

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

CLAIM NO: ANUHCV 2005/0097

BETWEEN:

ADA BROWNE

Claimant

And

BELGROVE GREGORY

First Defendant

BGREGS & COMPANY LIMITED

Second Defendant

Appearances: Mr. Ralph A. Francis for the Claimant
Ms. Mary B. White for the First and Second Defendants

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2009: November 10, 11, 29

2010: February 2
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JUDGMENT

[1] **Thomas J (Ag.):** On 25th May, 2006, Ms. Ada Browne, the Claimant, filed a fixed date claim form¹ in which certain claims are made against Belgrove Gregory and Bgregs & Company Limited the First and Second Defendants, respectively.

¹ By order of Master Mathurin dated 28th October, 2005 , the Claimant was granted leave to amend the Claim Form and Statement of Claim to add Bgregs and Company Limited as a party to the action and to continue the proceedings by way of fixed date claim.

- [2] The Claimant in her amended statement of claim says that she is the registered proprietor of, and entitled to possession of commercial premises situated at Lower Market Street; St. John's; Antigua registered as Parcel 273; Block 66 1692E; Registration Section; St. John's South (the premises"). The Claimant further contends that the Defendants are tenants of the said premises at a monthly rent of \$12,000.00, with the term of the tenancy commencing 1st January, 2003, and determined by the Claimant on 21st April, 2004. The reason given being the non-payment of rent for six months.
- [3] It is the further averment of the Claimant, that the First Defendant on his own behalf and/or on behalf of the Second Defendant, acknowledged the non-payment of rent by letter and requested the Claimant's consideration of the payment of the arrears by monthly remittance of \$24,000.00 with effect from May 2004, and a cheque in the said amount was enclosed.
- [4] The Claimant says that by letter dated 4th June, 2004, the Claimant's attorney-at-law, on her behalf acknowledged receipt of the sum; but at the same time, it was indicated that there was no waiver of the Notice to Quit of 21st April, 2004.
- [5] At paragraph 6 of the statement of claim, the Claimant avers that the Defendants have failed to deliver possession of the premises to the Claimant and have remained in occupation as trespassers. Further, the Claimant details certain amounts of the arrears of rent paid by the First Defendant, namely \$24,000.00 on 26th October, 2004 and \$12,000.00 on 5th January, 2005. In this regard the Claimant avers that the First Defendant has not remitted any further sums and remains owing the sum of \$36,000.00.
- [6] In the premises the Claimant pleads that she is entitled to mesne profit at the rate of \$12,000.00 per month from 1st June, 2004, to delivery of possession. And it is the Claimant's further contention that there is due and owing in respect of the premises, as of 8th February, 2005, the sum of \$64,136.37 for utilities consumed by the First Defendant on the premises which account is in the name of the Claimant and which continues to accrue.
- [7] Accordingly, the Claimant claims:
- (i) An order for possession of the premises.
 - (ii) Arrears of rent in the sum of \$36,000.00.

- (iii) Mesne profit at the rate of \$12,000.00 per month from 1st June, 2004, to the date of delivery of possession.
- (iv) The sum of \$64,000.00 for utilities.
- (v) Interest pursuant to the Eastern Caribbean Supreme Court Act at the rate of 12% per annum on the sum of \$36,000.00 for 1st June, 2004, to judgment and at the rate of 8% per annum on all mesne profits accruing and due to the Claimant from 1st June, 2006, to the date of delivery of possession.
- (vi) Costs.

Defence and counterclaim of First Defendant.

- [8] In his defence filed on 5th July, 2005, the First Defendant avers that he is not a defendant on the matter. He imputes his knowledge and defence herein to his prior position as sole proprietor of Market Point Supermarket and his current personal status as 80% shareholder and Manager of the Second-Named Defendant which now trades as Market Point Supermarket.
- [9] The First Defendant further denies that he operates Market Point Supermarket as the Claimant contends.
- [10] At paragraphs 3 to 7 of his defence the First Defendant pleads the following:
- "1. On 17th November, 2000, the Second Defendant company, Bgregs and Company Limited with its object being to purchase the assets and liabilities of Market Point Supermarket from then onwards.
 2. On 23rd November, 2000, by a memorandum, duly signed by Belgrove Gregory, all staff of the Supermarket was duly informed of the new company and its objects and required to sign the said memorandum.
 3. At this time (23rd November) the Claimant was a member of staff of the Market Point Supermarket, being Assistant Manager.
 4. The Claimant signed the memorandum and also holds 20% of the shareholding of the new company.
 5. The formation of the new company was planned by the Claimant and himself in light of the introduction of the 2% business tax.
 6. A lease was executed by the Claimant and the Second Defendant on or about 18th October, 2002; but business activity on the Claimants' premises "until about the 14th March, 2003".
 7. Prior to the said date of 14th March, 2003, business was conducted in the Hadeed property."
- [11] In so far as the Notice to Quit is concerned, the First Defendant avers that he "blindly" authorized a member of staff to accept it and that when he saw it later he did not pay much attention as he was

