

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA 601 of 1991

BETWEEN

MAY JOSEPHINE HUMPHREY

Plaintiff

AND

THE TRINIDAD AND TOBAGO NATIONAL PETROLEUM MARKETING LIMITED

First Defendant

AND

SECURICOR SERVICES LIMITED

Second Defendant

Before: Master Margaret Y Mohammed

Appearances:

Mr. F Hosein SC for the Plaintiff

Mr. G Delzin for the First Defendant.

DECISION – ASSESSMENT OF DAMAGES

THE BACKGROUND

1. This is an assessment of damages under the Rules of the Supreme Court (“the RSC”) which was referred to the Master by Dean Armorer J after the trial of the action since the judge had found that despite the evidence led at the trial it was difficult for her to assess the quantum of damages.

2. The facts which gave rise to this assessment of damages are in 1963 the plaintiff leased the premises situate at #122, 124 and 126 Duke St Port of Spain (“the premises”) to the first defendant for a period of 30 years at a monthly rent of \$900. The said lease entitled the first defendant to renew for a further period of 20 years. In or around 1986 and before the expiry of the leasehold period, both the plaintiff and the first defendant agreed to surrender the lease and that the first defendant would prepare the deed of surrender. The deed of surrender was never prepared and on February 4, 1991 the first defendant assigned the unexpired residue of the said lease to the second defendant. After the expiration of the 30 year term in 1993 the second defendant remained on the subject premises and held over claiming entitlement to a 20 year lease.

3. On these facts the plaintiff issued proceedings in this matter on February 18, 1991 against the first defendant and subsequently joined the second defendant. The plaintiff’s claim against the first defendant was for : a declaration that the agreement made in 1986 for the first defendant to surrender the lease was binding; specific performance of the said agreement; an order that the first defendant execute a deed of surrender of the lease within 21 days of the court’s order; an injunction restraining the first defendant from assigning or sub-leasing the premises and damages for breach of contract in lieu of or in addition to specific performance.

4. Against the second defendant, the plaintiff claimed damages for trespass and an injunction restraining it from assigning, subleasing and/or remaining in or continuing to occupy the premises. The plaintiff also claimed against both defendants that the purported assignment of the lease by the first defendant to the second defendant was null and void and of no effect and she therefore requested that the court set aside the assignment and award mesne profits. The second defendant counterclaimed that it is entitled to have a renewal of the lease for 20 years.

5. On February 15, 2005 Dean-Armorer J gave judgment for the plaintiff, dismissed the second defendant's counterclaim and ordered the first defendant to pay the plaintiff damages in lieu of specific performance. The first defendant was also ordered to pay the plaintiff's costs of the action and the second defendant was ordered to pay the costs of the plaintiff's counterclaim.
6. The plaintiff passed away subsequent to the ruling on liability and her son, John Desmond Humphrey ("JDH") was substituted in her place.
7. At the hearing of the assessment of damages before me, Counsel for the plaintiff and the first defendant agreed that I assess the quantum of damages based on the witness statements filed by the plaintiff in the assessment of damages pursuant to the order of Master Paray-Durity made on May 29, 2009 and written submissions to be filed at a later date. The parties also agreed that there will be no cross-examination of the persons who filed witness statements.
8. In support of the quantum of damages, pursuant to the aforesaid order of Master Paray-Durity the plaintiff filed 2 witness statements, that of the substituted plaintiff, JDH on June 16, 2009 and Afra Raymond ("AR") on June 30, 2009. The first defendant did not file any witness statements. The first defendant filed his submissions on May 25, 2011 and replied on June 8, 2011 and the plaintiff filed submissions on May 31, 2011.

PRELIMINARY ISSUE

9. Before I address the substantive issue it is necessary at this juncture to address the issue of what evidence is before the court in order to quantify the damages since there appears to be a divergence of opinion between the plaintiff and the first defendant.

