

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**CV 1742 of 2015**

**BETWEEN**

**CORI DEVELOPMENT INC.  
(Acting by Christopher Stephen  
Sambrano in his capacity as Receiver)**

**FIRST CLAIMANT**

**CHRISTOPHER STEPHEN SAMBRANO  
(In his capacity as Receiver)**

**SECOND CLAIMANT**

**AND**

**RICHARD EDWARDS**

**FIRST DEFENDANT**

**FERNANDA EDWARDS**

**SECOND DEFENDANT**

**Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High  
Court**

**2018: March 28**

**2019: August 28**

**Mr. Bartlett Morgan, Attorney-at-Law of Lex Caribbean for the First and  
Second Claimant.**

**Mr. Ivan Alert, Attorney-at-Law for the First and Second Defendant.**

## **DECISION**

### **Introduction**

- [1] The issue before the Court is whether the Claimants are entitled to mesne profits from the Defendants.

### **Background**

- [2] The First Claimant is a registered company, and the freehold owner of property at Porters Gate Development, Mount Standfast, St. James. The property was mortgaged to RBC Royal Bank (Barbados) Limited (“the Mortgagee”), by the First Claimant.
- [3] On 25 August 2015 the Second Claimant (“the Receiver”), was appointed as Receiver of the property by the Mortgagee.
- [4] The Defendants are husband and wife. The First Defendant is also a director of the First Claimant. When the Receiver was appointed, the Defendants occupied Unit 31 at the mortgaged property.
- [5] By a fixed date claim form filed on 07 December 2015, the Claimants sought:
1. possession of the premises occupied by the Defendants;
  2. mesne profits at the rate of \$2,000.00 a month from 01 July 2015, until possession is delivered up;
  3. interest on arrears and mesne profits;

4. further or other relief; and
5. costs

### **The Affidavit Evidence**

- [6] The Receiver's affidavit accompanied the fixed date claim form. It informed that the Defendants rented Unit 31 from the First Claimant. The lease was said to have been terminated by a previous receiver, who was appointed and discharged by the Mortgagee, prior to the appointment of the Receiver.
- [7] The Defendants were still in occupation of Unit 31 when the Receiver was appointed. He adopted the decision of the previous receiver to terminate the lease, and so informed the Defendants by letter. The Defendants continued to occupy Unit 31 even after they were informed by the Receiver that their lease was not "in the best commercial interest of the receivership".
- [8] Having received no positive response from the Defendants, the Claimants filed the fixed date claim form for possession of Unit 31.
- [9] The First Defendant filed two affidavits in reply on 14 and 22 March 2016. The first affidavit revealed that the Second Defendant was out of the jurisdiction, and attending university in Brazil. The First Defendant admitted that they occupied Unit 31 from 01 October 2013, and outlined the circumstances under which they moved into Unit 31.
- [10] There are two relevant leases. The first lease was for a period of one year,

with an option to renew, and a monthly rental of \$2,000.00 per month. A second lease commenced on 01 October 2014 for a period of twenty-seven (27) months. The First Defendant points out that when he received a notice to quit from the first receiver, the first lease had already expired.

- [11] In his second affidavit the First Defendant stated that given the circumstances under which he entered into the second lease agreement, he had no personal finances available to secure alternative accommodation. He asked the Court to declare that he had a right to occupy Unit 31 under the terms of the second lease.

### **The Consent Order**

- [12] On 06 June 2017, the Court approved a consent order between the Claimants and the First Defendant, in which the First Defendant agreed to:

“.....deliver up possession of the premises.....on or before the 31<sup>st</sup> day of August 2017”.

An order in similar terms was made against the Second Defendant, but it was not a consent order.

- [13] The Defendants did not vacate Unit 31 by 31 August 2017. This is gleaned from the fact that on 19 September 2017, the Claimants filed a request for the issue of a writ of possession. The application was solely against the First Defendant on the basis that he had not complied with the consent order for possession. The Deputy Registrar of the Supreme Court issued the writ to the

Marshal on 24 October 2017. There is no evidence before the Court as to when Unit 31 was vacated by the Defendants.

### **Mesne Profits**

[14] The learned authors of **Halsbury's Laws of England** explain that:

“The landlord may recover in a claim for mesne profits the damages which he has suffered through being out of possession of the land or, if he can prove no actual damage caused to him by the defendant's trespass, the landlord may recover as mesne profits the value of the premises to the defendant for the period of the defendant's wrongful occupation. In most cases, the rent paid under any expired tenancy is strong evidence as to the open market value. Mesne profits, being a type of damages for trespass, may be recovered in respect of the defendant's continued occupation only after the expiry of his legal right to occupy the premises. The landlord is not limited to a claim for the profits which the defendant has received from the land, or those which he himself has lost”. (Vol.63 (2016), para.279).

