[2021] JMSC Civ 59

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV03462

BETWEEN **Kay-Ann Melissa Williams** **CLAIMANT**
(Administrator of the estate of Carl Williams)

AND **Melvin Blythe** **DEFENDANT**

Mrs Tamara Riley Dunn and Ms Melissa Watson instructed by Nelson-Brown, Guy & Francis for the claimant

Michael Brown instructed by Michael B. P. Erskine & Company for the defendant

Heard: 1, 2 February 2021 and 26 March 2021

Landlord and tenant– Recovery of possession – Whether premises reasonably required – Balance of hardship - Rent Restriction Act, section 25.

EVAN BROWN, J

Introduction

[1] This is a claim for recovery of possession and outstanding rent. The claimant seeks the recovery of possession of a parcel of unregistered land located in Logwood District in the parish of St. Elizabeth, measuring approximately 8935.25 square feet and being the land comprised in Valuation Number 163-01-002-001 of the Tax Roll. The claim for rent, as it appears in the Fixed Date Claim Form, filed 27 August 2019, is $400,000.00 for the period April 2018 to July 2019 and continuing. This part of the claim was the subject of a

contested application for an amendment at the start of the trial. I will return to this aspect below.

Background

[2] These are the uncontested or otherwise undisputed facts. The defendant entered into a seven-year lease of the property, commencing on 1 July 1998 with Carl Williams, (now deceased) then owner of the property. Under item 5 of the schedule to the lease agreement, the rental was $20,000.00 per month, payable in advance on the first day of each month and negotiable at the end of every two years. The lease ended by effluxion of time on 30 June 2005. It contained no renewal option. The defendant therefore continued in possession by holding over.

[3] Carl Williams died on 14 December 2006. He died leaving a Will under which the claimant was made the beneficiary of the parcel of land. Following his death, his executors, Patrick and Dwuie Bennett, brothers, took possession of the estate, including the demised property. They advised the defendant accordingly and that the rent should be paid to them. There was an increase in the rent to $25,000.00, in about 2013. Initially, Patrick Bennett was in charge of collecting the rent. However, since early 2014 the management of the property became Dwuie Bennett's sole responsibility.

[4] In or about 2014-2015, the claimant advised Dwuie Bennett that she wanted possession of the property so she could renovate it. As a result, Dwuie Bennett served the defendant "a letter" giving him notice to vacate the property, informing him that the claimant wanted her inheritance.

[5] The executorship of the Bennetts was terminated by order of the court on 24 March 2017, at the instance of the claimant. The claimant was granted Letters of Administration in the estate of Carl Williams. On 27 March 2018, the claimant served the defendant a notice to quit and deliver up possession of the premises on or before 26 April 2018. The stated reason in the notice was that "[t]he property is needed for the administrator/beneficial owner's use and occupation".

Recovery of possession

[6] The claimant's title to the demised premises was not disputed. The defendant submitted that the order for recovery of possession should be refused on two bases. Firstly, the claimant does not require the premises for her own use, residing abroad as she is, and attempting to regularized her immigration status. Secondly, the claimant should be estopped from denying the defendant a lease for ten years, based on the conduct of Dwuie Bennett. ***Walsh v Lonsdale*** (1882) Ch. D 9 was cited in support of the latter argument.

Issue

[7] The principal issue for discussion is whether the claimant is entitled to an order or judgment for recovery of possession.

Law and analysis

[8] The claim for recovery of possession is governed by the ***Rent Restriction Act*** (***RRA/***the ***Act***). It takes only a cursory reading of the ***RRA*** to agree with the view that its principal purpose is to curtail the otherwise *carte blanche* rights of a landlord to increase the rent and regain possession of the demised premises from the tenant or lessee: ***Halsbury's Laws of England*** volume 21, at para 1456. The ***RRA*** therefore applies to the letting of all building land, dwelling-houses and public or commercial buildings, unless exempted under the legislation (see ***RRA*** s.3). The entities which fall under the aegis of the ***RRA*** are collectively referred to as "controlled premises" (see s. 3(2) of the ***RRA***).

