

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV. No. 04037 -2009

BETWEEN

KENNETH

BISCOMBE

CLAIMANT

AND

RONNIE

RYAN

DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE JONES

Appearances:

Mrs. D. Moore-Miggins for the Claimant.

Mr. M. George for the Defendant.

Reasons

By a written tenancy agreement made in 2002 the Claimant became the tenant of the Defendant of premises which housed a restaurant. The initial term of the tenancy was for one year at a rental of \$8,000.00 a month. This written agreement expired in 2003 and thereafter the Claimant held over paying a monthly rental. Over the years both the rent as well as the area rented increased. By January 2008 the Claimant was paying the sum of \$12,000.00 a month rent.

In 2005 the Claimant did substantial improvements to the premises as well as purchased new equipment to upgrade the kitchen. He also added a wine cellar to the premises in the year 2008. The cost of these improvements and upgrading was, according to the Claimant, over \$500,000.00. By 2007-2008 the relationship between the parties had deteriorated. In particular

the Claimant complains of certain acts which he says amounts to a breach of his covenant of quiet enjoyment.

These acts include:

- (i) The playing of loud music by the Defendant's gardener and caretaker on adjoining premises;
- (ii) Indecent acts on the adjoining premises by the Defendant's gardener;
- (iii) The cutting of pipes supplying water to the premises on four different occasions by the gardener;
- (iv) The request of the Defendant for compensation in the sum of \$21,000.00 for trees on the said adjoining premises which the Claimant says he cut down with the permission of the Defendant;
- (v) Harassment of his staff and customers by the Defendant;
- (vi) Threats on his life by the Defendant and
- (vii) Harassment by the Defendant for an increase in rent of \$600.00.

In December 2008 the parties attended the offices of an attorney for the purpose of entering into a written tenancy agreement. Instructions had given to the Attorney by one or the other or both of the parties. A written agreement was prepared by the Attorney. Both parties read the agreement. The agreement was signed by the Claimant but not by the Defendant. The Defendant advised them that he could not sign same because he was running late for a plane. The Defendant however authorized the Claimant to pay his portion of the fees for the preparation of the said agreement. The Defendant subsequently refunded the Claimant the said sum paid on his behalf.

Among other things the unexecuted agreement provided for the tenancy to be for a term of 10 years; for the payment of a rental of \$12,000.00 a month from the 1st January 2009 for a period of 1 year and thereafter increases of 5% on the 1st January of every succeeding year and for the Defendant to transfer the liquor licence for the restaurant into the Claimant's name at the next licensing session.

The Defendant never signed the agreement. The Claimant however remained in the premises paying the monthly rental of \$12,000.00. The Defendant failed to transfer the liquor licence to the Claimant's name at the next licensing session in 2009 but rather applied for a renewal of the licence in his name. In a letter dated the 3rd September 2009 the Defendant, among other things, advised the Claimant of his disappointment that he was continuing to refused to pay the rent increase of \$600.00 which he said had been claimed by him since November 2008.

In September 2009 the Defendant served a notice to quit on the claimant. This notice required the Claimant to leave the premises by the 31st October 2009. While admitting service the Claimant challenges the notice to quit because it does not state the grounds upon which possession is sought. On the 1st November at 12.05 am the Defendant accompanied by a bailiff and two police officers came onto the premises and demanded possession from the Claimant. According to the Claimant in order to avoid a confrontation he left the premises. When he returned the next morning the locks had been changed. He thereafter cut the locks and re-entered the premises. At that time he discovered that there were items missing.

On the 2nd November this action was commenced by the Claimant and on the 4th November 2009 the Defendant gave an undertaking not to disturb the Claimant's quiet enjoyment of the premises pending the determination of the action. The Claimant alleges that on the 30th November 2009

the Defendants servants breached the injunction by entering onto the premises and planting a row of shrubs which in effect blocked his access to the restaurant from a side entrance used by commercial vehicles. The Defendant does not deny that a row of plants was planted on the premises subsequent to his undertaking. He says they were planted along the fence in June 2010 and alleges that on the 15th June 2010 the Claimant uprooted the plants.

It is upon these facts that the Claimant seeks wide ranging relief. There is no counterclaim.