10. The plaintiff has submitted that in assessing the quantum of damages to be awarded I must consider the evidence on record as adduced before Dean-Armorer J at the trial and the further evidence directed to be filed by the Master namely the witness statements of JDH and AR. Attached to the JDH witness statement are 2 valuation reports, one of Faizal Hosein dated February 23, 2003 on the land and building (“the Hosein valuation”) which is attached as annexure JH 3 and the other of Raymond and Pierre Limited (“the Raymond & Pierre Valuation”) dated August 15, 2008 which is attached as annexure JH 4 based on the land only. The AR witness statement refers to the Raymond & Pierre Valuation.
11. In support of the Hosein valuation, the plaintiff has submitted that it was attached to the witness statement of JDH for the “sake of convenience” since he gave viva voce evidence and was cross- examined at the trial where this report was formally tendered into evidence.
12. The plaintiff also submitted that at the trial Joanne Ferreira (“Joanne”), the plaintiff’s grand-daughter gave evidence of \$40,000 which she invested in a garment factory to be established on the premises after the plaintiff promised her the use of the premises upon the surrender of the lease.
13. In response, the defendant submitted that the only evidence properly before me to consider the award of the quantum of damages is the witness statements of JDH and AR. The first defendant also submitted that without any act of adopting the previous evidence, I am limited to the evidence before me.
14. With respect to the Hosein valuation, the defendant objected to its admissibility on 2 grounds. Firstly, the witness statement of JDH cannot as a matter of law admit the Hosein valuation without complying with the evidential pre-conditions namely it is documentary evidence of an expert which is placed before this court without any foundation being laid and the maker of the report has not provided a witness statement that allows the valuation to be admitted as a report of an expert and

secondly it fails to disclose the relevant factors that influenced the analysis and conclusion.

15. According to the judgment of Dean-Armorer J the evidence of the plaintiff at the trial consisted of oral testimony of JDH¹, Joanne², Lennox Sankersingh³ and Mr Faizal Hosein⁴ and documentary evidence. However despite this evidence the judge still found “it impossible on the dearth of evidence as to quantum to assess damages and I will order that this be done by a Master in Chambers ⁵”.
16. When the assessment of damages came up before the Master on April 4, 2008 she gave directions for witness statements to be filed and exchanged on or before May 29, 2009. This direction was subsequently extended on 3 occasions, namely on July 8, 2008, February 17, 2009 and June 18, 2009. In light of the judge’s comment on the issue of the assessment of damages, that the damages be assessed by a Master and the direction given by the Master to file evidence in the assessment it is not unreasonable for me to conclude that the only evidence before me on the assessment of damages is the evidence filed pursuant to Master Paray- Durity’s order.
17. An assessment of damages is to be treated as a separate hearing⁶. In this regard I agree with the first defendant’s submission that the assessment of damages before me is a trial that requires evidence in accordance with Order 38 of the RSC and in this regard, for the plaintiff to prove its damages it must present evidence to convince me on the quantum to be awarded. Therefore, in assessing the quantum of damages I will only direct my attention to evidence contained in the witness statements of JDH and AR.

¹ Pages 6-9 of the judgment

² Pages 9-10 of the judgment

³ Page 10 of the judgment

⁴ Page 11 of the judgment

⁵ Page 39 of the judgment

⁶ Order 38 rule 8 RSC

THE EVIDENCE

John Desmond Humphrey

18. JDH set out his occupation as an architect/retired politician who has been an architectural student since 1951 and opened an architectural practice in 1960. He also stated that he was an artist and a designer of carnival costumes and bands. As a politician he has been in public life for 40 years and a member of parliament for 26 years.
19. It was JDH's evidence that his mother owned the premises and in 1963 she leased it for 30 years to Shell Trinidad. The residue of the lease was later assigned to the first defendant. In 1986 his mother lived with him and his ailing father in a small apartment at his home. His son and daughter, Joanne , also lived with him save and except for a period in 1986 when his daughter lived in an apartment in Regents Gardens but operated a business at his home. His daughter made stuffed toys and unique garments and had a staff of employees.
20. After the first defendant agreed to surrender the lease, in anticipation of getting the premises JDH's mother offered it to Joanne to operate her expanding business. Joanne had moved into the mother's apartment and the mother had moved into an upstairs bedroom of his house after his father's death. Pursuant to Joanne and her husband's request JDH took measurements and prepared a design to accommodate a factory and a boutique at the premises.
21. The first defendant reneged on its agreement to surrender the lease to the plaintiff and instead assigned the residue to the second defendant by deed number 1963 of 1991, made on February 4, 1991.

