

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCv2022/0136

BETWEEN:

BERNESTINE LEWIS

Claimant

And

ESTHER HALL

Defendant

Appearances:

Mr. Jarid Hewlett for the Claimant
Mr. Damien Benjamin for the Defendant

2024: April 16;
August 22

JUDGMENT

[1] **WILLIAMS, J.:** The defendant Ms. Esther Hall resided at a property at Bendals for over thirty years until early 2022. The registered proprietor the now deceased Mr. John Joseph Jeffers was during his lifetime her landlord. The claim alleges that since Mr. Jeffers' death, Ms. Hall has stopped paying rent. Ms. Hall for her part alleges that she has spent considerable sums on repairs to the property which should be set off against any rent allegedly owed. This dispute has prompted the present claim.

The Claim

[2] The claim was commenced by Fixed Date Claim Form filed on 20th April 2022 requiring the defendant to:

1. Vacate the premises particularly described as Registration Section: Golden Grove, Block 612 1790D, Parcel 47.
2. Pay to the Claimant the sum of \$69,000.00 for arrears of rent and mesne profits.
3. Pay to the Claimant the sum of \$4,500.00 as damages for the destruction of three of the Claimant's fruit trees.
4. Pay the Claimant interest from June 2019 until the date of judgment at the rate of 5% per annum.

5. Costs.
6. Any further order as the court deems fit.

[3] The claimant is Bernestine Lewis represented by her attorney Mr. King Jones. As previously indicated the defendant was Mr. Jeffers' tenant and remained in occupation of the property after his death until recently. She resists the claim for arrears of rent and mesne profits on the basis that she has spent considerable sums on repairs to the property.

Case Management

[4] Case management of this matter took place on 19th May 2023. It was ordered that the parties would rely on the affidavits filed in the claim to that point as their evidence at trial. Crucially, standard disclosure was ordered to be carried out by 19th June 2023. The claimant's list of documents was filed in accordance with the order, but no list of documents was filed by the defendant. The implications of the defendant failing to file the list of documents will be examined shortly.

[5] The claimant filed a notice for the defendant to prove documents on 26th March 2024 pursuant to CPR 28.18. In the said notice the claimant noted that the defendant had not filed a list of documents in accordance with the court's order of 19th May 2023. The claimant therefore put the defendant on notice that she would have to prove all documents which were exhibited to her affidavit at trial.

Trial

[6] Trial of this matter was held on 16th April 2024 with both Mr. King Jones and the defendant giving evidence. The parties were granted leave to file written closing submissions by 2nd May 2024. The defendant's closing submissions were filed on 30th April 2024 and the claimant's on 28th May 2024.

Preliminary Issue- Standard Disclosure

[7] At the commencement of trial, learned counsel for the defendant indicated that he had not filed a list of documents in accordance with the court's previous order. Counsel indicated that this was due to absence from work for an extended period due to illness. The effect of the defendant's failure to file a list of documents will be examined before all other issues in the case.

[8] The procedure for standard disclosure is contained at Rule 28.7 of the Civil Procedure Rules (Revised Edition) 2023. In this regard, CPR 28.7(2) provides as follows: “Each party must make, and serve on every other party, a list of documents in Form 11.” CPR 28.7(3) further provides that; “The list must identify the documents or categories of documents in a convenient order and manner and as concisely as possible.” CPR 28.11 further provides for the inspection and copying of listed documents. CPR 28.13(1) specifies the consequences of failure to disclose documents as follows:

“A party who fails to give disclosure by the date ordered, or to permit inspection, may not rely on or produce at the trial any document not so disclosed or made available for inspection, without the permission of the court.”

[9] Thus, there is a sanction for non-compliance with CPR 28.7 which is that any documents not disclosed or made available for inspection cannot be relied upon at trial. Although counsel for the defendant gave a reason for non-compliance with the order for standard disclosure namely illness, he never sought permission to rely on the documents not disclosed. No application for relief from sanctions was made before trial pursuant to CPR 26.8.

[10] It is not open to the defendant to argue that the documents were exhibited to her affidavit filed on 17th May 2023. A large part of the documents exhibited to that affidavit consist of copies of receipts which she claims are evidence of sums spent on the repair of the property. These documents are simply exhibited collectively and are not individually listed or identified. The purpose of CPR 28.7(3) is to assist the parties and the court with the identification of the necessary documents at trial. This would prove almost impossible with several receipts relating to transactions carried out over a number of years simply lumped together.

[11] Disclosure is an important aspect of the culture of civil litigation which is encouraged by the Civil Procedure Rules. Lord Justice Rix stated in **Rubin v. Expandable Ltd**¹ with reference to the similar provisions in England, “The general ethos of the CPR is for a more cards on the table approach to litigation.”

