call the maker if he is proved to be:*
>
> *(a) dead,*
>
> *(b) unfit by reason of his bodily or mental condition to attend as a witness,*
>
> *(c) outside of Jamaica and it is not reasonably practicable to secure his attendance,*
>
> *(d) cannot be found after all reasonable steps have been taken to find him, or,*
>
> *(e) is kept away from the proceedings by threats of bodily harm.*

> *It really would make nonsense of the section if a party, whether or not a counter notice was served, is required to prove that the statement's maker is dead, unfit, unavailable, cannot be found or, was kept away by threat. This is because, if those preconditions had to be established in any event, there would be no saving in cost or time at trial. The counter notice would be entirely irrelevant and unnecessary."*

[3] The result of all this was that much time was "lost", in the course of the trial, to counsel arguing about admissibility. The irony is that most of the documents involved were emails, generated and delivered electronically, the authenticity of which could hardly be in doubt. They were mostly connected to a law firm which, as we will see when I review the evidence, acted on behalf of one of the parties. Yet neither side called anyone from that law firm to give evidence. These events demonstrate, both the importance of counsel abiding pre-trial orders related to documents and, the urgent need to abolish the hearsay rule in civil proceedings.

[4] As regards the substance of the claim, this concerns a lease or, shall I say an alleged lease, between the Claimant (lessor) and the Defendant (lessee). The relevant allegations in the Particulars of Claim, filed on the 9th September 2020, are:

> *"1……..*
>
> *2. The defendant was served with a Notice to Quit on 3rd day of February 2020 to vacate the premises within three months but the defendant has refused and or failed to vacate the premises. Appended hereto is a copy of the Notice to Quit and the email correspondence from TARA Courier Delivery Service evidencing service of the Notice.*
>
> *3. Subsequent to the service of the Notice the defendant retained Attorneys-at-Law with whom the Plaintiff's Attorney's-at-Law have been communicating. Despite ongoing communication, the Defendant continues to exclude the Plaintiff from the premises whilst the*

Defendant operates and owns another premises which houses buildings and a Petrol Filling Station.

4. *Due to the Defendant's refusal to vacate the premises the Plaintiff, has suffered loss, inconvenience and has incurred expenses."*

The Plaintiff claimed recovery of possession and costs. The claim, be it noted, was filed in the Parish Court for the parish of Hanover on the 9th September 2020.

[5] The Defendant filed a defence and counterclaim containing 17 paragraphs. In summary the defence contends:

a). The Defendant is in possession pursuant to a written lease agreement. The agreement was entered into in 2009 for 10 years and was renewed.

b). In 2019 the Claimant's attorney-at-law, Messrs Dunn Cox prepared the renewed lease and sent it to the Defendant.

c). The Defendant executed and returned the new lease, on or about the 1st April 2019, to Messrs Dunn Cox.

d). The Defendant has, since 2009, been in possession and continues to operate its business there and has paid the agreed rent of US$5,940.00 plus GCT every month.

e). The lease has a termination clause which requires six months' notice by either party. It also gives the Defendant a right of first refusal should the Claimant decide to sell the property.

f). The Defendant has always demonstrated an interest in buying the premises. The Plaintiff's agent had orally indicated the Plaintiff's interest to sell the premises to the Defendant.

g). In the period April 2019 to November 2020 the Defendant spent J$1,750,000 on the premises and has made arrangements for renovations and alterations. The Defendant therefore reasonably expected that the property would be sold to it or, it would get a right of first refusal or, the lease would not be terminated "*in the short term*."

h). A notice to quit was issued on the 10th February 2020 contrary to the Defendant's expectation. The notice gave only three months' notice to quit and is contrary to the terms of the lease.

i). The Defendant claims restitution of the sums spent on the improving the property, unjust enrichment and/or, damages for breach of contract. The Defendant also counterclaims for specific performance of the 2019 lease.

[6] The matter was transferred to the Supreme Court of Judicature and, on the 12th May, 2021, further transferred to the Commercial Division.

[7] The Claimant filed a Reply and Defence to Counterclaim on the 1st day June 2021. This document had 13 paragraphs and asserted:

a. There was no agreement to renew the 2010 lease

b. Although Dunn Cox was retained by the Claimant, the proposed second lease was prepared for review by both parties.

c. The Defendant has been late with several rent payments and the Claimant refused to sign the proposed new lease agreement.

d. The Claimant gave no one authority to make any representations on her behalf. She made no representations and gave no encouragement for any renovation to the premises.

e. There is no newly executed lease providing for six months' notice.

