In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016 No: 30

CARLA CROCKWELL

Appellant

-v-

WEST END DEVELOPMENT CORPORATION

Respondent

JUDGMENT

(In Court)[1]

Appeal-landlord and tenant-claim for rental arrears-un-pleaded counterclaim for breach of the landlord's repairing obligations-litigant in person-duty of trial judge to ensure level playing field and consider the merits of un-pleaded claims which are supported by the evidence

Date of Hearing: June 27, 2016, December 20, 2016
Date of Judgment: January 6, 2017

The Appellant appeared in person
Mr. Christopher Swan, Christopher Swan & Co., for the Respondent

[1] To save costs this Judgment was circulated to the parties without a hearing.

Introductory

1. The Appellant appeals against the decision of the Magistrates' Court (Wor. Charmaine D. Smith, Acting) dated March 12, 2015 entering judgment in favour of the Respondent for arrears of rent (and related charges) and Court fees in the amount of $12,321.97 and dismissing her Counterclaim for damages to be assessed.

2. The Learned Acting Magistrate began her Judgment by explaining how, due to conflict impediments, she was assigned to the case rather than a substantive Magistrate and how, due to a combination of party unavailability and Court administration challenges, the proceedings became extremely protracted. It suffices to point out that the trial commenced in July 2012 and concluded in December 2014, after sittings on nearly 30 separate days. The Learned Acting Magistrate quite aptly concluded her Judgment with the following wise words:

> "*Hindsight is always 20-20 vision, however I take this opportunity to comment on the appropriateness, in my view, of such a matter having been settled by way of mediation, rather than this protracted and potentially costly legal maze.*"

The Magistrates' Court Judgment

<u>The Respondent/Plaintiff's claim</u>

3. The Judgment records that the Respondent/Plaintiff adduced evidence supporting its claim and that the Appellant disputed liability on the following grounds:

    - accounting errors had been made from 1997;
    - the Appellant/Defendant was unaware that she was potentially liable for collection fees and/or late charges;
    - rent increases imposed by the Respondent/Plaintiff were unlawful;
    - the Appellant/Defendant was entitled to withhold rent because of a breach of the Respondent's repairing obligations;
    - the Appellant/Defendant was entitled to withhold rent because of a breach of the Respondent's obligation to accord her quiet enjoyment.

4. The Learned Acting Magistrate rejected the complaint about accounting errors because the Respondent/Plaintiff established that a nil balance was applied from 2005. The complaint about collection and late fees was rejected on the grounds that these heads of claim were clearly permitted under the Lease. The complaint about unlawful rent increases was rejected because this matter was not put in cross-examination or

supported by the Appellant/Defendant's own evidence. The Court found that the Appellant/Defendant was liable to pay what she admitted in evidence that she failed to pay:

> "*At the end of the day, looking at the accounts, I would say I owe about 9 ½ months' rent at $1338.75 considering the circumstances of WEDCO's accounting errors. I thought I could claim for them but I couldn't because basically they were time-barred. It wasn't my intention not to pay the rent. I was seeking for an injustice that was served on me by the landlord to no avail.*"

The Appellant/Defendant's Counterclaim

5. The Learned Acting Magistrate made the following key findings:

   (a) the landlord was obliged under the Lease to keep the exterior of the premises in tenantable order, to refund rent paid during any period when the premises were in un-tenantable condition and to repair any damage within a reasonable time;

   (b) the landlord did not repair railings which were damaged for a period of 5 years (2007 to 2012) which included the period of time (2006-2007) when the Appellant/Defendant withheld rent;

   (c) it was unclear during what periods of time the interior of the premises were in disrepair and what aspects of the premises were in disrepair during the period June 2006 to June 2007 when the tenant withheld rent.

6. No express findings were made on the Appellant/Defendant's Counterclaim, which was only implicitly dismissed. Rather, the entitlement to withhold rent was expressly rejected and no deductions made. This was seemingly because the Appellant/Defendant, appearing in person, did not formally file a Counterclaim and only filed a Summons in support of an application to withhold rent under section 19(3) of the Landlord and Tenant Act 1974.

7. However, by the end of the trial the Appellant/Defendant had vacated the premises and was in substance seeking to set off her claim for breach of covenant against the landlord's claim for arrears of rent. So the central issue of substance was whether or not she had established any breach of covenant resulting in actionable loss on the landlord's part.

The merits of the appeal

Attack on the Respondent's judgment for arrears of rent etc

8. Mr Swan rightly submitted that the attack on the money judgment in his client's favour based on the Appellant's own admission was unsustainable.

9. The Appellant sought during the hearing of the appeal to re-argue the trial altogether, not appreciating the fundamental character of an appeal. The Learned Acting Magistrate was clearly correct to find that the Appellant had admitted owing a certain amount and to enter judgment based on that admission. It is not possible at this stage for the Appellant to withdraw an admission which she made in the witness box at trial. The appeal against this aspect of the Judgment of the Magistrates' Court is dismissed.

Attack on the dismissal of the Appellant's Counterclaim

10. It is not entirely clear why the Learned Acting Magistrate declined to assess damages for the Respondent's failure to repair the external railings for a period of 5 years. This was presumably because the Appellant was a litigant in person and she was not assisted in relation to the applicable law and principles which are not routinely explored in the local courts. The Magistrates' Court was clearly entitled to find that the damage complained of was not so serious as to generate a right to withhold rent altogether, and it appears that this was the narrow lens through which this issue was viewed. This was a view which was apparently formed with the positive encouragement of Mr Swan, legitimately advancing his own client's interests.

