

ANTIGUA AND BARBUDA

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(Civil)

CLAIM NO ANUHCv2011/0745

BETWEEN;

ISLYN STAFFORD

Claimant

AND

ST JOHNS DEVELOPMENT CORPORATION

Defendant

Appearances

Dr David Dorset for the Applicant

Mr. Hugh Marshall for the Defendant

.....
2016: January 11

2017: March 7
.....

JUDGMENT

Introductory and Chronology

[1] **LANNS, J. [Ag]:** By Notice of Application, with Affidavit in support filed on the 23rd November 2011, the Applicant, Islyn Stafford sought "leave to apply for judicial review pursuant to CPR 2000, r. 56.3, and for interim relief and orders in the following terms:

- (1) An injunction prohibiting the Respondent whether by itself, its servants or agents or howsoever from taking any adverse action against the Applicant as threatened in the Respondent's letter of 17th November 2011, namely closure of and repossession of the Applicant's store at # 5 B at Vendor's Mall, Heritage Quay, St John's Antigua, a retail trading under the name of "I shall tell my Friends" until further order"

- (2) A declaration that the letter of 17th November 2011 is null and void and of no legal effect,
- (3) Leave is granted to the Applicant to apply for judicial review
- (4) The Applicant do file her Fixed Date Claim and Affidavit in support within 14 days of this order.
- (5) The matter to proceed in accordance with CPR 2000 r.56

[2] By Order made in Chambers on the 25th February 2011, James, J. [Ag] granted the orders sought at (1) (4) and (5) above of the Application:

[3] The settled order was in the following terms:

"IT IS HEREBY ORDERED THAT

- (1) The Respondent is prohibited whether by itself its servants or agents or howsoever from taking any adverse action against the Applicant as threatened in the Respondent's letter of 17th November 2011, namely closure of and repossession of the Applicant's store at # 5B at Vendor's Mall, Heritage Quay, St John's Antigua, a retail trading under the name of "I shall tell my Friends" until 9th December 2011
- (2) The Applicant do file her Fixed Date Claim and affidavit in support within 14 days of this order.
- (3) The matter to proceed in accordance with CPR 2000 r.56.
- (4) Interim injunction for a period of 14 days following today"

[4] By Fixed Date Claim Form with supporting affidavit, filed on 7th December 2011, the Applicant sought the same injunction along with the following reliefs:

- (1) A declaration that the Defendant's letter of 17th November 2011 is null and void and is of no legal effect, it being contrary to Article 8.01.2 of the lease agreement between the parties.

- (2) A declaration that the decision of the Defendant to deny the Claimant the benefit of a 40% waiver of rent every month since April 2007 as is accorded to other tenants is unlawful, illegal, and irrational.
 - (3) Restitution of the sum of \$54,960.80 and ongoing.
 - (4) Interest pursuant to section 35 of the Eastern Caribbean Supreme Court Act
 - (5) Costs; (6) Interest pursuant to section 7 of the Judgments Act; (7) Further or other relief as the court may consider just.
- [5] By order of Remy J, dated 3rd February 2012, the Defendant, on the 23rd February 2012, filed an Affidavit in Reply to the Affidavit in support of the Fixed Date Claim Form.
- [6] Thereafter, the matter seemed to have fallen into abeyance for three years, and was restored to the court's list in 2015. By then, the Applicant had retained new counsel. After a few adjournments the Application eventually came for hearing before me on the 29th February 2016 at which time, I heard oral arguments/submissions. At the hearing, neither party was interested in cross-examining any of the affiants. At the conclusion of the hearing, the parties were ordered to file written post hearing submissions, (which they did), and they were content to have the matter considered on the material before the court, and on the oral and written representations submitted by the parties.

Brief Background Facts

- [7] The Applicant is one of several tenants of the Respondent. She operates a souvenir store called "I shall tell my friends" at Vendors Mall at Heritage Quay, St John's Antigua.
- [8] The Defendant is a body corporate established under the St John's Development Corporation Act, Chapter 392 of the Laws of Antigua and Barbuda, and is engaged in private contracts pursuant to section 4 of that Act. The Defendant rents store units to tenants in its premises known as the Vendors Mall Complex, situate at Heritage Quay, St John's Antigua.
- [9] In or about the year 2007, due to adverse economic conditions, the Applicant, along with other tenants was granted a 40% waiver of rent, monthly, amounting to \$947.60 per month. In April 2007, the waiver was lifted in relation to the Claimant, for the month of April only, on account of the

alleged disorderly conduct¹ of the Claimant. The waiver was subsequently withdrawn in February 2010 on the ground of disorderly conduct and misbehavior displayed in the presence and hearing of cruise ship tourists; and apparently after the applicant allegedly made a certain report of shooting threats to the police.² The Claimant regards this waiver as an imposition of a fine, which she says is unreasonable.