[8] The Claimant gave evidence and her witness statement dated the 12th day of August 2021 was allowed to stand as her evidence in chief. Michelle Whittaker gave evidence for the Defendant. Her witness and supplemental witness statements, dated 13th August, 2021 and 15th October 2021 respectively, stood as her evidence in chief. Both witnesses were extensively cross-examined. At the close of the Defendant's case both parties made extensive written and oral submissions. I do not intend to restate either the evidence or submissions as both are matters of record. I mean no disrespect to counsel or their respective clients. It suffices, I think, to state my findings of fact and the evidential basis therefor. It seems to me, when the contemporaneous documentary evidence is considered, the balance of probabilities allows for only one result.

[9] I find as follows:

i). The parties first entered into a written lease agreement in 2006 for three years see, exhibit 1 tab H. In 2009 that lease was renewed for 10 years, see exhibit 1 Tab A.

ii). In 2019 the lease was renewed. This occurred when the Claimant's attorney-at-law sent a lease agreement for the Defendant's principals to sign and return. The Defendant signed and returned the document, see undated lease which commenced on 1st April 2019, exhibit 1 tab D.

iii). The Defendant paid the requested deposit and thereafter paid rent by deposit into the Claimant's bank account.

iv). The lease requires a minimum 6 months' notice for termination.

v). The Notice to Quit, Exhibit 1 Tab G, is ineffective as being for a shorter duration.

vi). The Claimant did not, either directly or through her agent, represent to the Defendant that any money spent on the premises would be refunded. Nor did the Claimant induce or encourage the Defendant to make improvements to the same

vii). The Defendant expended money improving the property in the hope that it would be offered the premises if and when the Claimant decided to sell. They also did so for the purpose of their business.

[10] My reasons for arriving at these factual conclusions may be shortly stated. In this matter the burden of proof is on the Claimant who must prove the case on a balance of probabilities.

[11] The most important factual issue has to do with whether or not a new lease agreement became effective in the year 2019. The Claimant denies it did. They rely on oral evidence and on communications passing between themselves and their attorneys-at-law. On the other hand, the Defendant relies on a signed copy lease, exhibit 1 Tab H and, an invoice from Dunn Cox dated 3rd April 2019,"*in connection with preparation of a lease agreement"* Exhibit 1 Tab J. It is common ground that, at all material times, Dunn Cox were the attorneys-at-law acting for the Claimant. There is also a letter, enclosing a cheque, dated 2nd April 2019 for *"half (½) costs of the preparation of the new lease agreement"*, see exhibit 1 Tab I. It is common ground that the letter is erroneously dated 4th April, 2018 as the contents clearly indicate it was issued in 2019. The amount of the cheque differs from the invoice by approximately $4,000. This of course is because the cheque was drawn on the 2nd April 2019 but the invoice was prepared on the 3rd April 2019. The parties were not cross-examined on that discrepancy but nothing turns on it. There may have been an oral miscommunication of the amount due. What is important is that the Claimant's attorney-at-law invoiced the Defendant for half (½) costs of the preparation of the lease. This would normally only be done if there was a lease.

[12] Email correspondence also supports my finding of fact. These are firstly, an email of the 18th March 2019 at 8:53 p.m from Dunn Cox to the Claimant. It ends with the following words, exhibit 1 Tab C:

> *"Were you able to open a now USD account with Scotiabank for the payment of rent? Kindly confirm whether you are now satisfied with the terms of the draft instrument of Lease and wish to proceed with execution"*

No written response to that email was put into evidence.

[13] Secondly there is exhibit 2, an email dated 24th May 2019 at 4:44pm, in which the Claimant wrote to Dunn Cox:

> *"Dear Paulette, I am reviewing the instrument of lease executed by Garmic Ventures Limited and will advise you on* [sic] *to proceed on completion of my review. In early January of this year Mrs. Whittaker, my brother James Malcolm, my husband and myself were at the property on Seaview Drive in Lucea with the "List of Fixtures and Fittings." As we did our walk through, at no time did Mrs. Whittaker mention any concerns."*

This letter, which is attached to another not admitted into evidence, is one month after the new lease had been signed by the Defendant and the half (½) costs paid. It certainly does not suggest any antipathy towards the Defendant.