The issues for my determination are (i) is the Claimant entitled to the benefit of the unexecuted tenancy agreement? (ii) did the Defendant breach of the covenant of quiet enjoyment which arose as a result of the relationship of landlord and tenant? (iii) is the notice to quit served on the Claimant in September 2009 ineffective insofar as it terminated the Claimant's tenancy? (iv) what relief if any is the Claimant entitled.

The onus of proof on all the issues is on the Claimant.

Is the Claimant entitled to the benefit of the unexecuted agreement?

It is not in dispute that the Defendant did not sign the agreement. The Claimant submits that he is entitled to the benefit of the agreement because the Defendant by his conduct led him to believe that despite his failure to execute that agreement the terms were agreed and were in effect. The conduct of the Defendant relied on by the Claimant is:

- (i) since the preparation of the agreement he never indicated verbally or in writing to either the attorney preparing the agreement or to the Claimant his disagreement with the terms of the agreement;
- (ii) he paid his share of the fees for the preparation of the agreement;

- (iii) he accepted the rent of \$12,000.00 without demanding the increase of \$600 that he had been claiming prior to the drafting of the agreement;
- (iv) subsequent to the agreement he applied for the liquor licence in his name.

In addition the claimant submits that I must take into consideration the detriment suffered by him by his undertaking the substantial renovations to the premises. According to him the term of 10 years was intended by him to facilitate his recovering his full investment together with profits.

Let me say here that the fact that the Claimant may have done renovations and improvements to the premises at a cost of \$500,000.00 in my view does not assist the Claimant with respect to this issue. These renovations were done in 2005 long before any agreement for a 10 year term. The fact that the Claimant may have wanted a 10 year term so as to recoup his investment is to my mind irrelevant to this issue.

On the evidence I accept that the Defendant never indicated to the Claimant or to the attorney preparing the agreement his disagreement with its terms. While I find as a fact that the Defendant led the Claimant to believe that the only reason he did not sign the agreement was because he was late for his flight. In my opinion however that fact is not sufficient to bind the Defendant with the terms and conditions contained in the contract. The fact is that whatever the reason proffered at the time the Defendant did not execute the agreement. That of itself, in my opinion, indicates that the Defendant was not at that time prepared to be bound by the agreement. This is confirmed by an examination of the reason proffered. In my opinion the only way that the execution of the agreement would have affected the Defendant making his flight was if there would have had to have been changes made to the agreement. The time taken to sign the agreement in circumstances where all the parties were already present would have been

negligible. According to the Defendant although he did say that he could not sign because of his flight there were certain terms and conditions in the agreement with which he did not agree.

In my opinion the evidence of the Attorney who prepared the agreement does not assist with respect to the specific instructions received from the Defendant re the agreement. Indeed in chief the attorney says that he was acting for both parties at the time. According to him the parties attended his offices on that day to give him the instructions but under cross-examination he seems to suggest that on the one hand the agreement was a product of ongoing negotiations and instructions to which he was privy and on the other hand that he got an e-mail from the Defendant containing the instructions. This e-mail was not tendered into evidence. In these circumstances it is difficult if not impossible to come to the conclusion that the parties were *ad idem* on the terms of the agreement. Further while in chief the Attorney says that both parties read over the lease and expressed approval with its contents, in cross-examination he gives the impression that he concluded that the Defendant agreed with the contents because the Defendant did not express his disapproval and made arrangements for payment of the fees.

While it is not in dispute that the Defendant reimbursed the Claimant for his share of the Attorneys fees. I do not accept that this is necessarily referable to an acceptance of the terms of the contract. In my opinion it is as likely referable to the Defendant's acknowledgment of the fact that the Attorney had prepared the document and was therefore entitled to his fees whether or not there was agreement to its terms.

With respect to the failure to continue his demand for the additional \$600.00 rent. The evidence is that this demand continued after December 2008. Indeed by his letter dated the 3rd September 2009 the Defendant indicated that the Claimant continued to be in breach of this obligation

which he had imposed since November 2008. According to the Defendant the sum of \$6,000.00 was due.

With respect to the liquor licence the agreement provided that the Defendant transfer the liquor licence into the Claimant's name at the next session instead the Defendant renewed the licence in his own name it would seem to me that rather than be evidence of compliance with the terms of the agreement this is clear evidence that the Defendant did not consider himself bound by the agreement.