- [10] On 31st December 2009, Senator, the Honourable Anthony Stewart wrote to the Claimant advising that on account of her unseemly violent, and confrontational behaviour exhibited in front of the cruise ship visitors, she would not be entitled to rent the premises for the period 1st to 31st January 2010, and further that she would not be entitled to qualify for the waiver of 40% discount rent upon resumption of her rental on 1st February 2010.
- [11] The Claimant apparently defaulted in the payment of rent for November 2011, and thus, by letter dated the 17th November 2011, the Defendant threatened closure of the Claimant's store unless she pays arrear of \$4,893.39. Notably, the Defendant has conceded that it could not lawfully close down the Claimant's store for nonpayment of rent unless the requisite one month demand for settlement had been given. In the affidavit in response of Senator Anthony Stewart, the Senator informed that no action was taken by the Defendant to evict the Claimant. In the result, the reliefs sought for at paragraphs 1 and 2 of the Application, as well as paragraphs 1 and 2 of the Claim Form, for injunctive relief, and for a declaration that the letter of 17th November 2011 is null void and of no effect, are no longer pursued, in contention, or necessary, as they have been overtaken by events and or effluxion of time

Issues

- [12] The main issue for the court's determination is: whether the decision taken by the Defendant to withdraw the waiver of 40 per cent rent discount in relation to the Claimant was unlawful, illegal and irrational; and (2) What, if any, damages is the Claimant entitled to recover? A corollary issue is whether the withdrawal of the waiver of rent was procedurally unfair and was a breach of natural justice.

¹ Engaging in a fight with another tenant in the presence of tourists and others

² See letter from the Defendant to the Claimant dated 31st December 2009

[13] For the reasons that follow, I give judgment for the Claimant against the Defendant.

Submissions of Mr Marshall

[14] In summary, the submissions for the Defendant are grounded on the following points:

- (1) The revocation of the waiver was not an unlawful or arbitrary decision; it was based on the fact that the Claimant had arrears of rent which automatically disallowed the 40% waiver. (Letter from the Defendant to tenants of Vendor's Mall dated 9th October 2006 relied on)
- (2) This is not a case of irrevocable election by waiver or even unlawful, illegal, or irrational action by the Defendant. The Claimant should have brought her claim in the law of estoppel.
- (3) Because the revocation of the 40% was lawful, there can be no restitution of \$54,960.80 and ongoing.
- (4) The Claimant has pleaded for interest pursuant to section 35 of the Eastern Caribbean Supreme Court Act instead of section 27. This claim is therefore defective and no application has been made to remedy the defect. In the result, the claim should be disallowed.
- (5) There are no damages sought other than the claim for restitution, and because the claim for restitution should not be allowed on the basis that revocation of the 40% waiver was lawful, there is no principal sum which should attract interest.

Other submissions of Mr Marshall

[15] The remedies sought by the Claimant are essentially private law remedies. (b) No public law remedies are sought by the Claimant; (c) Administrative law proceedings are not amenable to review the decisions of a public body that is not acting in discharge of public duties; (e) The acts complained of are in relation to the private function of the Respondent in its capacity as landlord. (**R v Pannel Takeovers and Mergers, ex parte Datafin** [1987] QB 815 relied on)³

³ To my mind, those submissions are more applicable to the Application for leave to apply for judicial review; leave has already been granted.

Submissions of Dr Dorset

[16] In summary, Claimant's submissions are grounded on the following points:

- (1) The Respondent revoked the waiver on the ground that the Applicant had engaged in misconduct on the 30th December 2009, which conduct as alleged, "has far reaching repercussions on Cruise Tourism Product of Antigua and Barbuda".
- (2) The Applicant was not afforded a hearing with respect to the charge of misconduct; and she denies the allegations of the Respondent.
- (3) Even though there is a contract between the Applicant and the Respondent the rights of the Applicant are not determined solely by contractual relationship. The rights attending to the Applicant's tenancy (including the right to be the beneficiary of a rent waiver) cannot be invaded or taken away except for just cause and in accord with natural justice. **(R v Barnsley Metropolitan Borough Council, ex p Hook [1976] 1 WLR 1052** relied on)
- (4) The Applicant has a constitutional right to liberty, which includes the right to work and to earn a living, and once she pays her rent and abides by the lawful restrictions imposed by the Respondent, she is entitled to operate her business at Vendor's Mall like other vendors who are also beneficiaries of the 40% rent waiver. Senator Stuart deposes in his affidavit in response that the variation is still in force.
- (5) The law should seek to treat like cases alike. In the instant case, other vendors were getting a 40% rent waiver. There was no proper basis, in the absence of natural justice for the Applicant to be treated differently.
- (6) The Defendant in withdrawing the 40 % waiver failed to take into account relevant consideration i.e. the representations of the Claimant. The Defendant, having obtained a report of an incident on 30th December 2009, proceeded by letter dated 31st December 2009, to withdraw the 40% waiver without hearing from the Claimant. The Defendant failed to act in accordance with public law principles and even in the context of a contractual relationship failed to act in accord with the principles laid down by the **Braganza v BP Shipping Ltd [2015] UKSC 17**.
- (7) The Defendant in revoking the 40% waiver was not merely dealing with the contractual relationship but was under a duty not to act in breach of the rules of natural justice.
- [8] The Defendant has not challenged the gravamen of the Applicant's complaint that she was denied natural justice and as a result, lost the 40% waiver.

