

**IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

Claim No: ANUHCv 2019/0618

BETWEEN:

**BERTYL ERICSON WESTE
(Lawful Attorney for Yvonne Veronica Terry the Personal Representative of Edward Terry)**

Claimant

and

**NATHANIEL MAYNARD
TOP RANKING LTD.**

Defendants

Appearances:

Kivinee Knight of counsel for the Claimant

Sherfield Bowen of counsel for the Defendants

2022: June 22nd

2023: February 22nd

JUDGEMENT

- [1] **Drysdale, J:** The Claimant filed these proceedings seeking relief for breach of a tenancy agreement.

THE BACKGROUND

- [2] The Claimant is the qua attorney for Ms. Yvonne Terry, the personal representative of the estate of Edward Terry, deceased, which estate owns the parcel of land registered in Land Registry as Registration Section Sutherlands Block 64-1892D Parcel 241 situate at Old Parham Road in the island of Antigua (hereinafter “the Land”).
- [3] Although the Defendants were in occupation of the Land from as far back as 2006 no formal agreement for the rental of the Land existed. In 2011 the parties executed the first lease. It

was for a period of three years and stipulated the rental to be the sum of \$300.00 per month. A subsequent lease was executed in 2014 for a period of one year and provided that the rental was the sum of \$400.00 per month. The final lease was executed in 2015 and provided a rental of \$500.00 per month.

[4] The Defendants failed to pay the rental thereby resulting in the Claimant issuing a notice to quit and deliver up the Land. However, the Defendants remained in possession of the Land causing the Claimant to institute these proceedings seeking the following reliefs:

- a. Vacant possession of the Land;
- b. Pay the unpaid rent and any charge for use and occupation up to the date an order is made;
- c. Pay rent and any charge for use and occupation from the date of the order until the claimant recovers possession of the property;
- d. Costs
- e. Legal fees and expenses
- f. Interest

[5] The Defendants filed a defence challenging the legal authority of the Claimant to institute this action. The Defendants also contended that the lease agreement was in breach of the Rent Restriction Act¹ (hereinafter “the Act”) in that the increased rental exceeded the statutory maximum capable of being imposed.

[6] The Defendants alleged to have been a tenant since 2003. The Defendants claim to have paid rental to David Weste, the father of the qua attorney in the sum of \$300.00 annually. The Defendants claimed that in 2011 and beyond the attorney for the Claimant bullied them into signing the various leases which in any event are in violation of the Act. The Defendants contend that based on the Act that rental has been paid through to the year 2030. The Defendants submit that the court make a determination of the legality the rent increases using the base year of 2006.

¹ Cap 378 of (12th September 1947)

- [7] The Claimant filed a reply reiterating that he is the lawful attorney and that the Defendants are indebted as claimed. The Claimant asserted that there has been no revocation of the power of attorney and the Grantor of the Power of Attorney is both alive and well. The Claimant further contends that the Act does not apply to these proceedings as the 15% cap on increase in the rental is only applicable where the standard of rent has been established.
- [8] The Claimant refutes that the Defendants paid rental to David Weste and stipulated that the said David Weste died in 2005 and thus no rents could have been payable to him in the circumstances.
- [9] The Claimant denied bullying the Defendants into executing the leases. The Claimant asserts that the Defendants occupied the Land prior to 2006 but states that this occupation until about 2011 was done without permission or the payment of any rental. On 1st May 2012 the Claimant filed a summons in the Magistrate's Court for vacant possession of the Land. The matter was settled by consent with the parties agreeing for the Defendants to compensate the Claimant in the sum of \$7,920.00. That subsequently they entered into two leases in which the monthly rental was increased to \$400.00 and \$500.00 respectively.
- [10] Only the Claimant gave evidence at trial. Save for an amplification in which he deposed that the Defendants had partially vacated the Land in February 2021 but left some concrete fixtures on the Land which he subsequently removed on 8th March 2022, his evidence in chief was consistent with his pleaded case. The Claimant was also cross examined. Although he was found to be generally credible some aspects of his evidence were found to be wanting. The effect of this will be explored in the judgment. For the purpose of this judgment, I will only reference such evidence as is pertinent to explain my decision.

THE ISSUES

- [11] The following are the issues for determination:
- a. Whether the Claimant is a proper party to these proceedings
 - b. Whether the Rent Restriction Act applies to the lease agreement

- c. Whether the Claimant is entitled to any damages

ANALYSIS AND LAW

Whether the Claimant is a proper party to these proceedings

[12] The Defendants contend that the Claimant is not a proper party as there is no valid power of attorney which allows the qua attorney to commence proceedings. For reasons which will become clear hereunder, this claim is untenable.

