

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2014-04838

BETWEEN

DR. PETER MARTIN

**Legal Personal Representative of the Estate of Thomas Soloman Martin otherwise called
Thomas Solomon Martin otherwise called Thomas Martin**

Claimant

AND

ANTHONY SIRJOO

Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances:

1. Mr. N. Bisnath instructed by Ms. L. Mendonca for the Claimant.
2. Mr. Colvin E. Blaize instructed by Mr. F. Hove Masaisai for the Defendant.

Date of Delivery: May 2, 2017

JUDGMENT

1. Before the court for its determination was the Amended Claim Form and Statement of Case filed on behalf on the Claimant on June 26, 2015 wherein the following reliefs were sought:
 - (i) The sum of \$405,000.00 being arrears of rent.
 - (ii) Interest on the said sum of \$405,000.00.
 - (iii) Costs.

2. By Amended Defence and Counterclaim filed on behalf of the Defendant on July 31, 2015, the following reliefs were sought:
 - (i) The sum of \$195,000.00 representing the balance due and owing to the Defendant pursuant to the original agreement.
 - (ii) Damages for breach of the implied covenant for quiet enjoyment of the property.
 - (iii) Interest.
 - (iv) Costs

The Claimant's Case

3. By a written tenancy agreement dated June 1, 2005, Thomas Solomon Martin (hereinafter referred to as "the deceased"), rented to the Defendant the property known as 36 Methuen Street, Woodbrook, Port of Spain (hereinafter referred to as "the said property") at the rent of \$10,000.00 per month, payable in advance on the 1st day of each month for a term of two (2) years.

4. It was the Claimant's claim that upon the expiration of the term of the tenancy the Defendant continued in occupation of the demised premises upon the same terms and conditions of the lease dated June 1, 2005 save for an increased rent of \$15,000.00 per month but the Defendant failed to pay the said rent from September 2010 to November 2012 (inclusive).

The Defendant's Case

5. The Defendant accepted that a tenancy agreement was made between himself and the deceased for the rental of the said property for the monthly rent of \$10,000.00 from July 1, 2005 to June 30, 2007 where the Defendant would carry out a custom brokerage business which specialised in the import and export of goods, clothing, fabrics and merchandise from all over the world.
6. The Defendant stated that while he had a good relationship with the deceased, they never agreed upon a date when rent should be paid and rent was paid at any time during the month.
7. The Defendant disputed the authenticity of the unsigned tenancy agreement attached as "PM2" of the Claimant's Amended Statement of Case and stated that he was a stranger to its contents.
8. The Defendant averred that in or about April 2007, he and the deceased agreed that the rent would be increased to \$15,000.00 per month and that the duration of the Defendant's occupancy of the subject property would be extended to an indefinite period and that the deceased would give to the Defendant a minimum of one month's notice whenever the deceased required the said property and that there was an express agreement that the cost of repairs and maintenance at the said property would be borne by the deceased and that it would be fit for the purpose for which it was rented.
9. The Defendant further averred that on or about August 2010 he consulted with the deceased as to a set off rent and/or a reduction of the monthly rental fee pursuant to an agreement between them: that the deceased would reimburse the Defendant for substantial repairs, maintenance and upgrades which the Defendant had carried out on the sewer system of the said property and it was stated that the deceased also agreed to compensate the Defendant for damages which occurred to his goods, materials and/or merchandise stored at the said property caused by the defective sewer system.

10. The Defendant in his defence also claimed that the defective sewer system caused damage to his goods and merchandise on four separate occasions between the years 2010 and 2011 by flooding the entire downstairs of the said property and on one of those occasions, while the deceased was alive, he stated that the deceased agreed that he would be compensated for his loss in the sum of \$125,000.00 but this sum was never paid by the deceased. Furthermore, the Defendant claimed that on the other three occasions he suffered losses in the sum of \$230,000.00.
11. The Defendant also claimed that on each occasion that the sewer system caused flooding, his business had to remain closed for at least one week and he suffered a loss of earnings in the region of \$9,000.00 per day. Furthermore, he had to hire private contractors to fix the sewer problem which cost him a total of \$70,000.00 for the four occasions that flooding occurred. The Defendant also claimed that he expended monies on professional cleaning services which cost him about \$10,000.00.
12. The Defendant averred that the defective sewer system was a breach of the covenant for quiet enjoyment as it caused him on each occasion to suffer severe financial losses and it was also a cause of annoyance, discomfort and stress.
13. The Defendant further claimed that having agreed that the monthly rental fee would be applied to the monies owed by the deceased to compensate him for the losses which were incurred and for the cost of the repairs to the sewer system at the said property they further agreed to the sum of \$615,000.00.
14. It was the Defendant's claim that the deceased granted him permission to continue his occupation of the said property and to bear only the cost of electricity and that the monthly rental of \$15,000.00 was applied to the settlement of the monies owed by the deceased.
15. The deceased died on or about September 2010 and the monies owed to the Defendant were never paid. The Defendant stated that he continued to pay the rental income towards the outstanding debt pursuant to the agreement between him and the deceased.