[9] There was no issue taken with the assumption that the premises in question are controlled premises. That is to say, it was not argued that either a certificate of exemption had been issued by an Assessment Officer under the ***RRA*** s. 3 (1) (e) in respect of the premises or, that it fell into a class of premises declared exempted by the Minister under s.8 of the ***Act***. That would have been a matter for the claimant to advance and only a deafening silence reverberated throughout the statement of case and evidence on the point.

[10] That said, the claimant cannot recover possession without an order or judgment for the recovery of possession. By that same premise, the defendant cannot be forcibly removed from the premises. Neither can the claimant do any act, ad interim, which is calculated to interfere with the defendant's quiet enjoyment of the premises, or to compel him to give up possession, upon pain of summary conviction before a Judge of the Parish Court (See ***RRA*** s.27).

[11] The predicate step in terminating a tenancy of controlled premises is the service of a valid notice which states a reason for the requirement to quit (see s.31 (1) of the ***RRA***). In so far as a public or commercial building is concerned, the landlord is obliged to cite one of the following statutory reasons in the notice. Firstly, that the premises are reasonably required by the landlord for "use by him for business, trade or professional purposes". Secondly, the premises "are required for the purpose of being repaired, improved, or rebuilt". Thirdly, the commercial building "is required by law to be demolished". (see s.25 (1) (e); s.25 (1) (h); and s.25 (1) (k) of the ***RRA***)

[12] Unless one of those reasons is stated in the notice to quit, the court can make no order or give judgment for the recovery of possession of any controlled premises (see s. 25 (1) of the ***RRA***). A further restraint on the court's power to make an order or give judgment for the recovery of possession, is the requirement that the court considers it reasonable to do so. Reasonableness has been said to be the overriding consideration: ***Hill & Redman***, at para C 1044. Indeed, a judgment handed down without having considered whether it would have been reasonable to make the order for possession was declared a nullity: ***Peachy Property Corporation v Robinson*** [1967] 2 QB 543.

[13] In assessing the reasonableness of making the order or giving judgment for recovery of possession, the court is required to take into account the whole gamut of circumstances, including the personal needs and conduct of the parties: ***Hill & Redman***, at para C 10444). The following are among the inexhaustive list of examples of the circumstances which courts have found to be relevant. In ***Williamson v Pallant*** [1924] 2 KB 173, the loss of the goodwill of the tenant's business was salient. In ***Yelland v Taylor*** [1951] 1 All ER 627, the landlord's perjury was the circumstance of moment. While in

Briddan v George [1946] 1 All ER 609, the recent acquisition of the property fell to be considered.

[14] The incidence of the burden of proving the reasonableness of the circumstances appears to fall on the landlord. In ***Nevile v Hardy*** [1921] 1 Ch 404, the plaintiff desired to recover possession of the upper floors of a dwelling house for the occupation of herself and persons in her whole-time employment. Under the English law, in addition to proving that the dwelling house was reasonably required, it had to be established that alternative accommodation was available to the tenant. Although the landlord was able to establish that the upper floors were reasonably required, he failed on the second limb. The second limb required the court to be "satisfied that alternative accommodation, reasonably equivalent as regards rent and suitable in all respects, is available". In rejecting the argument that the onus was cast upon the lessee, Peterson J, at page 408, held that it was for the landlord who seeks possession to satisfy the court of that alternative accommodation, as described, was available. ***Nevile v Hardy*** also decided that the question of reasonableness is settled on the circumstances as they exist at the date of the hearing.