[15] In the local case of **Mark Lynch et al v. Brigitte Taylor**, the learned Chief

Justice observed that:

“Mesne profits are damages in trespass which are payable to a landlord for losses incurred due to a tenant's remaining in possession after the termination or expiry of a tenancy. A landlord may make a claim for and recover mesne profits which reflect the open market value for the period of wrongful occupation”. (**Civ.Ap. No.18 of 2008 (decision dated 03 March 2014)** at para.11; see also the Privy Council decision in **Inverugie Investments Ltd v. Hackett [1995] 2 LRC 454**).

[16] In light of the jurisprudence this Court has to decide whether the Defendants were trespassers at any time during their occupation of Unit 31. A collateral question is also whether the two receivers, appointed by the Mortgagee, lawfully terminated either or both of the leases.

### **The Role of the Receiver**

[17] Neither of the Mortgagee's two receivers were appointed by the court. And there is no claim that their powers were derived from the Bankruptcy and Insolvency Act, Cap.303. Their powers are derived from another statute and the mortgage document. The Law of Property Act, ("Cap.236") authorizes the appointment of out of court receivers.

[18] Professor Andrew D. Burgess posits that:

“The statutory foundation for this type of receivership is s.110 (1) (c) and s.111(2). These subsections disclose that such a receivership is primarily concerned with the appointment of a receiver of the mortgaged property in order to secure the mortgagee the payment of his interest out of the rents and other income profits of the mortgaged property. Receivership under [Cap.236] may also involve the sale of the mortgaged property. A receivership under [Cap.236] is, therefore, a severely limited one. A receiver within it has no power to carry on the mortgagor's business. Again, even though he has a power to collect income, he cannot collect assets such as, for example, book debts. Finally he has no powers in relation to leasing, terminating leases or recovering possession of leases.

There are two ways in which the limitations on [Cap.236] receivers may be circumscribed.

Firstly, an application may be made to the court for an extension of the receivers' powers. Secondly, the mortgage deed itself may expressly provide for wider powers for the receiver. This is possible since [Cap. 236] expressly provides that the powers of a mortgagor or receiver provided for in [Cap.236] may be varied by express provision of the mortgage deed". (See "**The Law of Corporate Receivers and Receiver-managers**", at pages 173-174; and s.118 (3) of Cap.236).

[19] There is no evidence that the Mortgagee obtained court orders for the appointment of either receiver. Therefore, they had to rely on a limited statutory power in Cap.236, or powers in the mortgage document, to facilitate the termination of the Defendants' leases.

[20] The Claimants did not produce a mortgage document until ordered to do so by the Court, pursuant to a request by the Defendants for further information. The document is a deed of charge dated 04 February 2005. Clause 8.6 authorises the appointment of a receiver "of the Property or any part thereof...". Specifically, clause 8.6 provides that a receiver may:

"(c) generally deal with manage develop or reconstruct the Property or any part thereof or concur in so doing including power to lease or otherwise acquire and carry out or complete any works of building repair or reconstruction (with power to use any machinery and incorporate in any

building any unfixed materials) without being responsible for loss or damage;

(d) make any arrangement or compromise allow time for payment or enter into abandon or cancel or disregard any contracts which he shall think expedient”. (See document attached to the Response for Request for Information filed by the Claimants on 05 December 2016).

[21] Even where a receiver is authorized to terminate a lease, he must do so in accordance with the terms of the lease. One author notes that:

“A receiver, whether appointed by the court or by a private party, perhaps pursuant to a charge, has general authority to give a notice to quit”. (See “**Hill & Redman’s Law of Landlord and Tenant**”, 2009, Vol.1 at para. A [4509]; and **Doe d. Birmingham Canal Navigation v. Bold (1847) 11 QB 127**).

### Were the Leases Lawfully Terminated?

[22] The first receiver purported to terminate an existing lease by a letter dated 05 May 2015. It stated *inter alia* that:

“.....you are in physical occupation of the Property under an arrangement with [the First Claimant] to pay a monthly rent, determinable with once (sic) calendar months’ notice by either party in writing to expire on the last day of the month. By way of this letter, you are hereby given notice to terminate your said occupation and deliver up vacant possession of the Property with effect from the 30<sup>th</sup> day of June 2015”.