[13] By Power of Attorney dated 22nd May 2013, Yvonne Terry appointed Bertyl Weste to be her lawful attorney for the following:

‘purpose of managing all my real and personal estate and to act in conduct and manage all my affairs as he thinks fit and in respect to my beneficial interest in the Estate of EDWARD A. TERRY, deceased with power either by himself or other persons to execute documents of all kind, to prosecute or compromise legal or arbitration proceedings of all kinds, to compromise claims of all-kinds and to deal and manage all my affairs and to execute all or any of the following acts and deeds and things relating thereto, that is to say:-

1. To manage all my affairs in such manner as my Attorney shall think fit.
2. To commence carry on or defend all actions and other proceedings touching my affairs and in relation to my interest as beneficiary of the Estate of the said EDWARD A. TERRY, deceased, or any part thereof or touching anything in which I may be in anywise concerned.
3. To give such notices make such claims and to Institute any action or other legal proceedings in any court or to submit to arbitration for any purpose necessary to preserve my rights and interest in or recover possession of my properties and to defend all actions or other legal proceedings that may be brought against me in connection with my properties and to prosecute, discontinue or compromise all such

actions and to levy execution as my Attorney or his Legal Attorney or his Advisers shall think fit.'

[14] The Power of Attorney also expressly provided that it was irrevocable until revoked by the Yvonne Terry, or by the operation of law upon her death.

[15] There is no evidence that this Power of Attorney has been revoked or is in some manner unreliable. Given the clear terms which allow the attorney to manage all matters, sign all documents, issue any notices and commence legal proceedings touching and relating to her interest in the Land, there is no disability of Bertyl Weste acting as lawful attorney for the Claimant.

Whether the Rent Restriction Act applies to the tenancy

[16] Although the Defendants were in occupation of the Land from as far back as 2006 there was no formal agreement or any agreement for the rental of the Land. I accept the evidence of the Claimant that the Defendants occupation was without permission. I also accept the evidence of the Claimant that the Defendants never paid rent as alleged to his father in 2006 and beyond as his father died on 24th March 2005 which logically would make this an impossibility.

[17] The Defendants occupation was regularized by virtue of the first lease agreement executed in 2011. This lease set the rental at the sum of \$300.00 per month. This rental was increased in 2014 to the sum of \$400.00 and then later to the sum of \$500.00 pursuant to the lease of 2015.

[18] The Defendants contend that the various increases were illegal and in contravention of the Act. The Claimant counters that the Defendants had no difficulty with the rental and paid substantial sums thereto. The Claimant also suggests that the parties contracted out of the Act.

[19] Section 5(b) of the Rent Restriction Act provides that:

'It shall not be lawful for the landlord to increase the rent of-

(b) any building land or dwelling-house or public or commercial building to which this Act applies, other than a new building, to an amount which exceeds the standard rent by more than fifteen per centum unless the increase is sanctioned by the Rent Commissioners in accordance with the provisions of section 6.'

[20] The purpose of any rent restriction act is to keep rental expenses whether as it relates to living accommodation for commercial premises affordable. Therefore, a limit is placed on the amount that a landlord can demand from a tenant. In the case of Antigua and Barbuda it is 15%. Although, parties may contract out of the law this is only the case if statute permits or to do so would not be contrary to public policy. To buttress this, reliance is placed on Halsbury's Laws of England² which articulated the law on contracting out as follows:

'As a general rule, any person can enter into a binding, contract to waive the benefits conferred on him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that it would be contrary to public policy to allow such an agreement. Statutory conditions may however be imposed in such terms that they cannot be waived by agreement; and in certain circumstances, it is expressly provided that any such agreement shall be void.'

[21] The Act does not permit parties to waive their rights or contract out of its application. Further even if this was not the case nowhere in the lease agreement between the parties is there any term or provision that allows for the contracting out of the Act. The Claimant cannot rely on the conduct of the Defendants in adhering to the express terms of the agreement by paying the rental to establish that the parties were permitted to legally waive their rights and did in fact lawfully do so. Further, I am also of the opinion that objective of the Act was to regulate rent increases. This coupled with the attempt to set a mechanism for its operation

² Volume 22 (2019) para 242

gives rise to the view that the public policy would not allow for parties to contract out of its operation.