[15] Finally, the court is duty-bound to consider whether more hardship will result in either the grant or refusal of the order or judgement for recovery of possession. The proviso to section 25 (1) is in the following terms:

> *"Provided that an order or judgment shall not be made or given on any ground specified in paragraph (e), (f) or (h) unless the court is also satisfied that, having regard to all the circumstances of the case, less hardship would be caused by granting the order or judgment than by refusing to grant it; and such circumstances are hereby declared to include –*
>
> *(i) when the application is on a ground specified in paragraph (e) or (f), the question of whether other accommodation is available for the landlord or tenant;*
>
> *(ii) when the application is on a ground specified in paragraph (h), the question of whether other accommodation is available for the tenant".*

[16] The English Court of Appeal had to consider the incidence of hardship in ***Sims v Wilson*** [1946] 2 All ER 261. In that case, the court's power to make an order or give

judgment for recovery of possession was similarly circumscribed by a consideration of whether greater hardship would be caused by granting the order or judgment than by refusing to grant it. Morton LJ, at page 263, with whom the other members of the court agreed, was of the view that the burden is upon the tenant to prove that greater hardship would be caused by granting the order or judgment than by refusing it. Morton LJ opined that once the landlord established that the dwelling house was reasonably required, it fell to the tenant to establish the ingredient of hardship.

[17] This English position stands in contradistinction to the position in this jurisdiction. The distinction between the two jurisdictions is to be found in the different modifier appearing before the word “hardship”, in otherwise similar legislation. In the English Act, the court is enjoined to consider whether “greater hardship” would be caused by granting the order than by refusing it. Under the Jamaican legislation, the court must be satisfied that “less hardship” would be occasioned by granting the order than by refusing to grant it.

[18] Two cases on appeal, one pre- and the other post-independent Jamaica, declared the law in this area. In the former, ***McIntosh v Marzouca*** 6 JLR 349, the sole question was the onus of proof of hardship. MacGregor J accepted the submission that the change in the wording in the Jamaican legislation puts the burden of proof on the landlord. ***McIntosh v Marzouca*** did not have the authority of a three-judge panel as it was an appeal from the Resident Magistrate, sitting in Petty Sessions.

[19] The decision in post-independent Jamaica, ***Ruby Chai Chong v Michael Kwok Wooming*** (unreported) RMCA #33/1983 judgment delivered 29 February 1984 (***Chong v Wooming***, carries with it the weight of the local Court of Appeal. This action concerned a commercial tenancy in which the order for recovery of possession was refused. The order of the Resident Magistrate was on the ground that “greater hardship would be on the defendant [tenant] if the order was made than on the plaintiff [landlord] if it was refused”.

[20] The submission which ultimately received the imprimatur of the Court of Appeal was that the following. The incidence of proving that less hardship will be caused to the tenant if the order is granted, rather than to the landlord if the order is refused, is on the landlord. That, it was submitted, is the consequence of the draftsman's choice of phrase adverted to above. After quoting from the English Act in which the phrase "greater hardship" is used, Campbell JA (Ag) (as he then was) went on to say (at page 8):

> *"Placing the onus of proof on the tenant under the above proviso is both logical and reasonable, because in the ordinary course of things, it would be illogical to expect the landlord to adduce evidence to destroy his case by showing that if the order sought by him was granted it would cause greater hardship to the tenant. To the contrary he would logically be expected to adduce evidence showing that the granting of the order would cause less hardship to the tenant than would be caused to himself if the order was refused.*

The upshot of the converse phraseology in the Jamaican legislation is to put the burden of proving that less hardship would be caused in the granting, rather than the refusal, of the order, on the landlord.

[21] Although the Court of Appeal did not explicitly pronounce on the significance of this difference in the incidence of proof, the submission was not faulted. In my humble opinion that submission is eminently sound. It seems to answer the question, what should the court do if, upon a consideration of all the evidence of hardship, that is, when it seeks to arrive at the balance of hardship, it concludes that the question remains "in medio"? The answer advanced is that it must be resolved in favour of the tenant, as it is the landlord who would have failed to discharge his burden of proof.

[22] It appears that the "hardship" contemplated by the legislation is that which reflects the ordinary meaning of the word. That is to say, no modifier appears before the word in the ***RRA***, for example, exceptional. The court, therefore, in considering this question will have regard to matters of adversity which are ordinarily or naturally attendant upon the act of restoring or retaining possession, which one party must inevitably bear. It has been suggested that there is a symbiotic relationship between the question of hardship and reasonableness. The court has to be cognizant of the balance of hardship when it comes

to weigh whether it is reasonable to grant or refuse the order or give judgment for the recovery of possession: ***Hill & Redman's Landlord and Tenant*** Vol. 1, 1989.