16. The Defendant claimed that he was not in arrears of rent as the monies owed in rent were set off against the monies that the deceased had agreed to pay on account of the damage he said he sustained due to the defective sewer.

Determination of the Issues:

17. The issues which had to be determined by the court were:

- (i) What was the nature of the tenancy and what were the terms of the tenancy agreement between the deceased and the Defendant?
- (ii) Was there a breach of the covenant of quiet enjoyment by the deceased?
- (iii) Whether there was an expressed agreement by the deceased to pay the sum of \$615,000.00.

Nature of the Tenancy Agreement

18. The first issue that had to be determined was the nature of the tenancy, and specifically, whether the tenancy was a periodic tenancy or a tenancy at will.

19. In resolving this issue, the court had regard to **Halsbury's Laws of England, Landlord and Tenant Volume 62 (2016), paragraphs 192, 193 and 195**, which stated:

"192. Nature of tenancy at will.

A tenancy at will is a tenancy under which the tenant is in possession, and which is determinable at the will of either the landlord or the tenant. Although such a tenancy on its creation is expressed to be at the will of the landlord (or, as the case may be, the tenant only), the law implies that it is to be at the will of the other party also, because every lease at will must in law be at the will (that is, with agreement) of both parties. As in other tenancies, a tenancy at will arises by contract which binds both the landlord and the tenant

(Ley v Peter [1858] 3 H&N 101 at 107; if there is no such intention, possession will be as a licensee only: Heslop v Burns [1974] 3 All ER 406); and the contract may be expressed or implied. An express tenancy at will may have effect as such even though an annual rent is reserved. The use of the words 'tenant at will' in an agreement does not create a tenancy at will if the remainder of the agreement is inconsistent with such a tenancy.

193. Implied tenancy at will.

A tenancy at will is implied where a person is in exclusive possession by the owner's consent (Doe d Hull v Wood [1845] 14 M & W 682 at 687) and his possession is not as employee or agent or as a licensee holding under an irrevocable licence, and is not held in virtue of any freehold estate or of any tenancy for a certain term. Such a tenancy is implied accordingly in cases of mere permissive occupation without payment of rent (Buck v Howarth [1947] 1 All ER 342, 45 LGR 466 DC (oral permission to occupy for life created tenancy at will); Young v Hargreaves [1963] 186 Estates Gazette 355, CA (permission to live in a house for 'as long as you wish, and I hope it will be for the rest of your lives' held to be a tenancy at will converted into a yearly tenancy where rent by reference to a year was paid).

Such a tenancy may be implied if there are circumstances from which the court may infer that the tenancy is not to be a periodic one. The payment of a periodic rent is only one, albeit an important one, of the circumstances to consider."

The basic rule is that if one party permits another into possession of his land on payment of rent, failing more the inference sensible and reasonably to be drawn is that the parties intended that there should be a periodic tenancy: see Javad v Aqil [1991] 1 All ER 243 at 249.

195. Possession after expiry of lease.

A tenant who, with the landlord's consent, remains in possession after his lease has expired is tenant at will until some other interest is created, either by express grant or by implication by the payment and acceptance of rent."

20. The court also had regard to the learning in **Commonwealth Caribbean Land Law, Sampson Owusu, Chapter 12 page 530, Tenancy at Will**, where it was stated:

“The following situations may give rise to a tenancy at will by implication:

- (a) Where after the expiration of a term of a lease or tenancy, the lessee or tenant obtains the permission of the landlord to remain in possession and holds over without renewal of the lease or the tenancy agreement;*
- (b) Where a tenant enters into possession under a lease which turns out to be void;*
- (c) Where a party to a negotiation for a tenancy agreement is allowed into possession while the negotiations are going on;*
- (d) Where a party enters into possession in pursuance of an agreement to let whether parole or in writing in which no provision is made for rent or periodic payment which gives rise to periodic tenancy.*

In all these situations, if in addition to entering into possession, the tenant pays rent for the premises, he will be held to be a periodic tenant, i.e. monthly, weekly, or yearly, according to the mode by which the rent is calculated (Metcalf & Eddy Ltd. v Edghill [1963] 5 WIR 417, 420).