On the facts of this case there is no evidence before me to support the submission that the Defendant by his conduct led the Claimant to believe that the terms of the unexecuted agreement applied. In the circumstances the cases referred to by the Claimant on this point do not assist the Claimant in this regard. In the circumstances the Claimant's submission that he is entitled to the benefit of the agreement cannot succeed. I find as a fact that at the material time the Claimant was a monthly tenant of the Defendant at a rent of \$12,000.00 a month.

Breach of the covenant for quiet enjoyment

It cannot be disputed that the Claimant as tenant is entitled to the benefit of an implied covenant for quiet enjoyment. The implied covenant protects the tenant against the acts of the landlord or persons claiming under him which interfere with the tenant's enjoyment of the demised premises. The first question to be answered is whether the acts complained of are capable of amounting to a breach of the covenant and secondly if they are so capable whether there is credible evidence in this regard.

The acts complained of must have the effect of interfering with the tenant's enjoyment of the property. It is trite law that acts done on adjoining premises, even though the acts may amount to a nuisance in law, will not usually constitute a breach of the covenant even though the landlord has the power to prevent it unless he directly participates in the act: **Hill and Redman 17th Edition vol 1 page 202 paragraph 120.**

The Claimant's complaint of the playing of loud music by the Defendant's gardener and caretaker on adjoining premises; indecent acts on the adjoining premises by the Defendant's gardener though amounting to a nuisance and occasioned by the servants of the Defendant do not in my opinion amount to a breach of the covenant. Neither do the requests for compensation for destruction of trees nor threats on the Claimant's life. The latter acts in my opinion do not interfere with the Claimant's enjoyment of the premises. In similar vein a demand for an increased rent does not in my view amount to a breach of the covenant.

In the circumstances we are left with the Claimant's allegations of the cutting of pipes supplying water to the premises and the harassment of his staff and customers by the Defendant. At the end of the day the question of whether this interference has taken place is a question of fact for my determination.

The harassment claim. There are two allegations in this regard. The first concerns acts of the Defendant on the 7th September 2009. The Claimant alleges that on the 7th September 2009 the Defendant harassed his customers and terrified his staff. Apart from the evidence of the Claimant in this regard the only other evidence is that of an employee of the Claimant's. The evidence of the Claimant in this regard is easily discounted since according to the employee the Claimant was not on the premises at the time. According to her on the 7th September 2009 the

Defendant came to the restaurant before it was opened and said in a loud voice “I am the owner of here and I’m throwing Ken out and closing the restaurant and all of you will have to find new jobs elsewhere.” There is no suggestion by her of her or any other members of staff being terrified. According to her in cross-examination she still works at the restaurant and there were no customers there.

The second concerns the Claimant’s claim that the Defendant caused the publisher of a magazine to drop an advertisement after being told that he would be throwing the Claimant out of the premises. Save this blanket statement, which is at best hearsay, there is no evidence of this fact. In my opinion even if the acts of harassment pleaded and claimed by the Claimant were capable of amounting to a breach of quiet enjoyment on the evidence I am not satisfied that these acts in fact occurred.

Unfortunately the position is the same with respect to the cutting of the water supply. While I accept that these are acts capable of amounting to a breach of the covenant the evidence in support is sorely lacking. The only evidence of this is a blanket statement of the Claimant that the Defendant’s gardener has over the last four months cut the pipes supplying water to the restaurant. In fact the Claimant’s evidence is merely a repeat of his plea in the statement of case. According to the Claimant in his statement of case the acts occurred within the last four months. From the date of the statement of case that would be between the months of July to October 2009. By repeating the plea in the Statement of case word for word in his evidence the Claimant’s evidence is that the acts occurred between April and August 2010. I do not accept the Claimant’s evidence in this regard.

In the circumstances the Claimant has not established that there was a breach of the covenant of quiet enjoyment.

The Validity of the Notice to Quit

Although there is no counterclaim by the Defendant for possession the question of the validity of the notice to quit is relevant insofar as it relates to the actions of the Defendant on the 1st November 2009. That is the date on which the Defendant sought to obtain possession of the premises. If the notice to quit is valid the Defendant would have been entitled to peaceably enter and take possession of the premises upon the expiration of the period of notice. If it is invalid then not only does the tenancy continue but the acts of the Defendant on the 1st November would amount to an illegal entry and a breach of the covenant of quiet enjoyment.