[23] However, as intimated by Morton LJ in ***Sims v Wilson***, *supra*, before any consideration of reasonableness and hardship, the landlord must establish that the premises are reasonably required. Indeed, this is now a statutory requirement under the ***RRA***, s. 25 (1) (e) (ii) (see para [11] above). The meaning of "reasonably required" is therefore in issue.

[24] In ***Quinlan v Philip*** (1965) 9 WIR 269, Wooding CJ expressed the view that the accepted meaning of the phrase "reasonably required" is of some vintage. "Reasonably required" means "reasonably needed", per Wooding CJ, at page 271. He contrasted "reasonably needed" with "reasonably claimed", the former connoting more than the latter. While "reasonably required" is not synonymous with absolute necessity, insofar as connation goes, "reasonably required" rises above desire. Indeed, Campbell JA (Ag) in ***Chong v Wooming***, *supra*, at page 4, was agreed that "reasonably required" could not be equated with even a bona fide desire to have the premises. Campbell JA (Ag) accepted that "reasonably required" means a "genuine present need".

[25] So then, a court asked to make an order or give judgment for recovery of possession of commercial premises must be satisfied that the premises are reasonably required by the landlord for his own use; that it is reasonable to make the order; and, that less hardship would be caused in granting the order rather than in refusing it. That is the received, conventional judicial wisdom. A cursory reading of section 25 (2) of the ***RRA*** gives the appearance, at first blush, that there is a fourth hurdle.

[26] Section 25 (2) is in the following terms:

> *"A court asked to make such an order or give such a judgment –*
>
> *(a) shall require the Secretary of a Board to furnish the court with a certificate setting out such information as the Board possesses in relation to the premises in respect of which the application is made;*
>
> *(b) may –*

(i) adjourn the application from time to time;

(ii) stay or suspend execution of the order or judgment, or postpone the date of possession for such period as it thinks fit, and from time to time grant further stays or suspensions of execution and further postponements of the date of possession;

(c) shall, if it makes the order or give judgment, state in writing the grounds on which it does so".

[27] The court invited both counsel to make submissions on the possible impact of subsection 25 (2) (a) upon the proceedings. This they did, via teleconference, on 11 February 2021. Mrs Riley Dunn submitted that the section is typically applicable when there is an application for an exemption and cited two cases in support: ***Airlink Wireless Network Limited v D.R. Holdings Limited and Donald Rainford*** [2020] JMCC Comm 29 and ***Judith McKenzie v Vinnette Oxford*** (unreported) RMCA 26/2005 judgment delivered 20 December 2006 (***McKenzie v Oxford***). In the former the issue concerned an exemption and in the latter, the determination of the standard rent was under consideration. In the case at bar, there is no issue concerning "new" rent. The quantum of outstanding rent in the present claim concerns rent that was proposed and accepted. Ergo, the subsection is an irrelevant consideration for this court.

[28] In his pithy response, Mr Brown argued that in relation to all applications under section 25, a certificate from the Board is necessary. Since the Secretary of the Board was not required to furnish a certificate, the court cannot make an order for possession in short, the section is mandatory. Mr Brown did not cite any authorities to support his position.

[29] I agree with Mrs Riley Dunn's submissions. Of the two cases learned counsel cited, ***McKenzie v Oxford*** is more to the point. In that case, the appellant/tenant's rent was increased unilaterally. The tenant refused to pay the increased rental. Following that, she was served with a notice to quit. Upon her refusal to vacate the premises, an action was brought for recovery of possession and the outstanding rent. Her defence was that she did not owe the outstanding rental as there was no determination of the standard rent by the Rent Assessment Board. Further, the increased rental was impermissible for being in excess of that permitted under the Act.