A tenant under a tenancy at will is thus vested with a mere personal right, which cannot therefore be a subject-matter of assignment or sub-lease, and determines on the death of either party. Tenancy at will cannot even survive involuntary alienation (Wheeler v Mercer [1957] A.C. 416, 427). Any act which is inconsistent with the tenancy has the effect of terminating the relationship, provided that such acts have come to the knowledge of the tenant.”

21. A periodic tenancy has a prefixed term which continues indefinitely at the end of each term until it is determined by either party and both the landlord and tenant reserves the right to determine the tenancy by giving regular notice.

22. A tenancy can be implied where, after a fixed term tenancy has expired, the tenant remains in occupation and continues paying rent. Whether a periodic tenancy will be implied will depend on the facts. If a tenancy is implied it will be assumed to be on the same terms as the previous tenancy so far as they are compatible with a periodic tenancy.

23. The court noted the pleaded case of both the Claimant and the Defendant and in relation to the Defendant, had particular regard to what was pleaded at paragraphs 2, 3, 7, 15 and 19 of the Amended Defence and Counterclaim filed on July 31, 2015 which was summarised above. The court also had regard to paragraph 3 of the Defendant's witness statement wherein the Defendant said:

"In 2005 I entered into a Tenancy agreement with Solomon Martin (deceased) for the rental of the premises known as No. 36 Methuen Street, Woodbrook, Port of Spain for the monthly rent of \$10,000. In or about 2007, we agreed that the rent would be increased to \$15,000.00 and I could stay at the property for an indefinite period of time."

24. During the course of his cross-examination, the Defendant also said, in response to questions posed by the Claimant's attorney that he understood that he had an obligation to pay rent but that obligation was not fulfilled due to the sums that he felt were due and owing to him. He also stated that if no sums were found to be due and owing to him, then his obligation to pay the agreed rent would subsist.

25. Having regard to the law as it related to both tenancies at will and periodic tenancies, the court was of the view that in the circumstances of this case, there clearly was in existence a periodic tenancy, and as it related to rent, the terms of that periodic tenancy were that rent would be paid on a monthly basis in the sum of \$15,000.00.

26. The Defendant clearly accepted that this was the terms of the tenancy although he stated that there was no fixed date during the month for the rent to be paid but his evidence was clear that the rent was to be paid on a monthly basis.

Covenant for Quiet Enjoyment

27. The court then considered the position as it related to “quiet enjoyment” and whether or not the Defendant incurred losses and spent money as a result of the sewer problems that the Defendant claimed manifested itself on more than one occasion.
28. The undertaking for quiet enjoyment by the landlord is implied in any landlord and tenant relationship. The tenant’s enjoyment of the property should not be disturbed by the landlord or any person who derived title from the landlord. Any substantial or physical interference with the tenant’s ordinary and lawful enjoyment of the property would be a breach of the landlord’s covenant for quiet enjoyment (**Southwark LBC v Mills [1999] 3 WLR 939, 957**).
29. The liability of the landlord is not limited only to acts of the landlord, but also extends to the rightful acts of third parties who derive title from him, such as the landlord’s other tenants. The acts of other tenants, which are injurious to the tenant, can be rightful only because the landlord has suffered those acts to be carried out by the other tenant. The landlord therefore is answerable for such rightful acts of the third party (**Sanderson v Berrick-upon-Tweed Corporation [1884] 13 QBD 547**).
30. Where the acts of the third party are found to be wrongful, i.e. by improper use of the property of the landlord, the position is completely different and **Baxter v Camden London Borough Council (No. 2) [2000] L. & T.R. 159**, explained the term “improper use” as a use not authorised by the landlord. Where the use of the property was wrongful by the third party, then the Landlord is not liable under the covenant for quiet enjoyment. The tenant is at liberty to proceed against the third party for such wrongful acts if it interferes with possession and/or ordinary enjoyment of the demised property.
31. When the court considered the Defendant’s pleaded case, the Defendant made no allegations as to any disturbances by the deceased which resulted in a breach of quiet enjoyment. At paragraph 5 of his defence, he pleaded that there was an implied covenant for quiet enjoyment and that his loss was caused by a defective sewer system and in the body of the defence he went on to assert that the defective sewer system resulted in a breach of the covenant for quiet enjoyment.