Save that he alleges that in the course of obtaining possession of the premises certain items went missing no issue has been made of the method by which the Defendant attempted to obtain possession. In particular there is no allegation or evidence of the use of force in this regard. Neither is there any dispute that the time given by the notice to vacate the premises had expired. The Claimant's evidence is that the Defendant came onto the premises accompanied by police officer and a bailiff. The bailiff advised him that he was there to enforce the notice to quit. He says given the belligerent demeanour of the entire party fearing that he would be arrested or hurt he left the premises.

The question of whether the notice to quit properly determined the Claimant's tenancy. This issue must be considered against the background of my finding that the Claimant was a monthly tenant of the premises. In these circumstances the Claimant would be entitled to a month's

notice to vacate. By his pleading the Claimant alleges that the notice to quit was invalid because it failed to specify grounds for requiring the Claimant to vacate the premises. In the circumstances of this not being premises subject to the rent restriction legislation there is in my opinion no requirement to give the grounds upon which possession is sought. Neither is this a case where the landlord is seeking to exercise his right to re-enter the demised premises as a result of a breach of a covenant.

At the hearing it was submitted the action of the Defendant was illegal because it was contrary to section 21 of the Landlord and Tenant Act. According to the submission the section envisages that a landlord is to proceed to court to obtain possession of the premises pursuant to a notice to quit. It seems to me on an examination of the section that this submission cannot succeed. In my view this section provides the procedure to be followed if the landlord proceeds by action to recover possession. In the instant case the landlord elected not to proceed by action. In addition the Claimant relies on the statements of Justice Dean-Armorer in the case of **Akbar Ali v Lilly Ramnarine HCA 170 of 2002**. In my opinion this case does not assist the Claimant. In that case it was conceded that the notice to quit was invalid and ineffective to determine the tenancy. In those circumstances the landlord sought to rely on the right to re-enter for non-payment of rent. The learned judge's statements were made in that context. In the instant case there is no claim by the Defendant that he forfeited the tenancy for non-payment of rent or breach of any covenant.

It is not in dispute that a month's notice is sufficient to determine a monthly tenancy. In his submissions the Claimant suggests that in all the circumstances of this case and in particular bearing in mind the expenditure made by him on the premises the length of the notice ought to be longer than one month. As I understand the submission it is that in accordance with the case of

Mamidoil –Jetoil Greek Petroleum Company v Okta Crude Oil refinery case the court has the power to imply terms into the contract and one term that should be implied is a longer period of notice. In my opinion neither of the Mamidoil cases assist the Claimant in this or any regard. In my opinion there is nothing in the evidence adduced or the cases relied on which will allow me to fix a longer period of notice. In my opinion the mere fact that the Claimant may have expended a considerable amount of money on improvements to the demised premises is not enough.

There being no issue with respect to the service of the notice to quit. The notice to quit relates to the premises and is clear and unequivocal. Given my finding that at the relevant time the Claimant was a monthly tenant the only issue for my determination with respect to the notice to quit is whether the document served on the Claimant complies with the requirement of giving him one complete month's notice to vacate the premises. In my opinion that notice is a valid notice and required the Claimant to deliver up the premises to the Defendant on the 31st October 2009. Further in accordance with the notice and the law the Defendant was entitled to peaceably enter onto and retake the premises on the 1st November 2009.

With respect to the relief sought the Claimant submits that he is entitled to the value of the items discovered missing from the premises and to the benefit of the substantial improvements that he made to the premises during his tenancy.

With respect to the missing items the Claimant has two difficulties which both relate to the quality of his evidence. In proof of loss the Claimant tenders into evidence a copy of a list of the items he claims were missing and their value. The list seems to be a copy of a list provided to the police. The items alleged to be missing are items of food including 250 dinner mints; toilet

paper, cutlery and a flatware sorter. According to the Claimant when he returned to the premises the next day these items were missing. The difficulty is that there is no evidence that these items were there when the Claimant locked up the premises. This is of particular importance given the nature of the items the Claimant alleges to be missing. As well apart from the Claimant's say so there is no evidence with respect to the value of the items. Not even evidence as to the replacement cost. In the circumstances I reject the Claimant's evidence in this regard.

Finally the Claimant submits that in all the circumstances of the case I ought to conclude that there was an implied term of the contract between the parties that the Defendant would compensate the Claimant for the improvements made to the premises or that the Claimant would be allowed to remain in the premises for long enough to recoup his investment. As I understand the submission it is that: in the circumstances the failure to compensate the Claimant results in a breach of contract which entitles the Claimant to damages.