[30] Against that factual background, the Court of Appeal opined that the critical question for the learned Resident Magistrate was, what was the standard rent at the time the property was let? Accordingly, the Resident Magistrate had a duty to act under section 25 (2) by obtaining the certificate of the Secretary of the Board. Her failure to do so was therefore fatal to the order for recovery of possession.

[31] It is palpable that the live issue could not have been resolved without resort to section 25 (2) (a). In the instant case, although the rental claimed is disputed, the defence is that the claimed outstanding rental was set-off against monies the defendant expended in the repair of the property. To this I shall return below. For present purpose, that defence suffices to show that section 25 (2) (a) has not been triggered.

[32] That observation pre-empts the next point. That is, section 25 (2) is an entirely procedural subsection. It does not contain what I would characterise as substantive law. Admittedly, the draftsman's use of the word "shall" denotes a mandatory action, in both ss. 25 (2)(a) and 25(2)(c). That contrasts with his use of the directory language, "may", in ss. 25(2)(b). However, that diverse use of language does not change the procedural character of the entire subsection. That is, read within the context of the entire Act, the legislature did not make compliance with section 25(2)(a) a precondition to the making of an order for recovery of possession. So that, I interpret "shall" in subsection 25(2)(a) to mean the court must require the Secretary of a Board to furnish the requisite certificate, if that evidence is dispositive of any issue in the claim.

[33] I find negative support for this position both in case law and academic writings. My brief and inexhaustive survey of the cases in this area failed to reveal any allusion to any condition precedent to the grant of an order for recovery of possession, other than those adverted to above. Similarly, a perusal of ***Hill & Redman's Landlord and Tenant*** Vol 1, 1989, the equivalent of Moses' tablets, and Gilbert **Kodilinye's *Commonwealth Caribbean Property Law*** 4th edition disclosed only the three criteria mentioned above. In light of this lack of support in the literature and case law for the position articulated by Mr Brown, I am constrained to look at it askance.

[34] Having said that, the primary general proposition of law may be stated as follows. A court shall not make an order or give judgment for recovery of possession of commercial premises, unless the premises are reasonable required by the landlord for the stated purpose, where less hardship will be caused to the tenant and, it is reasonable so to do. A secondary or collateral proposition is this. The burden of proving the preceding three precedent factors falls on the landlord. For the purposes of the ensuing analysis and application to the facts of this claim, I will disaggregate the primary general proposition.

Has the claimant established that the premises are reasonably required?

[35] The first hurdle for the claimant is to demonstrate that the premises located at Logwood District, St. Elizabeth is reasonably required for her own use and occupation. The notice to quit which was served upon the defendant declares: "[f]or the reasons (sic) that: The property is needed for the administrator/beneficial owner's use and occupation". So stated, the drafter of the notice conjoined purposes set out in section 25 (1)(e)(i) and 25(1)(e)(ii) of the ***RRA***. This combination of the sub-paragraphs is permissible under the ***Act***. I quote section 25(1)(e):

> *"the premises being a dwelling-house or a public or commercial building, are reasonably required by the landlord for –*
>
> *(i) occupation as a residence for himself or for some person wholly dependent upon him, or for any person bona fide residing or to reside with him, or for some person in his whole-time employment; or*
>
> *(ii) use by him for business, trade or professional purposes; or*
>
> *(iii) a combination of the purposes in sub-paragraphs (i) and (ii)".*

[36] However, it is insufficient to merely reflect in the notice to quit the reasons adumbrated in the legislation. Evidence must be given in support of each reason advanced, to bring them within the contemplation of the ***RRA.*** I will take the second purpose, "occupation", first. "Occupation" is not at large under the ***RRA*** but ought to be for specific purposes, persons or class of persons. The claimant seems to have abandoned this part of the reasons for recovery of possession as no evidence was led in support of it. I will therefore pass to a consideration of the reason which is stated after the

form of section 25(1)(e)(ii) namely, reasonably required by the landlord for use by her for business, trade or professional purposes.