32. The Defendant called as his witness Mr. Nicholas Parker, the private contractor/plumber, who effected the repairs to the sewer system and at paragraph 5 of his witness statement, Mr. Parker stated:

"I closely examined the problem, I realized that the restaurant across the street and another building were also connected to the Defendant's connection to the main sewerage line. I also realised that there was a clog on the Wrightson Road main sewerage line which may have been the root of the problem. What also contributed to the clogging of the sewerage is the fact that the restaurant does not have a grease trap. Therefore the grease sticks to the sides of the sewerage line and prevents a proper flow."

33. The witness, however, in response to questions posed to him during cross-examination, seemed to indicate that the restaurant was on the same property as the tenanted property and this was not further clarified in the evidence.

34. This witness also indicated that he was of the view that the sewerage problem that he had to attend to on all four occasions was as result of the improper management of the grease from the restaurant.

35. The court noted that there was no pleading, nor was there any evidence before it, that the sewerage problem was caused by any act that was directly related to the deceased, or that there was any disturbance caused by the deceased relative to the sewer issues the Defendant experienced. The only evidence that the court had before it in relation to the sewerage issue, placed the root of the problem at the feet of this restaurant which, according to paragraph 5 of the witness statement of Mr. Parker, is opposite to the tenanted property.

36. Having regard therefore, both to the law and the evidence before the court, there was no circumstance which the court found that there was any breach of the covenant for quiet enjoyment by the deceased.

37. The court also had to consider whether or not there was some expressed agreement between the deceased and the Defendant relative to the payment of any agreed sum.

38. In resolving this issue, the court found that there were variations in the Defendant's evidence as to the time the first loss occurred. His pleaded case and his witness statements clearly established that the first incident occurred prior to the deceased's death in 2010.
39. In cross-examination, the Defendant stated that the first incident occurred a year or two before the death of the deceased.
40. If taken at its highest, the Defendant's evidence was that there was an agreement for an expressed sum and a commitment by the deceased to pay those sums. However, the Court found it strange that no set off was implemented from the time that agreement was arrived at and the Defendant continued, during the lifetime of the deceased and up to his death in September 2010, to pay the full rent that was agreed in the sum of \$15,000.00.
41. On a balance of probabilities the court found that it was highly improbable and implausible that if an agreement had been effected whereby the deceased agreed to repay a substantial sum of money there would be no set off for a substantial period of time.
42. There were also credibility issues that the court found with respect to the Defendant's evidence. In relation to the pre-action protocol letter, while the Defence clearly outlined that the letter was received, the Defendant, during cross-examination, categorically stated that he never received the said letter. There was such a variance in his testimony on a fact which was not germane to the issues that fell to be determined, that it ultimately led the court to take a very guarded approach as it related to all of the Defendant's evidence.
43. The Defendant's claim as it related to the loss that he said he suffered was also viewed with some degree of suspicion. By virtue of his own evidence, it was his company which imported all of the goods that he claimed were lost but the Defendant's company was a limited liability company and was not a party to this action.
44. Even if the court was wrong in its assessment of the facts and application of the law on the covenant of quiet enjoyment, the Defendant did not satisfy the burden placed upon any litigant to prove Special Damages. Special damages must be specifically pleaded and

proven. It cannot be sufficient for a witness who is claiming sums of money of this magnitude to not proffer before the court, either documentary evidence or a proper and itemised breakdown as to how these losses were sustained.

45. While the Defendant said that certain documents were lost due to the flooding which occurred as a result of the sewerage incidents, it was established in cross-examination that these documents could have been retrieved by the original suppliers or that some attempt could have been made to retrieve documents to place before the court in support of his claim.

46. Ultimately, if the court took the Defendant's case at its highest and accepted that he was entitled to recover loss as a result of the breach of the covenant for quiet enjoyment, there was no basis upon which any award for damages could have been made.

47. For the reasons outlined the court made the following orders:

- (i) There was judgment in favour of the Claimant against the Defendant in the sum of \$405,000.00 which represented the arrears of rent due and owing from September 2010 to November 2012.
- (ii) Interest shall accrue on the said sum at the statutory rate of interest from the date of this judgment until repayment and;
- (iii) The Defendant shall pay to the Claimant the costs on the claim, calculated on a prescribed costs basis, of the sum of \$62,000.00.
- (iv) The Defendant's Counterclaim was dismissed and the Defendant was ordered to pay to the Claimant \$38,250.00.
- (v) There was a stay of execution on the payment of the sums awarded of 28 days.

JUDGE