REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2010 – 03244

BETWEEN

GARNER AND GARNER LIMITED **CLAIMANT**

AND

ROOPCHAN CHOOTOO **DEFENDANT**

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Colvin Blaize for the Claimant

Ms Veena Badrie Maharaj for the Defendant

Dated: 27 June 2013

JUDGMENT

1. The claimant and defendant were tenant and landlord respectively of a warehouse. The tenant brought this claim for trespass to the warehouse by the landlord and for damages resulting. The landlord filed a counterclaim for arrears of rent.

2. In September 2007 the claimant entered into the tenancy agreement. The warehouse was to be used for office and storage. The monthly rent was $4,000.00 per month. The claimant's business does tiling and laminate flooring.

3. The claimant filed a statement of case in the name Garner & Gellizeau Limited on 30 July 2010 against the defendant. The claimant in its statement of case set out that in May 2009, it was in arrears of rent for 3 months in the sum of $24,000.00 (this should have been 6 months). The claimant alleges the defendant in June 2009 unlawfully trespassed and locked the claimant out of the warehouse. The defendant took possession of the claimant's goods, materials and tools of trade stored at the warehouse to the value of $698,795.05. While in unlawful occupation, the defendant then served a notice to quit effective 31 July 2009. The claimant says its attorney sent a letter dated 24 July 2009 calling on the defendant to remove its locks from the premises.

4. Despite numerous requests the defendant failed to give the claimant access to the premises. By letter of 18 September 2009, the claimant, through his attorney, put forward a proposal to settle the outstanding rent. A cheque for $10,000.00 was deposited

by the claimant with his attorneys for the part payment of the rent. There was no response. In consequence this claim was made for conversion of the goods and tools. The claimant claimed damages for trespass, delivery of the goods, damages for breach of the covenant of quiet enjoyment, damages for conversion, exemplary and aggravated damages.

5. The defendant filed a defence on 13 October 2010. He contended the name under which the claim was filed no longer existed in the Companies Registry and at the time of the claim was not a duly constituted company. Without prejudice to any consequence of this the defendant contended as follows. No value was admitted of the items stored. He contended rent was owing as of June 2009 for 6 months. The claimant on 4 June 2009 issued a dishonoured cheque for $9,600.00. The defendant, through his attorney, on 18 June 2009 sent a letter warning the claimant to settle the outstanding rents failing which a bailiff would be appointed to collect the rent. After 18 June 2009 the claimant began to enter the premises in the night and began to remove items. On 13 July 2009 the defendant through a bailiff levied against the claimants by taking "walk-in possession" by leaving goods impounded on the premises. The bailiff secured the goods on the premises. A levy document was filed at the Magistrates' Court in Port of Spain. A Notice to Quit dated 26 June 2009 was then served on the claimant terminating the tenancy on 31 July 2009. The defendant sent a further letter through his agent Essential Trading Company on 5 August 2009. He accepts that the claimant's attorney had sent a letter dated 24 July 2009 to him. He had contacted the attorney and indicated that he had no objection to the claimant retrieving its property provided all the rent owed was paid

up-front. He denied receiving the letter dated 18 September 2009 from the claimant's attorney. He contended he had conducted a lawful levy; the claimant had refused to pay the rent for January to June 2009; and he attempted to mitigate his losses and had stored the items until September 2010. He counterclaimed for the rent, bailiff expenses and storage fee in the sum of $54, 750.00.

6. In its reply the claimant said it had changed its name to Garner & Garner Limited. The claimant denied there was a levy but that the claimant was locked out in early June 2009. They attached a letter from the "alleged" attorney at law of the defendant disavowing the letter of 18 June 2009. The claimant also set out that by the time the counterclaim was filed the defendant had unlawfully disposed of over $200,000.00 of the claimant's stock and tools. It suggested the purported levy was excessive.

7. At the first case management conference on 30 November 2010 I allowed an amendment of the claim to provide for the claimant to be called Garner and Garner Limited. The defendant agreed to provide a list of the items he had sold. The parties were to try to meet for items remaining to be handed over. On 18 January 2011, a meeting had not taken place and on the court's urging they were to meet to sort out the handover of the items being kept there.

8. The parties having not been able to resolve this claim witness statements were ordered and a trial set.

9. The claimant called Mark Garner as its witness. A witness statement had been filed for Mathison Thomas who did not present himself at the trial. His witness statement was struck out. The defendant gave evidence.

The Evidence

10. Mr Garner on behalf of the claimant said in April 2009 he had commissioned Mathison Thomas to do a yearly audit of the goods and materials. He attached a copy of that inventory to the witness statement. He said he had purchased Pergo Premium Laminate Flooring stock directly from the Pergo Company in the United States at different times. What was attached were orders made between May 2005 and September 2006. He attached emails relating to purchase of tools in 2002, 2003, 2004, 2005. The claimant's witness statement attached invoices for tiles purchased on 4 May 2007, 8 June 2007 and 18 June 2007. There was another email chain in 2007, the relevance of which was not apparent.

11. The claimant also submitted proposals for laminate flooring work to be done at the Hall of Justice, Port of Spain. These were related to the period March 2009 to November 2009.