[37] In her affidavit in support of the FDCF, filed 27 August 2019, the claimant merely recited the historical fact of the service of the notice and its purports. However, in her second affidavit, given in response to the defendant's contestation of the reasons in the notice, the claimant had much more to say. She asserted that her need for the property is genuine. That genuine need is inextricably bound with the income-earning capacity of the property. To this end, she complained of the defendant's sporadic payment of rent and her desire to improve the property and by that token command a better income from it.

[38] It is palpable from the claimant's evidence-in-chief that there is not one scintilla of evidence that she requires the property for use for business, trade or professional purposes. Without rehearsing the evidence, it is clear that the motivation for recovery of possession was fuelled by the claimant's desire to earn an increased income from the property. This is exemplified by the claimant's failed attempt to increase the defendant's rent by an unconscionable one hundred percent when she assumed management of the demised property.

[39] That is where the matter would have remained, were it not for a little uncharacteristic exuberance from seasoned senior counsel during the claimant's cross-examination. In answer to Mr Brown the claimant said the following. I quote:

> *"It is not that I want Mr Blythe out of the premises so that I can rent it for a higher sum. I need to command a better income for myself. I need it for my own use and occupation to start my own business, a partnership to be precise, to command a better income".*

This was the claimant's attempt to retreat from the real but veneered reason for wanting recovery of possession. Mr Brown's submission that none of this newly declared purpose finds expression in any of the claimant's affidavits, in defiance of all reasonable expectations, resonates with me. But even in this, the claimant's road to Damascus experience, she approbates and reprobates simultaneously. Simply, the supposed

intention to “start my own business, a partnership to be exact”, is layered above and below with the unvarnished desire for more income from the property.

[40] So then, while the claimant may indeed have a desire, perhaps even a genuine desire, to enter a partnership, that is below the bar of the meaning ascribed to “reasonably required”: ***Quinlan v Philip***, *supra*. There is a dearth of evidence about this partnership. Is it a business which consumes large open spaces like a car mart? Or is it a start-up which requires no more than a cubbyhole? Whatever the need for space, the court was not told whether this partnership is only the germ of a brilliant idea or a fructified, full-blossomed venture, awaiting available space. On this state of the evidence, I cannot find that the claimant has a “genuine present need” for the premises: ***Chong v Wooming***, *supra*.

[41] Mrs Riley Dunn in her closing submissions sought to address the question of the conspicuous absence of immediacy for possession. Counsel submitted that the lack of immediate or actual need does not negate the assertion that the property is reasonably required. She argued that there is no requirement that the claimant shows she is going to physically occupy the premises. On the contrary, the claimant has to show that possession will further her use of the property; namely, the use is for her business, not her personal use.

[42] Mrs Riley Dunn is correct in her argument that physical (if by that she means personal) occupation is not a relevant consideration. However, it is not a correct proposition to say an absence of immediate or actual need does not negate the statutory requirement of reasonably required. What the claimant is to demonstrate is that the premises are reasonably needed: ***Quinlan v Phillip***, *supra*. The submission also runs against the weight of authority. The gloss put on **Quinlan v Phillip** in ***Chong v Wooming,*** *supra*, is that “reasonably required” means a “genuine present need”. Without seeking to reduce the analysis to a contest in semantics, while the phrase may not mean at once, it does contemplate a demonstrable timeous context which is not open ended. In any event, the claimant, upon whom the burden lies, has failed to show a genuine need for possession of the property.

[43] But that was not all that was submitted on behalf of the claimant to show that the premises are reasonably required. Citing ***Douglas v Periera*** 11 WIR 20, in which Wooding CJ interpreted the phrase "reasonably required" to mean a "present genuine need", the following was submitted. In essence, the claimant, as the administrator of Carl Williams estate, requires possession in order to gather the assets of the estate, secure them for the beneficiaries and settle the expenses incidental to the grant.

[44] A landlord's present genuine need for requiring possession of the premises must relate to one or a combination of the purposes listed in section 25 of the ***RRA***. In other words, it is a closed list of purposes. There are no words in the section to show that it is accommodative of other purposes which a court may find reasonable. If that is a correct understanding of section 25, then the written submissions articulating execution of the claimant's duties as administrator of the Carl Williams estate are untenable.