[12] It was open to the defendant to seek a variation of the case-management timetable to seek an extension of time to effect standard disclosure. It was also open to the defendant to seek relief

¹ [2008] 1 WLR 1099 at paragraph 24

from sanctions. In the absence of any such applications, I am constrained to rule pursuant to CPR 28.13(1) that the documents exhibited to the defendant's affidavit filed on 17th May 2023 cannot be relied upon.

Evidence

Claimant's Evidence-Mr. King Jones

[13] The sole witness for the claimant was Mr. King Jones who is normally resident in the United States of America. Mr. Jones' evidence in chief was contained in his affidavit filed on 20th April 2022 in support of the claim. Mr. Jones is the lawful attorney of the claimant Bernestine Lewis who is the administrator of the estate of Mr. John Jeffers by virtue of a grant of letters of administration de bonis non issued on 19th March 2020. Mr. Jones also exhibits a power of attorney from Bernestine Lewis dated 9th August 2019.

[14] According to Mr. Jones approximately thirty years ago the defendant and Mr. John Jeffers entered into a lease agreement of the property whereby the defendant would pay rent of \$1000.00 monthly. The defendant was required to pay the rent into Mr. Jeffers' account at First Caribbean International Bank. Mr. Jeffers had granted a power of attorney to his stepson Mr. Franklyn Simon in order to allow Mr. Simon to access the account and transmit the rent collected to Mr. Jeffers. This was since Mr. Jeffers spent most of his time in the United States of America. Mr. Jeffers died on 14th September 2009.

[15] Mr. Jones states that for a number of years the defendant has stopped paying rent into the bank account. Mr. Jones relies on the relevant bank statements in support of this assertion. According to Mr. Jones he was advised by his attorney-at-law that due to the statute of limitations he could only claim arrears of rent from 2016 onwards. The actual details of the claim for rent will be examined in greater detail later in this decision.

[16] Mr. Jones then states that by letter and notice to quit both dated 6th June 2019 his attorneys-at-law Watt, Dorsett and Company wrote to the defendant demanding payment of the outstanding rent and requiring the defendant to vacate the property by 31st June 2019. The defendant's attorney-at-law Mr. Damien Benjamin responded by letter dated 17th June 2019 requesting to be provided with documentation that demonstrated Mr. Jones' legal right to collect rent. According to Mr. Jones these documents were duly provided to Mr. Benjamin under the cover of a letter dated 21st June 2019.

[17] Mr. Jones then commenced proceedings against the defendant on 8th December 2020. This claim was discontinued on 17th March 2022 for reasons which are not material to this claim.

[18] Finally, Mr. Jones alleges that the defendant maliciously and without his consent destroyed three fruit trees which had been on the property for a number of years. Mr. Jones estimates the value of each tree at \$1500.00 bringing the total value of the destroyed trees to \$4500.00.

[19] Under cross-examination it was put to Mr. Jones that he failed to make inquiries with Mr. Jeffers' stepson Mr. Franklyn Simon to ascertain whether any rent payments had been made to him directly instead of into the account. Mr. Jones admitted that he had made no such inquiries with Mr. Simon. It was further put to Mr. Jones that he had carried out no repairs to the property. Mr. Jones admitted that he had carried out no repairs.

Defendant's Evidence-Ms. Esther Hall

[20] The defendant is Ms. Esther Hall who is a graphic designer. Her evidence-in-chief was contained in her affidavit filed on 17th May 2022. The defendant stated that she first entered into the property as Mr. Jeffers' tenant over thirty years ago with the rent gradually increasing from \$800.00 a month initially to \$1000.00 monthly in recent years.

[21] She also admitted that a previous claim was brought against her which was discontinued. The defendant further elaborated that she no longer resides at the property having commenced moving out in February 2022 and that she handed over the keys to the property to her attorney-at-law in April 2022.

[22] The defendant further admitted that she was required to pay rent into Mr. Jeffers' account. She also states that Mr. Franklyn Simon had power of attorney for Mr. Jeffers. She also asserts that Mr. Simon did not maintain the property during the years 2014 to 2019.

[23] In terms of repairs carried out to the property, the defendant indicates that she made several requests to Mr. Jeffers and Mr. Simon to undertake repairs to the property. She further states that Mr. Jeffers agreed that she should carry out renovations herself and present the invoices to him. In this regard she exhibits receipts for repairs carried out during the period 2004 to 2019 in

the sum of \$83,486.05. She also alleges that since Mr. Jeffers' death she paid rent directly to Mr. Franklyn Simon.

[24] Finally, the defendant admits receiving the notice to quit dated 6th June 2019. However, due to the discontinuance of the previous claim, she has been advised by her attorney-at-law that a new notice to quit should have been issued.