12. Mr Garner said he made numerous oral requests to be allowed to retrieve the property from the warehouse between June 2009 and January 2011 since he desperately required the stock to complete already contracted jobs and to tender for new contracts. The defendant, he says, did not allow him to do so. He deposited $10,000.00 with his attorneys in September 2009 but the defendant refused to accept his payment proposal.

13. Mr Garner received a letter dated 11 January 2011 from the defendant's attorney identifying the items sold and a receipt for items sold in the sum of $6,900.00.

14. He said a detailed list of the stocks he had was listed as exhibit MG 2 to his witness statement. This was Mr Mathison's document. Mr Mathison had not turned up. I should note that Mr Mathison's list was allowed into evidence through Mr Garner as a document he had received from Mr Mathison, but not as to the truth of its contents. This was on the basis that Mr Mathison had provided a witness statement and was therefore expected to give evidence about his audit and document.

15. It is convenient to deal with the counterclaim first. The claimant's witness, Mr Garner, admitted in cross-examination that the claimant owed rent of $24,000.00. The rent was $4,000.00 per month. This therefore represented 6 months' rent due and owing. He accepts the claimant was given a notice to quit. The defendant says he sold items to the value of $6,900.00 to recover part of the rent owed. The issues for the defendant, therefore, relate to the bailiff's expenses and the storage fee expenses. The bailiff's expenses depend on my finding of facts relative to this issue.

16. There were certain aspects of the defendant's evidence which I accepted. He was given a cheque which was dishonoured. He sold certain items through a bailiff. I accepted he served a notice to quit. I accepted he engaged the services of a bailiff. However, he provided no receipt of what was paid and no reason for not so doing. A letter was sent on 18 June 2009 which was received by the claimant's attorney. The claimant's attorney presented a letter in which the defendant's then attorney purportedly disavowed knowledge of that letter.

17. Whether the attorney had sent the letter or not, it represented the state of play from the defendant's point of view at that time. It stated: "Please contact our client or Mr Bolah Bharath, the appointed agent and bailiff to collect these outstanding rents". What it does confirm is that at that time there was an appointed agent. No mention was made of "walk-in possession" having been done up to that point. The letter from Mr Blaize, the claimant's attorney, of 24 July 2009 responded to that 18 June 2009 letter. This letter set

out that the entry by the landlord was in early June, before the notice to quit had been served.

18. I think it is far more likely that any possession would have taken place after the letter demanding the payment of rent and having given 14 days to pay the rent. The defendant says the possession of the premises took place on 13 July 2009 when the bailiff intervened.

19. Given that the claimant's attorney replied on 24 July 2009 it would be more plausible that the claimant had been spurred into action by this taking of possession.

20. I accepted the defendant's evidence that the bailiff's possession only took place on 13 July 2009.

21. The notice to quit provided for the claimant to vacate at the end of July 2009. Thus the taking of possession was before the time provided for the claimant to quit the premises. This would have, therefore, been done to secure the rent owed.

22. In such circumstances the defendant would have been entitled to take possession of such items as would reasonably be necessary to secure the rent owed. The question arises as to whether taking possession of everything that was there was reasonable.

23. What also complicates this case is that the claimant only made a proposal in September 2009 for the payment of the rent due. It was not a tendering of the whole sum of what was due. The defendant was entitled to reject the proposal being made. The reasonableness of the attorney's proposal must also be seen in the context of what it proposed. One of the things proposed is that the sum of $4,600.00 be paid at the end of August 2009, but the letter was being sent on 18 September 2009 or later.

24. Thus at that time there was no payment of the rent due and no return by the defendant of what was being kept.

25. The defendant says the items were moved to an annexe sometime after and he has claimed storage fees. He has given no method of calculating the storage fees, however.

26. The essential issue based on the claimant's claim then is whether it was reasonable for the defendant to detain all of the items held. In Professor Kodilinye's **Commonwealth Caribbean Property Law, 3rd Edition** at page 56, it is stated:

"Excessive distress occurs where more goods are seized than are reasonably necessary to satisfy the arrears of rent and proper charges of the distress."

27. In the footnote of the above passage, it is stated:

"However, it has been held that an excessive levy will give rise to a cause of action only where the value of the goods seized was out of all proportion to the amount of rent actually due: **Thompson v Facey [1976] 14 JLR 158**; **Hernandez v Rewan [2007] High Court, Trinidad and Tobago, No. CV 00084 of 2005 (unreported)."**

28. Further, the learned author states at page 56:

"The measure of damages for excessive distress is the value of the goods wrongfully seized, less the arrears of rent and the costs of the distress. Where the excess goods seized have not been sold, so that the tenant has suffered no actual damage, he will recover only nominal damages."

29. In March 2011, items were handed over minus items which were sold. The defendant provides a list of the items handed over. That list is a substantial one containing 126 items including tools and materials. A sample of the items include 912 4' laminated flooring board; 142 moulding strips wood and metal assorted size and pattern; 75 lengths aluminium and laminated moulding; 300 moulding strips; 60 cases laminated moulding

strips; 66 cases 4' laminated flooring board48 boxes per-go glue (10 per box); among many more items. While I cannot come to any conclusion about the value of these items, it is clear that the entire seizure would be out of proportion to the rent due.