Where does the balance of hardship lie?

[45] Having decided that the claim for recovery of possession foundered at the first hurdle, that is dispositive of this aspect of the claim. However, in the event that is not a sustainable finding, I will now go on to consider the question of hardship. I commence with the submissions. Mr Brown isolated the hardship which would result to the defendant in the grant of the order for recovery of possession as the installation of the infrastructure required to operate the business in a new location. He charged that the claimant failed to outline what hardship she would suffer. In his submission the particulars of the business remain a mystery.

[46] For her part, Mrs Riley Dunn submitted that the court was not put in a position to make an assessment of the defendant's affordability to relocate. Therefore, renting an open lot ought to suffice. Turning to the claimant's side of hardship, it was advance that the claimant would have no control over the legacy left by her father. That was grounded in the defendant's supposed declaration of a set rent that he will pay for ten years together with an intention not to negotiate anything else. This lack of control, it was urged, will

undoubtedly cause hardship, which is already in train on account of the issues surrounding the payment of rent.

[47] The starting point is the law as laid down in ***Chong v Wooming***, *supra*. The claimant/landlord is duty-bound to adduce evidence which demonstrates that the granting of the order would result in less hardship to the tenant. That said, having reviewed the evidence, I agree with Mr Brown's submission that the claimant did not articulate what hardship she would suffer. The answer to Mrs Riley Dunn's submission appears to be this. The claimant, as successor-in-title to Carl Williams, has as much control over the tenancy as he would have had. As long as the demised premises remain "controlled premises", the standard rent is the subject of legislative determination. Where there is a failure to arrive at a rent permitted by law, the recourse is to the Board for the determination of an Assessment Officer (see ***RRA*** s. 10A).

[48] When the claimed hardship of 'lack of control over her legacy', is placed within the context of the dealings between the claimant and the defendant, the irresistible inference is this. The claimant wishes to have unrestrained power to dictate the rental for the demised property. However, this runs against the grain of the mischief which the ***RRA*** was enacted to guard against (see para [8] above). The hardship to be suffered by the landlord ought properly to relate to the use to which the property is to be put. To that end, there is no evidence.

[49] Without any evidence of hardship from the claimant, there is nothing to provoke the court to embark upon a balancing exercise. In fine, the claimant has failed to discharge her burden of proving that less hardship will be caused to the defendant if the order is granted, than if it is refused: ***Chong v Wooming***; ***McIntosh v Marzouca.***

Is it reasonable to grant the order for recovery of possession?

[50] Neither side made any submissions on the reasonableness, or otherwise, in granting or refusing the order for recovery of possession. As was said above, this is the overriding consideration (see para [12] above). This question may be disposed of concisely. The claimant having failed to prove that the premises were reasonably required

and that less hardship would be caused in the grant of the order, as a matter of logic, it would be unsound to conclude that it is reasonable to grant the order.

The claim for outstanding rent

[51] The claimant sought also an order for the payment of the sum of $400,000.00, being the rent owed for the period April 2018 to July 2019 and continuing. At the commencement of the trial, the claimant sought to amend the claim by substituting the sum of $115,000.00: $65,000.00 for the year 2020 and $50,000.00 for January and February 2021. The claimant accepted that the defendant had lodged the payments for 2021. Without objection, the claim for outstanding rent was amended to read $65,000.00. The defendant denied owing this amount. He claimed it was part of the repairs effected for which there was an agreement to set-off expenditure for the repairs against the rent for 2016.

[52] The issue arising here is whether the sum claimed was part of the agreement struck between the defendant and the then executor, Duwie Bennett. The fact of the agreement between Mr Bennett and the defendant for the latter to effect repairs to the premises is not in dispute. There is also agreement that cost of the repairs would be borne by the defendant, and recouped by a set-off against future rent obligations. Where they diverge is in relation to the cost of painting that was done to a part of the building on the premises.