11. The strict legal position may well have been that the right to withhold rent had fallen away by the time of the trial but that did not extinguish the broader (admittedly un-pleaded) case that the landlord was in breach of its repairing covenants. If any such breach which was more than trivial was established by the tenant she was entitled to an award of damages. Order1A of the Magistrates' Court Rules 1973 came into force on January 1, 2014 before the conclusion of the trial with a view to promoting "*the overriding objective of enabling the court to deal with cases justly*" (Order 1A rule1(1)). The first listed example in the non-exhaustive definition of what dealing with cases justly means (Order 1A rule 1 (2)(a)) is "*ensuring that the parties are on an equal footing*". This is a very fluid and intangible concept which is difficult to apply in practical case management terms but it is a judicial case management requirement which comes into sharp focus whenever (a) one party is legally represented and the other is not, and/or (b) there is an obvious inequality of power or resources between opposing litigants.

12. In the present case the Appellant was a litigant in person of limited resources defending a claim brought by a statutory corporation. Justice in my judgment required the Magistrates' Court to deal with the Appellant's un-pleaded Counterclaim on its merits. The Respondent had notice of her overlapping claim to withhold rent which was fully canvassed at trial. The breach of covenant claim was supported by the Appellant's evidence and formed the subject of positive factual findings in her favour. This Counterclaim ought not to have been rejected (if it was) on technical pleading grounds.

13. The governing legal principles may be summarised as follows. Putting aside an express contractual obligation to refund rent for any period when premises are completely un-tenantable, there is at common law a right to damages for breach of the contractual duty to maintain the exterior of premises in good repair where the damage in question is not so severe as to deprive the premises of any rental value at all. Those

damages are ordinarily assessed by reference to the reduction in the rental value of the premises. In *Crow-v-Hollis* [2016] SC (Bda) 85 Civ (30 September 2016), where Mr Swan also appeared for the landlord, I described the governing principles as follows:

> "*23. I accept entirely Mr DeSilva's submission that this Court can award damages for breach of the covenant to maintain and/or repair based on a rough and ready assessment of the reduction in value of the premises to a tenant flowing from the landlord's breach of covenant: Regus (UK) Ltd-v- Epcot Solutions Ltd.[2008]EWCA Civ 361; Earle-v-Charalambous [2006] EWCA Civ 1090. However, these cases also illustrate the obvious point that clear evidence of specific breaches of covenant which have been drawn to the landlord's attention and not remedied within a reasonable time is required to enable a court to assess the value of damage which is more than trivial.*"

14. In *Crow-v-Hollis* I found there was no clear evidence of breach of covenant on the landlord's part. In the present case the Learned Acting Magistrate found that there was insufficiently clear evidence of the internal damage of which the Appellant complained. As regards the railings, however, she found as follows:

> "*68…I find as a matter of fact that the state of these railings…were finally addressed by WEDCO in 2009 and eventually repaired/replaced in 2012, some 5 years after they came to the attention of Mr Trott…*"

15. I infer from these primary findings in the context of the appeal record as a whole that this finding was recorded on the basis that the state of disrepair was insufficiently serious to warrant withholding rent altogether but was nonetheless more than trivial. It follows that the Appellant was entitled to an award of damages for the landlord's breach of covenant over a period of five years "*based on a rough and ready assessment of the reduction in value of the premises to a tenant flowing from the landlord's breach of covenant*": *Crow-v-Hollis*. Mr Swan submitted that if the Court reached this conclusion a 10% reduction in rent was the most that was warranted and that the reduction should only extend to a period of two years because the Appellant behaved in an obstructive manner and prevented repairs being carried out sooner.

16. The controversial issue of obstruction was not the subject of any express findings by the Learned Acting Magistrate. These sort of findings, which are not matters of inference from proven facts, are not properly open to an appellate court to reach. Adopting a rough and ready approach which is as fair as possible to both parties, I find that the Appellant is entitled to a deduction of 10% of her rent for the five year period when the repairing covenant was breached. Had the Magistrates' Court expressly addressed the issue of obstruction, I would (however it was resolved) have been inclined to award the Appellant a 20% deduction by way of damages for breach of covenant by the landlord. The Appellant's Counterclaim succeeds to the extent of $133.80 (10% of $1,338 per month) x 60 months= $8,028.

Disposition of appeal

17. The appeal against the decision of the Magistrates' Court fails in part and succeeds in part. The decision to enter judgment in favour of the Respondent in the amount of $12,321.97 is affirmed. The decision to refuse to award the Appellant any damages

for breach of the landlord's covenant to keep the exterior of the premises in tenantable condition over a period of five years is set aside and the Appellant is awarded $8,028.

18. The final result in financial terms is that the Respondent has been awarded in net terms approximately 1/3rd of its original claim at trial and the Appellant has achieved substantial success (effectively extinguishing 2/3rds of the Respondent's claim) on her appeal. Unless either party applies within 28 days by letter to the Registrar to be heard as to costs, I would make the following Order as to costs in the Court below and in this Court:

    (a) the Respondent is awarded 1/3rd of its costs in the Magistrates' Court, to be taxed in that Court unless agreed;

    (b) the Appellant is awarded 2/3rds of her costs of the present appeal, to be taxed in this Court if not agreed.

19. That said, the parties are strongly encouraged to resolve the net amount payable by the Appellant to the Respondent without further troubling the courts.

Dated this 6th day of January, 2017_____
IAN RC KAWALEY CJ