- (9) Even if the nature of the case is such that it might have been more appropriate to bring an ordinary action for breach of contract, the fact that the Claimant has sought an administrative order is of no consequence. (**Central Tenders Board vs White Construction Services** [2015] UKPC 39 at paragraph [8], relied on);
- (10) The Claimant is entitled to damages equivalent to the value of the monthly 40% waiver from February 2010 to date..

Discussion and Decision

- [17] As previously stated, the only issue left to be determined is whether the withdrawal of the 40% waiver was unlawful and or unreasonable and a breach of natural justice. This issue was discussed in the oral and written submissions of Dr Dorset, learned counsel for the Claimant. Dr Dorset, in his written submissions, quite correctly stated that the Defendant has not challenged the Claimant's complaint that she was denied natural justice.
- [18] Was the withdrawal of the 40% rent waiver unlawful?. Paragraph 4 of the letter from the Defendant to the 'tenants of the public Market Complex and Vendors Mall' dated 9th October 2006, informed that "effective December 2006, all uncapped rent accounts will be entitled to a 40% waiver of rent due, once the accounts are kept current with a zero balance at the end of the month". Mr Marshall submitted that the waiver was revoked by virtue of breach of the terms under which it was granted, i.e. arrears of rent.
- [19] A reading of the letter from the Defendant to the Claimant dated 31st December 2009, as well as the Affidavit of Senator Stewart in response filed on 23rd February 2012, suggests to me that the question as to whether the withdrawal of the rent waiver was unlawful is completely and conclusively answered in paragraph 4 of said letter dated 31st December 2009, and paragraph 10 of the Affidavit of Senator Stewart. What I take from those paragraphs, in particular, and from the letter of 31st December as whole, is that the true reason for the withdrawal of the waiver of rent, was the alleged misconduct said to have been displayed by the Claimant on the 30th December 2009. Notably, there was no indication in the letter that the Claimant was in arrears of rent and thus, the waiver of rent would be automatically discontinued or withdrawn. As far as the Defendant was concerned, 'the conduct and behaviour [of the Claimant] displayed in full view and

hearing of the cruise visitors, including obscene and offensive language, is a violation of the rules and regulations outlined in the **Vendors Mall Handbook** under **Conduct and Behaviour. ...**"

[20] Further, the Defendant was of the view that it had been quite lenient with the Claimant with the numerous Inspectors' reports made about the Claimant's breaches, but was not prepared to let this latest infraction (the incident of 30th December 2009) go unnoticed. (See paragraph 3 of the 31st December letter).

[21] Had the Defendant shown in the letter of 31st December 2009, that the real or predominant reason for the withdrawal of the waiver of rent was that the Claimant's account was in arrears, and had given her the required notice to settle, then the Defendant's action in withdrawing the 40% waiver of rent may have been considered lawful because in truth and in fact, the entitlement to rent waiver was conditional upon the rents being up-to-date; second, the Defendant had no legal obligation to grant a waiver to the Claimant, and in that regard, no right would have been breached. But where, as in this case, the withdrawal of the waiver was linked to the alleged disorderly conduct of the Claimant, and has been found to be the true reason for the withdrawal of the waiver, then, in my judgment, the issue of natural justice which includes a right to be heard on the alleged misconduct, arises and there has been no challenge to this issue.

[22] Accordingly, the Claimant's case as to the unlawfulness of the waiver of rent, succeeds. Having determined as I have, I am not of the view that it is necessary to proceed any further. In any event, the case authorities, cited and presented by counsel for the Claimant all seem to support the submissions made on behalf of the Claimant, and are against the submissions of the Defendant.

Conclusion

[23] For the reasons stated above, I enter judgment for the Claimant for damages equivalent to the monthly 40% waiver from the 1st February 2010 to the date of trial on the 29th February 2016, less any sum that may be owed or outstanding to date, for rent; together with costs to be assessed under CPR 56.13 (5) if not agreed. The judgment attracts statutory interest at the rate of 5 % per annum from the date of judgment to the date of final payment.

[24] I am grateful to counsel for their helpful submissions and authorities.

A handwritten signature in cursive script, reading "Pearlitta E. Lanns". The signature is written in dark ink and is positioned above the printed name and title.

PEARLETTA E. LANNS
High Court Judge [Ag]