22. JDH's mother was not financially well off since 1990. She only received old age pension and due to her failing health JDH admitted his mother at Jardine Home which he paid for until her death.

23. JDH also gave evidence that at the trial of the action before Dean-Armorer J the Hosein valuation was tendered into evidence and he has annexed a copy of the said document to his witness statement. He also referred to the Raymond & Pierre valuation which was also annexed to his witness statement.

Afra Raymond

24. This witness was a chartered valuation surveyor, a professional member of the Royal Institution of Chartered Surveyors since November 1993 and the managing director of Raymond & Pierre Limited, Chartered Valuation Surveyors, Real Estate Agents and Property Consultants. He is also involved in matters in Trinidad and Tobago relating to land, property, finance and planning. He stated that he was requested by the plaintiff to conduct a valuation of the premises with a view to expressing an opinion on the annual rental value for the period 1990- 2004. In this regard he examined the premises (land only) and prepared the Raymond & Pierre valuation.

SPECIAL DAMAGES

25. In this action, paragraph 7 of the amended statement of claim sets out the claim for special damages as "the loss of money invested with Joanne Ferreira for the use of the said property as a garment factory \$40,000" and "to loss of bargain on proposed sale of vacant property to Neal & Massy Group of Companies \$1,500,000".

26. Although this claim was specifically pleaded, I have not found any evidence in the 2 witness statements to prove the sums claimed and therefore I am constrained not to make an award for these sums.

GENERAL DAMAGES

27. The plaintiff submitted that the measure of general damages to be awarded is the benefit which the plaintiff would have derived from the premises had the contract been performed and any profits made for the period 1987 to 2005 (ie the date of the judgment). In determining the scope and level of the damages to be awarded, it was also submitted that the court is to take into account the unconscionable conduct of the first defendant.
28. In this regard, the plaintiff recommended that the court accept the Hosein valuation which stated that the total rental value over the period 1990 to 2004 is \$1,797,169.00 for both land and building and discouraged the court from accepting the Raymond & Pierre valuation of \$942,500.00 for the equivalent period on the basis that the valuation was limited to land only.
29. In response, the defendant submitted that in this case the loss of bargain to the plaintiff is the difference between the rent collected under the lease of \$900 per month from 1986 to 1993 which is \$75,600 and the market value rent which the plaintiff could have earned had the lease been surrendered in 1986. The first defendant also submitted that the market rental value for 1986-1993 is \$213,840 in which case the total difference would be \$138,240. Alternatively, the first defendant also proposed that in light of the late filing of the claim the court ought to assess damages calculated from 1991 instead of the date of the claim in 1986. In such a case the difference would then amount to \$62,100.

LAW AND ANALYSIS

30. In light of the objection by the first defendant to the Hosein valuation, I have decided not to allow it as part of the evidence before me for the following reasons. It is hearsay

and has not been properly adduced into evidence since there is no witness statement by the maker of the valuation laying its foundation and to merely attach it as an annexure to the JDH witness statement fails to meet the test of admissibility of documentary evidence.

31. Even if I am wrong on the issue of admissibility, I will still not accept the information contained therein for the following reasons. If admitted little weight will be attached as it was not subjected to cross-examination. There is no explanation of the methodology applied. There are 2 different methods in assessing the net rental income over the period 1990-2004 and without the benefit of a witness statement and/or viva voce evidence the methodology renders no assistance to me. The Hosein valuation is based on land and building and in preparing the report the maker did not have access to the premises but rather extracted information on the building from another valuation report of Charles B Lawrence & Associates dated July 2, 2001 on the estimated capital value of the building area.
32. The general principle for the assessment of damages is compensatory i.e. the innocent party is to be placed so far as money can do so in the same position as if the contract had been performed⁷. In the instant case the agreement which was supposed to be performed was the deed of surrender which should have been prepared in 1986.
33. Any claim to damages must be limited to the loss which is reasonably foreseeable as arising from the breach, either in the ordinary course of things or because of special circumstances known to the party committing the breach⁸. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach, but the court also has the power in cases where this would give rise to injustice, to fix such other date as may be appropriate in the circumstances⁹.