[14] Then there is an email, exhibit 3 dated 17th May 2019, from Dunn Cox to the Claimant. Although not expressly referenced it appears to be the email to which the Claimant was responding on the 24th May 2019. It contains four attachments but those were not put in evidence. The letter refers to the *"attached letter and copy instrument of lease executed by Garmic Ventures Limited with comments made thereon by Mrs. Whittaker*", and asked, "*Kindly advise whether you wish the instrument of lease fully executed in light of the comments made by Mrs.*

Whittaker". Dunn Cox, also in that email, references on enclosed invoice and explains the half (½) costs as well as the cost to stamp "*the instrument of lease."* The email ends with the following words:

> "*Kindly advise how you wish to proceed. We look forward to hearing from you."*

[15] The fourth bit of correspondence, on this issue, is an earlier email, exhibit 4 dated 29th March 2019 at 1:46a.m. It is from Dunn Cox to the Defendant. It commences:

> "*We apologise for the delayed response to your email below. After discussions with our client, she has agreed to the amendment of the draft agreement to include the terms outlined in your email below. We trust that you are now in a position to proceed with having the instrument of lease executed and commencing April 1, 2019. Please find attached amended instrument of lease."*

The attorney then gave instructions, including a statement of the half (½) costs payable, and ended as follows:

> "*note you are required to make the monthly payments and the payment of the security deposit to the bank account outlined in the said instrument of lease."*

The email referenced was not attached to the exhibit.

[16] Finally, on the documents relevant to the question whether a new lease agreement became effective, is an undated email from the Defendant to Dunn Cox. It is undated because when being copied the upper portion with the date was omitted. It is Exhibit 1 K and commences with the words:

> *"Thanks for taking the time to meet with us on Monday March 11, 2019 at 3:10p.m, to discuss our new Lease Agreement* "

The writer then proceeds to indicate agreement with several terms *"as discussed."* These included an 8% increase in rental, with an increase at the same rate every two years thereafter, and the payment of a security deposit. The Defendant goes on however to indicate some disagreements:

a). With the omission of a right of first refusal

b). The short tenure of 5 years asking for 10 instead

c). Asking that specific provision as to the payment of SCT be inserted.

The message ended:

> *"We thank you for your consideration and look forward to hearing from you."*

[17] The parties, for reasons best known to themselves, did not place before the court the entire stream of emails on the issue. The Claimant, on whom rests the burden to prove her case, did not have Dunn Cox testify. I cannot adjudicate based on evidence not given, it is the evidence placed before the court that must be considered. It seems to me that the Defendant and the Claimant's attorneys embarked on negotiations. They arrived at a satisfactory agreement. The Claimant's attorneys sent a document reflecting the agreed terms to the Defendant for its execution and return. The Defendant executed the document and returned it along with the half (½) costs requested. The Claimant's attorney also wrote to her asking that she indicate her agreement by also signing the lease. The Claimant did not instruct her attorneys to return the money paid or to indicate to the Defendant that she had had a change of heart and was in disagreement. It seems to me, that in these circumstances, the inescapable conclusion is that a new lease agreement came into effect.

[18] The matter becomes even clearer when the question of the payment of the new rent is considered. The Defendant maintains it has paid the deposit as well as the monthly rental in the manner required. The Claimant says she does not know if these amounts have been paid. Her explanation is that she is unable to access her

account electronically. The excuse is, with respect, ridiculous. The Claimant might easily have subpoenaed her bank to give evidence. In the circumstances, there being no evidence documentary or otherwise to contradict the Defendant's evidence, and bearing in mind on whom the burden rests, I accept that the Defendant has paid the deposit and rental in accordance with the new lease agreement.

[19] The notice to quit was not served until the 10th February 2020, see exhibit 1 Tab G. The question arises what transpired between May of 2019 and February 2020. The evidence is bereft of detail. The email silence suggests that the Claimant was in agreement with the new lease. Her attorneys had negotiated it, the tenant had signed it, the tenant was paying rent and, had paid the half costs that was required. Something occurred to cause a change of heart. The answer lies in the oral evidence of the Claimant. She gave evidence by video link and said that on a visit to Jamaica she was upset by the additions made to the premises. She was also upset about something said to her. I find, contrary to her evidence, that this upset occurred after the negotiation of the new lease. It could not have been before or otherwise there would have been no negotiations. The Claimant would have instructed Dunn Cox to write telling the Defendant there would be no renewal of the lease. By the time this upset occurred it was too late to change her mind. The Defendant was already a tenant under the new lease agreement because the Claimant had the signed copy, had the deposit and half costs and, had been collecting the rent. In such circumstances the Claimant is estopped from denying the existence of the lease.

[20] The Defendant counter-claimed for the value of improvements made. However, the lease has no provision for compensation in that regard. I do not accept that the Claimant, or anyone on her behalf, made the alleged or any promise of compensation to the Defendant. The Defendant was at all times a tenant under a written lease which made no provision for compensation for improvements. It is more probable that the principals of the Defendant anticipated being in a position to purchase if and when the Claimant decided to sell. It is a risk they took in the

effort to improve or enhance their own business. No equity arises on the facts of this case.

[21] The claim and counter-claim are therefore dismissed. The Defendants are entitled to the costs of the action as almost all the time was spent on the issue of whether or not a new lease agreement was effective. On that issue the Defendant has succeeded.

David Batts
Puisne Judge