I do not accept this submission. There is nothing on the evidence before me that would suggest any agreement between the parties, express or implied, that the Claimant would allow the Claimant to compensation for the improvements made whether by way of a money payment or by way of an extension of time in the possession of the premises in order to recoup his investment. In my opinion the mere fact that the Defendant allowed the Claimant to upgrade the premises does not lead to this assumption. In any event there is no evidence before me as to how much money was spent by the Claimant on improvements to the building as opposed to removable equipment. Neither, given the fact that the improvements were done since the year 2005, is there any evidence as to how much of the money invested has already been recouped by the Claimant and the length of time needed to recoup the balance.

While the Claimant has my sympathy unfortunately in all the circumstances of the case the Claimant has not met the standard required by law to achieve any of the reliefs he seeks. In the circumstances the Claimant's case is dismissed.

With respect to the alleged breach of the injunction while there is no application before me for committal I am of the opinion that the conduct of the Defendant's servants or agents in planting the said plants despite the Defendant's undertaking in this action is conduct which ought to be taken into consideration when determining costs.

On the question of costs see attached.

Dated this 18th day of November, 2010.

.....
Judith Jones
Judge

Notes of Evidence in the matter of

CV.No. 04037- 2009

Biscombe v Ryan

Decision of the Honourable Justice Jones

18th November 2010

Ms. Duke: May it please the court Ms. Akien Duke on behalf of the Claimant.

Mr. George: May it please my lady in this matter I appear on behalf of the Defendant Ronnie Ryan, my lady you may recall that you had given the Defendant leave to be excused from being present today.

Court: I don't recall but as you remind me.

Court: I am going to read my reasons.

Court: **Reasons read.**

Court: I will hear the parties on the question of costs. Mr. George you are seeking your costs?

Mr. George: My lady I am sorry that Mr. Ryan is not here because the instructions we had from him is that he was seeking his costs. In the absence of him telling me otherwise, yes.

Court: And you are seeking cost in what quantum?

Mr. George: My lady in regard to the claim which was put forth by the claimant, I think it would be mathematical calculations.

Court: Based on what, and what is the mathematical calculations?

Mr. George: My lady based on Part 67 of the

Court: Yes I mean mathematical calculations based on what figures. In other words you are telling me that we are looking at am prescribed costs?

Mr. George: Yes please my lady.

Court: Does the claim quantify any sum of money?

Mr. George: My lady I had written something but unfortunately my clerk did not send me that. If you can give me a minute. I don't know if she wants to make her statements to you?

Court: Well I suppose it will really depend on what you are saying that you are entitled to. I have to confess Mr. George I haven't seen anything in either the claim form or the statement of case which suggests to me that there is a monetary sum claimed by the Claimant.

Mr. George: I know that was part of the difficulty that they faced in terms of establishing their claim for the compensation. It was in the evidence of the Claimant in terms of his witness statement but as far as the formal claim they didn't quantify per say that, except where they sought to amend, I think there was the amended one whereby that was brought in.

Court: I don't think so Mr. George, in fact it is the amended statement of case that I am looking at. I don't see it unless you can?

Mr. George: Now we have at 6 that claim but again no figure is put there, again at 8 there is just the general claim.

Court: What he spent. He was not saying that he is entitled to recover \$500,000.

Mr. George: In those circumstances I guess because of the fact that they themselves have not established it, which I think is something the court itself relies on to defeat their claim, it would be difficult for them try to proceed on that basis.

Court: So it looks at though it's \$14,000.00 cost that we are looking at?

Mr. George: Yes my lady.

Court: Ms. Duke anything you wish to say?

Ms. Duke: Not really my lady just that I put the matter into your hands and hope that your guidance.

Court: **All right I had indicated that it seems to me that there is also the question of the injunction sought by the Claimant in this regard and although the Defendant did not in fact defend the injunction, he had to come to court on it and he did give undertakings in that**

regard. In all the circumstances of the case I am going to discount the cost to the Defendant of attending on the injunction because of his breach of the undertaking and I am going to award cost in the sum of \$14,000.00. The Claimant is to pay the Defendant's costs in the sum of \$14,000.00. So the claim is dismissed, the claimant to pay the defendant's cost in the sum of \$14,000.00. Thank you very much.

Ms. Duke: Thank you my lady.

Mr. George: I am indeed grateful, thank you my lady.