[23] No such lease was in existence on 05 May 2015. The lease described by the

first receiver expired on 30 September 2014. (See Exhibit RE2 annexed to the Affidavit filed on 14 March 2016). Therefore, the notice to quit was invalid with respect to that lease.

[24] The lease agreement existing on 05 May 2015 was a registered tenancy agreement executed on 01 October 2014. (See Exhibit RE1 annexed to the Affidavit filed on 14 March 2016). It commenced on 01 October 2014 with a duration of twenty-seven (27) months. This lease would have expired by the effluxion of time on 31 December 2016. When the first receiver sent the notice to quit, this lease had just under nine months to run.

[25] The registered tenancy agreement referred to a monthly rental of \$1,650.00, “....to be paid by way of offsetting the sum of \$44,200.00 which the [First Claimant] acknowledges he owes to the [Defendants]”. The Receiver had no legal authority to issue the unilateral demand for a monthly rent of \$2000.00, dated 26 February 2016. (See Exhibit RE1 attached to Affidavit filed on 22 March 2016).

[26] The Claimants have not refuted the validity of the registered tenancy agreement, either by affidavit or oral testimony. They have not alleged that this agreement is not an accurate representation of the existing state of affairs between the First Claimant and the Defendants.

[27] The registered lease made limited provision for determination by the First

Defendant by notice in writing. The question then is whether the notice to quit from the first receiver lawfully terminated the registered lease. Where there is no specific clause providing for a notice to quit by either of the parties to the registered tenancy agreement, common law principles are applicable.

[28] The statement of law in **Hill & Redman's Law of Landlord and Tenant** is useful:

“Any periodic tenancy may be determined by notice to quit given by the landlord or the tenant. The appropriate period for a notice to quit is determined by any express stipulation in the lease or principles of law which apply in the absence of express stipulation. The above principles of law are that:

(a) a yearly tenancy may be determined by at least a half-year's notice, expiring at the end of a year of the tenancy;

(b) any other periodic tenancy may be determined by a notice equal to at least a period of the tenancy and expiring at the end of a period of the tenancy”. (Issue 75, October 2010 at para.A [4382]).

[29] A perusal of the registered tenancy agreement reveals that it was not a periodic tenancy. Rather, it was a tenancy for a fixed term of 27 months. In the absence of a clause that permitted either the landlord or a tenant to terminate the lease early, the fixed term tenancy had to run its full course.

[30] In the Trinidad and Tobago case of **Metcalf & Edey Ltd. v. Edghill**, the

parties entered into an oral agreement in July 1960, for the rental of property for a fixed period exceeding three years. The rent was paid monthly. The oral agreement was reduced to writing in August 1960. The tenant gave one month's notice to quit, and vacated the premises when the notice expired in September 1960. The landlord sued for specific performance of the agreement. The tenant argued that a monthly tenancy was created. The Court of Appeal held that the agreement was effective as an agreement to execute a lease for the fixed term stated therein. **((1963) 5 WIR 417)**.

[31] The only circumstances in this tenancy agreement that allowed early termination was “.....in the event that the premises were rendered untenable for a period exceeding 30 days through partial or total destruction resulting from any cause....”. (Clause 7(a)). Neither party alleged such an event, therefore the lease could not be terminated by the receivers without the consent of the Defendants.

[32] Neither the previous receiver nor the Receiver had any legal authority to terminate the registered lease. It follows that up to and including 31 December 2016, the Defendants were not trespassers. The consent order between the Claimants and the First Defendant says no more than that he was to give up possession on or before 31 August 2017. This was eight months after the expiration of the registered lease.

[33] The Claimants have provided no evidence to suggest that the Defendants were holding over during that eight month period without consent. There is no evidence that the Defendants became trespassers after 31 December 2016. In effect the order authorized the Defendants to remain on the premises until 31 August 2017. There is also no evidence that the Defendants were required to pay rent but declined to do so between 01 January 2017 and 31 August 2017.

[34] The Court's order contained no acceptance by the Defendants or determination by the Court that they were trespassers or that they were liable to pay mesne profits.

[35] Likewise, there is no evidence as to when the Defendants actually vacated Unit 31. There is no evidence or allegation that no rent was tendered by the Defendants at any time between 01 January 2017 and the date on which they left Unit 31.

### **Disposal**

[36] The claim is dismissed as the Court has before it no evidence to support the payment of mesne profits by the Defendants.

[37] Costs are awarded to the Defendants to be agreed or determined by the Court.

**Dr. Sonia Richards**  
**Judge of the High Court**