- [22] Notwithstanding the above I find that the Act does not apply in this instance. Whilst this may seem to be contrary given what has been said, the operation section 5 of the Act which caps an increase in rental to 15% is based on there being established a standard rent. The standard rent is defined in a specific manner and essentially is the rent fixed by the Rent Commissioners. The definition which is contained at section 2 of the Act reads as follows:

"standard rent" means in relation to any building land or dwelling-house or public or commercial building the rent at which the building land or dwellinghouse or public or commercial building was let on the 3rd day of September, 1939, or, where the building land or dwelling-house or public or commercial building was not let on that date, the rent at which it was let before that date, or, in the case of any building land or any dwelling-house or public or commercial building not being a new building but one which was first let after the 3rd day of September, 1939, a rent to be fixed by the Rent Commissioners appointed under this Act, or in the case of any new building, the rent at which it was first let: Provided that, in the case of any building land or dwelling-house or public or commercial building let at a progressive rent payable under a tenancy agreement or lease, the maximum rent payable under such tenancy agreement or lease shall be the standard rent.'

- [23] Whilst the Act provides that the Landlord can apply for the standard rent to be fixed or the same fixed by the Rent Commissioners, in reality there are no appointed Rent Commissioners. Although the definition above contemplates other means of establishing a standard rent none of these are applicable to this matter. Also there appears to be no other mechanism as it relates to this matter to determine the standard rent independently of the Rent Commissioners. Further there is no evidence that the Claimant or any person attempted to trigger the operation of this Act. Thus, there being no mechanism (at this time)

for operation of the terms of this Act, section 5 which is dependent on there being a standard rent is not binding on the parties. Thus, the agreed rental is not contrary to the Act.

Whether the Claimant is entitled to damages

- [24] It is not disputed that the Defendants ceased paying the rental from October 2016. The final lease came into effect 1st August 2015 and was for a period of one year. The effect of this is that the lease would have expired 31st July 2016. However, the parties continued operating under the same terms and conditions and as such by law this constituted a renewal of the lease for a further year. There being a valid lease the non-payment of rent constituted a breach thereof.
- [25] Where there has been a breach of contract the innocent party is entitled to be put in the position as if the contract had been performed. The Defendants were served with a notice to quit on 17th February 2017 which directed that they vacate the premises on 31st March 2017. This means that the Claimant is entitled to the sum of \$3,000.00 being the rental which should have been paid for the months of October 2016 to March 2017.
- [26] Upon the determination of a tenancy where a former tenant remains in occupation, a landlord can claim compensation for the continued use of the Land. This is known as mesne profits and is usually equivalent to the former rental. Halsbury Laws of England in a longer and more detailed description of what constitutes mesne profits expressed the following:

‘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 Defendants trespass, the landlord may recover as mesne profits the value of the Land to the Defendants for the period of the Defendants 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 Defendants continued occupation only after the expiry of his legal right to occupy the Land. The landlord is not limited to a claim for the

profits which the Defendants has received from the land, or those which he himself has lost.'

[27] The Defendants continued to remain in possession of the Land after the termination of the lease. In fact the Defendants were pursuant to an order dated 5th February 2021 directed to deliver up possession of the property on or before 28th February 2021. It was also ordered that any failure of the Defendants to comply with the terms of this order for the removal of the house may result in contempt proceedings being issued against them. The Claimant asserts that the Defendants left concrete structures on the property which were only removed a year later. As such vacant possession was only obtained on 8th March 2022. The Defendants dispute this and suggests that they vacated the Land in the month of February 2021 as ordered by the Court.

[28] Interestingly whilst the Claimant asserts that the Defendants conducted a leather business from the Land no information on the type of structure that the Defendants had on the Land was disclosed. To my mind if the said structure was anything other than a chattel house then the Claimant having most able legal counsel would not have sought to have the same removed as any fixture would by law automatically become part of the Land. The Claimant also did not provide any evidence of him hiring someone to remove the concrete structures he alleged were left on the property. Moreover, the Claimant did not seek to enforce the order of the Court which would have held the Defendants in contempt for failing to adhere to its clear terms. I find therefore that the Claimant has not provided sufficient evidence to establish that the Defendants did not vacate the Land as ordered. Thus, I peg the date the Defendants vacated the premises to be in line with the order of the Court being 28th February 2021. Applying the principles applicable to the recovery of mesne profits, the Claimant is entitled to be compensated the equivalent of the rental for the period April 2017 to February 2021 (\$500 x 47 months) which amounts to \$23,500.00.

ORDER

- a. The Defendants shall pay the Claimant arrears of rental for the period 1st October 2016 to 31st March 2017 in the sum of \$3,000.00.

- b. The Defendants shall pay the Claimant the sum of \$23,500.00 as mesne profits for the period 1st April 2017 to 28th February 2021.
- c. Prescribed Costs in accordance with CPR 65.11
- d. Interest

Jan Drysdale
High Court Judge

By The Court

Registrar