[25] Under cross-examination it was put to her that she had constructed a house for herself during the relevant period. She admitted that she had done so. It was also put to her that the receipts which she relied upon were actually expenditure for her new home. The defendant vehemently denied this.

Issues

[26] The issues to be decided are as follows:

1. Whether the Notice to Quit issued to the defendant was valid?
2. What is the quantum of arrears of rent?
3. Whether the defendant can set off the costs of repair against the arrears of rent?

Validity of the Notice to Quit

[27] The defendant challenged the issuance of a notice to quit dated 6th June 2019. At that point there was no power of attorney or other documentation which gave Mr. King Jones authority over Mr. Jeffers' estate. Thus, the notice to quit was ineffective to terminate the lease with the defendant.

[28] After the issuance of the power of attorney, Mr. Jones did not issue another notice to quit to the defendant. Instead, the defendant gave up the premises on her own accord in April 2022. Accordingly, this is when the tenancy was terminated. Mesne profits are generally only applicable where a person has remained in unlawful occupation of a property.² This is not the case here. Thus, in the present case the claimant can only seek arrears of rent and not mesne profits.

[29] There has been no challenge to Mr. Jones' capacity to bring this claim for arrears of rent. The authenticity of his power of attorney and the grant of letters of administration de bonis non to Mr. Jeffers' estate are in evidence. Thus, there can be no question of Mr. Jones' capacity to prosecute this claim on behalf of the claimant.

² Antigua & Barbuda Civil Appeal No. 17 of 2004 (decided 23rd May 2005, unreported) at paragraph 56

Quantum of Arrears of Rent

[30] I shall deal with the claim for arrears of rent then address the defendant's claim for a set-off in respect of repairs carried out to the property. The defendant admitted to paying rent of \$1000.00 per month during the period for which arrears of rent are being claimed. Thus, there is no dispute as to the monthly rental payable.

[31] The next consideration is the period for which rent is payable. **Section 21** of the **Limitation Act**³ provides as follows:

"No action shall be brought, or distress made, to recover arrears of rent, or damages in respect of arrears of rent, after the expiration of six years from the date on which the arrears became due."

[32] Mr. Jones' affidavit in support of the claim expressly admits that portions of the arrears of rent accrued before the year 2016 are irrecoverable. This is as the claim was filed on 20th April 2022 therefore in accordance with **section 21** of the **Limitation Act** quoted above no rent which accrued before 20th April 2016 is recoverable.

[33] Mr. Jones is seeking arrears of rent of \$69,000.00 for the relevant period which would be from April 2016 to April 2022 when the claimant gave up possession. For ease of reference, I have summarized the information given at paragraphs of his affidavit as follows:

Year	Rent Paid	Arrears
2016	\$5000.00	\$7000.00
2017	\$2000.00	\$10,000.00
2018	\$0	\$12,000.00
2019	\$0	\$12,000.00
2020	\$0	\$12,000.00
2021	\$0	\$12,000.00
2022 (Jan to April)	\$0	\$4000.00
Total		\$69,000.00

³ Act No. 8 of 1997

[34] There is one problem with Mr. Jones' information as summarized above. This is that he is claiming rent for the whole of 2016. However, only rent from 20th April of that year can be claimed due to **section 21** of the **Limitation Act**. Accordingly, in respect of 2016 the claimant can only recover rent for the period 20th April 2016 until 31st December 2016. Thus (\$1000/30) which gives rent of \$33.33 per day and \$333.33 for the period 20th to 30th April 2016. When added to the sum of \$8000.00 for the period May to December 2016 rent payable for the remainder of the year 2016 was \$8,333.33. The sum of \$5000.00 which Mr. Jones admits was paid by the defendant that year must then be deducted. Therefore, the sum of \$3333.33 will be awarded as arrears of rent for the year 2016.

[35] The defendant has provided no evidence to dispute Mr. Jones' statements. This is despite stating in her evidence-in-chief that she had paid rent directly to Mr. Franklyn Simon. There are no receipts from Mr. Simon or contemporaneous notes made by her to show that the defendant paid rent to Mr. Simon instead of depositing it into Mr. Jeffers account.

[36] Thus, when the claim for the year 2016 is adjusted as outlined above, the claimant is entitled to the sum of \$65,667.67 as arrears of rent for the period 20th April 2016 to 30th April 2022.

Repairs to the Property

[37] The defendant seeks to set off from the arrears of rent sums which she has spent on repairs. In her affidavit the defendant exhibits various receipts in respect of alleged repairs to the property. Mr. Jones in cross-examination stated that he was not aware of any repairs carried out to the property by the claimant.