⁷ Lord Wilberforce in *Johnson v Agnew* (1980) AC 367 at page 400

⁸ *Hadley v Baxendale* (1854) 9 Exch 341

⁹ Lord Wilberforce in *Johnson v Agnew* (1980) AC 367 at page 401

34. Where damages are awarded in lieu of specific performance, the principle that damages should be assessed as at the date of the breach does not normally apply. The selection of the appropriate date is a matter for the court's discretion but the date usually chosen is the date at which the remedy of specific performance ceases to be available. In the instant case, the remedy for specific performance expired in 1993 which is the date the lease expired.
35. Damages have been ordered to be assessed as at the date on which the plaintiff elected to abandon his claim to specific performance¹⁰ and as at the date of judgment¹¹. If the plaintiff has been guilty of delay in pursuing his claim, the assessment may be directed as at an earlier date¹².
36. In the instant case, the trial judge found that in 1986 there was a non-binding pre-contractual agreement between the plaintiff and the first defendant to surrender the lease. Apart from this date there is no evidence that the judge fixed any other date from which quantum is to be assessed.
37. It is clear from the judgment of the trial judge that no date was fixed for which quantum is to be assessed. Having examined the 2 witness statements I have found no evidence to support the plaintiff's contention that she was deprived of the use of the premises after the lease expired in 1993. In light of the limited evidence before me I am constrained to assess the quantum for the period 1986 to 1993.
38. I will now address the evidence presented by the plaintiff in support of the market value of the annual rent of the premises for the period 1986-2005. The onus is on the plaintiff to prove his damages. While the Raymond & Pierre valuation is only on the land of the premises, the information set out in therein satisfies me that it represents

¹⁰ Domb v Isoz (1980) Ch 548

¹¹ Wroth v Tyler (1973) 1 All ER 897

¹² Malhotra v Choudhury (1979) 1 All ER 186

the open market valuation of rental income for the period 1990 -1993 and I therefore find the sums stated there acceptable.

39. With my acceptance of the Raymond & Pierre valuation there remains another challenge to overcome. There is no evidence on the market rental value between 1986 and 1990 and while I am very hesitant to pluck a figure from the air with respect to the period 1986-1987 and 1988-1989 if I fail to take this period into account the plaintiff will be severely prejudiced. In this regard, I am minded to accept the first defendant's submission and apply the rationale of a 10% deduction of the sum for 1990 and reduce the rent by this sum for the years 1988 and 1989 and continue likewise for the years 1987 and 1986. With such calculations, the annual rent at the market value for the premises for 1986 and 1987 will be \$21,870 for each year and for 1988 and 1989 the sum would be \$24,300 for each year.

40. In the circumstances, the total actual rental income which the plaintiff received for the period 1986 -1991 of \$900 per month amounts to \$75,600. The total sum of the open market rental for the period 1986-1993 which the plaintiff was deprived of was \$213,840. Therefore I award the difference of \$138,240.

INTEREST

41. The award of interest on damages is discretionary pursuant to section 25 of the Supreme Court of Judicature Act Chap 4:01. The state of the local authorities on the applicable rate of interest is now in a state of flux¹³ having regard to the prevailing economic situation. In the absence of any evidence being led as to the appropriate rate of interest, a reasonable rate of interest for the award of general damages is 9% per annum from February 18, 1991.

¹³ CV 2008-04009 Sean Wallace v The Attorney General of Trinidad and Tobago per Des Vignes J at paragraphs 69 and 70.

ORDER

42. General damages is awarded to the claimant in the sum of \$ 138,240 with interest at the rate of 9% per annum from February 18, 1991 until July 8, 2011.

Dated this 8th day of July, 2011.

Margaret Y Mohammed
Master (Ag)