30. At paragraph 26 of Mr Garner's witness statement he said that a copy of the inventory received is attached as MG 2. This is the same list that Mr Mathison had done in April 2009. However, at paragraph 27 he said the goods he recovered were either severely damaged or completely missing. He said many of the boxes containing tiles and flooring were missing. The defendant had already stated that items were sold off.

31. Of great importance is to what use I can put Mr Mathison's document. First, it is hearsay. Mr Mathison did not present himself to adopt his document. Second, even if I were to examine it, the document is confusing at best. Third, I have no way of assessing whether the values placed on the items by Mr Mathison are correct or how he arrived at them. He said there was approximately $250,000.00 worth of tools and $242,410.00 worth of stock. How he arrived at those figures is not known. Fourth, I could not see and hear Mr Mathison being questioned to determine if I could rely on his expertise or knowledge. Fifth, I could not determine if this was a document generated at the time when the document says it was generated. In other words, I could not determine its authenticity as representing the stocks in April 2009. Thus I found I could place no weight to it as a correct guide of the claimant's stock in June or July 2009.

32. I also could not rely on the claimant's other documents such as the order documents since those were generated a few years before. A substantial amount of time had passed since then so there was no way of knowing if the stock in June 2009 was the same stock being referred to in the 2005 and 2006 documents. A similar position holds for the tools.

33. Thus, even if I find the defendant's seizure of the goods were out of proportion to the rent due and the goods were detained for too long, I have no way of determining the value of the goods being detained. Based on the evidence I also could not assess what loss the claimant would have sustained from being kept away from its materials and equipment. In such a case only nominal damages could follow.

34. I also cannot determine on a balance of probabilities if the value of the items sold by the defendant were at a substantial undervalue except to make the observation that it does appear reasonably to have been sold at an undervalue. The defendant says it was difficult to sell items. Noteworthy also is that the list of items sold:

    a. *42 Case assorted laminate flooring $2,000.00.*
    b. *200 assorted floor tiles $500.00.*
    c. *A planer/ sander and dust collector $3,000.00*
    d. *1 toolkit $500.00.*
    e. *1 Extension ladder $500.00.*
    f. *(Indecipherable) Case assorted laminate flooring $500.00.*

35. The defendant also provided a list of items handed over. This was an extensive list comprising tools, materials and goods. Between Mr Garner's contentions and the defendant's contentions on the matters sold and returned I find the defendant's evidence and lists to be far more reliable. Mr Garner's evidence is vague and unsupported by any cogent evidence. It also appears that a substantial number of items were returned.

36. The claimant's case was also adversely affected by a misleading statement made in Mr Garner's witness statement. At paragraph 31 of his witness statement, Mr Garner asserted that one of the consequences of the defendant's detention of goods was that the claimant was subject to legal action by clients for non-performance of work. He attached a copy of an extract of a judgment obtained against his company for in excess of $274,000.00. However, on examination of that extract, the judgment was obtained against the company by Pergo (Europe) AB on 20 April 2009, for $41,810.36 US, which was two months before the goods were detained. There was no satisfactory explanation for this evidence. I concluded it was an attempt to inflate the claim and mislead the court. This impacted on Mr Garner's credibility as a witness.

37. On the evidence I find goods were reasonably detained given that the claimant did not tender the amount due, which for a company with the kind of work Mr Garner suggested the claimant company was, ought to have been a comparatively small amount. However, I find the levy was excessive in the sense of being out of proportion to the rent due. I do not find that the goods were converted as advanced by the claimant. The goods were

lawfully detained for the non-payment of rent. The claimant was really the author of its own misfortune by not tendering the rent due whether it was $24,000.00 as contended by the claimant or $28,800.00 as being suggested by the defendant.

38. I find the amount due as rent was the sum of $28,000.00 up to end of July 2009. The defendant would have sold items for $6,900.00 and had the benefit of a $4,000.00 security deposit. The defendant did not set out his basis for the claim to the storage fee and the means by which he came to the figure of $150.00 per day claimed. While ordinarily a party storing goods being held would be entitled to a reasonable amount for such a fee, the basis has to be explained. I find that aspect of the counterclaim not proved. Further, no receipt was tendered for the bailiff's fees. This was a simple matter of putting forward a receipt. I also find this aspect not proved. There is therefore judgment for the defendant on the counterclaim for the sum of $17,100.00 with prescribed costs on this sum. Interest is to run on this sum of $17,100.00 from the date of the counterclaim on 13 October 2010 to the date of judgment at the rate of 6 percent per annum.

39. There is also judgment for the claimant on the claim. However I can only award nominal damages which in the context of this claim I set at $10,000.00. Interest is to run on this sum at the rate of 6 percent per annum from the date of the claim on 30 July 2010 to the date of judgment. There was a claim for damages for conversion of goods to the value of $698,795.05. That aspect of the claim was not proved. Prescribed costs of the claim are

therefore payable to the claimant by the defendant based on the nominal damages figure of $10,000.00.

Ronnie Boodoosingh

Judge