[38] The starting point is that a landlord has an implied covenant to keep the property in a state of repair. If the landlord fails to meet this obligation the tenant may seek to carry out the repairs at his or her own cost and set off this cost against the rent. In **Lee-Parker v. Izzet**⁴ Justice Goff stated:

"I do not think that this is bound up with the technical rules of set-off. It is an ancient common law right. I therefore declare that so far as the repairs are within the express or implied covenants of the landlord, the third and fourth defendants are entitled to recoup themselves out of future payments and defend any action for payment thereof."

⁴ Lee-Parker v. Izzet [1971] 1 WLR 1688 at page 1693

[39] However, in this particular case as I have already observed the defendant failed to carry out standard disclosure in accordance with the case management order of 19th May 2024. Having failed to do so, pursuant to CPR 28.13(1) the defendant may not rely on the receipts referred to her in affidavit. Accordingly, there is no admissible evidence as to the cost of repairs claimed by the defendant and the claim for a set-off against the arrears of rent claimed is hereby dismissed.

[40] However, even if I am wrong about the defendant being unable to rely on the receipts, I find that they are of no assistance. None of the receipts exhibited relate to the period for which rent is being claimed. In fact, some of these documents date back to 1990 and most seem to date from 2004 to around 2009. Thus, it is impossible for the sums to be set off against rent accrued in the period 2016 to 2022.

Destruction of Fruit Trees

[41] Mr. Jones on behalf of the claimant seeks damages of \$4500.00 for the destruction of mature fruit trees on the property. In re-examination the defendant did not deny destruction of the trees but stated that she had planted them. I reject this evidence in its entirety. Mr. Jones in his affidavit in support of the claim had raised the issue of the destruction of the fruit trees. The defendant thus had the obligation in her affidavit pursuant to CPR 10.5 “set out all the facts on which the defendant relies to dispute the claim.” Having failed to do so she cannot now state that she planted the trees for the first time at trial.

[42] Mr. Jones has given no evidence as to what type of trees were planted on the property nor did he explain how he arrived at a valuation of \$4500.00. This is a classic case where loss or damage has been proven but cannot be calculated with precision. In accordance with the principles outlined by the Privy Council in **Greer v. Alstons**,⁵ I will therefore award nominal damages of \$1500.00 for the destruction of the fruit trees.

Interest

[43] The claimant seeks interest pursuant to **section 27** of the **Eastern Caribbean Supreme Court Act**. In **Asot Michael v. Astra Holdings**⁶ at paragraph 73 the court stated as follows:

⁵ Greer v. Alstons [2003] UKPC 46

⁶ Antigua & Barbuda Civil Appeal No. 17 of 2004 (decided 23rd May 2005, unreported)

“The High Court has discretion in proceedings for the recovery of a debt or damages, to award simple interest on any sum for which judgment is given. Interest may be awarded with respect to all or part of the period between the date of the judgment or prior payment. The rate of interest and the period for which it runs are discretionary.”

[44] The Court of Appeal in **Terrance Amedee v. Marcus Modeste**⁷ has recently clarified the periods for which pre-judgment interest should be awarded. At paragraph 100 of the decision Michel JA states:

“Interest on general damages is to be paid from the date of service of the claim form to the date of judgment, while interest on special damages should be from the date of the loss to the date of judgment.”

[45] In this case the damages awarded are solely in respect of arrears of rent and destruction of the fruit trees. In accordance with the Court of Appeal decision in **Alphonso v. Deodat Ramnath**⁸ the rate of interest will be 2.5% per annum which is half of the statutory rate of 5%. Interest will run from 20th April 2022 until the date of judgment.

[46] The Claimant is entitled to post judgment interest pursuant to **section 7** of the **Judgments Act**⁹ as a matter of course.¹⁰ This will be at the statutory rate of 5% per annum on the global sum awarded as damages from the date of judgment until payment.

Costs

[47] The claimant is entitled to Prescribed Costs on the sums awarded pursuant to CPR 65.5 and Appendix B and I so order.

Order

[48] The court therefore orders as follows:

1. Judgment is entered against the defendant in the sum of \$67,167.67 in respect of arrears of rent and the destruction of fruit trees.

⁷ SLUHCVP2022/0001 (decided 9th November 2023, unreported)

⁸ (1997) 56 WIR 184

⁹ Cap. 227

¹⁰ Haynes Brown v. Neil Sergeant (ANUHCVP2018/0009, decided 20th June 2019) at paragraph 45

2. The defendant shall pursuant to section 27 of the Eastern Caribbean Supreme Court Act pay interest on the sum of \$67,167.67 at the rate 2.5% per annum from 20th April 2022 to the date of judgment.
3. The claimant is entitled to interest on the sum of \$67,167.67 pursuant to section 7 of the Judgments Act at the rate of 5% per annum from the date of this judgment until payment.
4. The claimant is awarded prescribed costs of \$12,575.15.

Rene Williams
High Court Judge



By The Court

Registrar