[53] Having seen and observed both gentlemen being questioned under oath, I accept the evidence of Mr Bennett. I find that Mr Bennett was unshaken by cross-examination save in one particular. That is, his evidence under cross-examination that when he said the defendant told him he wanted to commence his used car dealership on the property, in his understanding, “commence” meant the defendant wanted to continue the business. Mr Bennett came across as a man who was exposed to at least secondary education, intelligent and at ease with the English language in his oral expression. I therefore find this part of his evidence too incredulous to be worthy of acceptance. However, incredulity in that particular does not render him an outright liar.

[54] In Mr Bennett's itemization of the repairs no painting is listed. This squares with what the defendant said at one point in his affidavit filed on 16 June 2020. At paragraph 5 he said this:

> *"That I expended large sums on the said premises, repairing the walls, floor and roof of the said premises as the said premises was (sic) in a deplorable state, at that time, and in fact some of the said sums was set off against the rental for the year 2016".*

It is from this amorphous "large sums" that the defendant alleges that $64,000.00 is due to him for painting.

[55] Both Mr Bennett and the defendant are clear the bargain struck was for rental for 2016 to defray the cost of the expenditure. This concession only came from the defendant after a strong denial, following which paragraph 5, quoted above, was showed to him. Although he conceded the terms of the oral agreement to effect repairs, the defendant gave no evidence which disputed that rental for 2016 was insufficient to recoup his actual expenditure. This I find unlikely, if it were truly a part of the agreement to repair, from a defendant who demonstrated astuteness in respect of the tenancy throughout. I disbelieve him and find that the rent claimed, $65,000.00 is owing.

Was there an oral agreement for a lease?

[56] For completeness I will address the issue of whether there was an oral agreement for a lease. I find that there was no such agreement. I have just referred to the astuteness of the defendant as a businessman and a tenant. His original tenancy was by way of a written seven-year lease. He had more than once insisted on the production of documents to assure himself of the bona fides of persons claiming authority to be his landlord. Furthermore, he had been presented with a new lease agreement which he refused to sign. All of this leads to the conclusion that the defendant knew that any long term lease agreement was to be attended by the formality of writing.

[57] The defendant was not even forthright concerning his current status on the property. He tried to be cunning. He was asked if at present he is a monthly tenant. His response, "I have no such agreement in writing. I pay the lease monthly". That came after

a long pause. His affidavit of 14 October 2019, paragraph 4 was showed to him. Cross-examining counsel read the paragraph to him in which he admitted he and his then landlord agreed for him to remain as a monthly tenant. He was then asked if those were his words. After what seemed like an interminable pause, during which he kept looking in the direction of his counsel, as if for a sign, he admitted the words were his.

[58] I believe Mr Bennett that no oral agreement was entered into with the defendant. The evidence does not disclose any rhyme or reason for Mr Bennett to have so usurped the authority of the claimant. I believe him that the defendant took on the risk of installing the infrastructure but not pursuant to any promise of a ten-year lease.

Conclusion

[59] The claimant, who had the burden to establish, on a balance of probability, that she reasonably requires the premises for the use of her own business, has not discharged that burden. Neither did she discharge the burden to show that less hardship would be caused to the tenant in the making of the order. These two findings constrain me to refuse to give judgement for the recovery of possession of the parcel of land located at Logwood in the parish of St. Elizabeth.

[60] In respect of the rent claimed, the claimant has persuaded me that painting was never a part of the oral agreement to repair the building. The defendant is therefore not entitled to set-off the sum claimed against outstanding rent.

Orders

1. The order for the recovery of possession of all that parcel of land located in Logwood in the parish of St. Elizabeth measuring approximately 8935.25 square feet and being the land comprised in Valuation Number 163-10-002-001 of the Tax Roll, is refused

2. The defendant is ordered to pay the claimant $65,000.00 being rent owing for 2020. Interest is awarded at the rate of 3% from 1 November, 2020 until the date of payment.

3. The claimant is awarded 50% of costs to be taxed if not agreed.

4. Liberty to apply.