not personally liable to the Claimant; and as such the document was served on the wrong party. It is further pleaded by the First Defendant that the 'erroneous acceptance' of the Notice to Quit does not make him a tenant of the Claimant.

[12] With respect to the acknowledgement of arrears of rent as pleaded by the Claimant at paragraphs 4 of her statement of claim, the First Defendant refutes the assumption made as regard his personal association with the written acknowledgement. It is the First Defendant's contention that at the time of the acknowledgement he was acting for and on behalf of the company. And with respect to the Claimant, the First Defendant avers that at all material times she was functioning as the Assistant Manager up to early 2004 and then unilaterally stopped functioning as such.

[13] Further denials pleaded by the First Defendant are in respect of: being in possession of the premises; being a trespasser on the premises; the payments of rent made were not made in his personal capacity, but as manager of the Second Defendant; liability for possession of the premises, rent, mesne profit; utilities or otherwise, separately or jointly.

First Defendant's counterclaim.

[14] It is the pleading of the First Defendant that at all material time:

1. the Claimant was fully aware that since 1st December, 2000, the First Defendant has not been and continues not to operate in his personal capacity as, Belgrove Gregory, as Market Point Supermarket;
2. the Claimant was aware that the Second Defendant trades as Market Point Supermarket of which Belgrove Gregory is Manager;
3. the First Defendant signed Belgrove Gregory in his capacity as Manager of the Second Defendant which since 1st December, 2000, had been trading under the name and style of Market Point Supermarket.

The First Defendant's counterclaims:

1. A Declaration that the name of Belgrove Gregory in his personal capacity and labeled as the First-Named Defendant in this matter is not a party thereto.
2. A Declaration that the First-Named Defendant in his personal capacity as Belgrove Gregory is not liable for any of the relief and or remedies claimed against him by the Claimant in the Fixed Date Claim and the related Amended Statement of Claim.
3. An Order that name of the First-Named Defendant being Belgrove Gregory in his personal capacity be struck-off and or removed as a party from this matter.

4. An Order that the First-Named Defendant shall not be liable for any relief and or remedies claimed or at all against him by the Claimant.
5. Such further or other relief as to the Court may deem just.
6. Costs.

Reply and defence to counterclaim of First Defendant.

- [15] In reply the Claimant joins issue with the defence of the First Defendant.
- [16] In her defence to counterclaim of the First Defendant, the Claimant contends that Belgrove Gregory is a proper party to the action and further that Bgregs and Company was the vehicle conceived and designed by the First Defendant to take advantage of the tax opportunities available under recently passed legislation.
- [17] It is the averment of the Claimant that she is aware that her premises were rented by the First Defendant and not by the Second Defendant and therefore denies that the First Defendant is entitled to the orders sought in his counterclaim.

Defence of Second Defendant.

- [18] In its defence the Second Defendant denies that the First Defendant operates a supermarket. Rather, it is contended that it has been trading as a supermarket under the style of "Market Point Supermarket" since 1st December, 2000.
- [19] The Second Defendant avers that on 23rd November, 2000, by way of memorandum, all staff members were informed that effective 1st December, 2000, a new company, Bgregs and Company Limited would purchase the assets and liabilities of Market Point Supermarket. The further averment is that the staff complement was informed in the said memorandum, would trade under the name of "Market Point Supermarket".
- [20] The Second Defendant contends that prior to the memorandum, the Claimant and the First Defendant jointly conceived and planned the formation of the Second Defendant in order to take over the operations named Market Point Supermarket and to also take advantage of the enactment of the new 2% business tax legislation. In this connection resolutions were passed by the Second

Defendant for the appointment of bankers and these resolutions were signed by the Claimant as 'Secretary' and Belgrove Gregory as Chairman.

[21] At paragraph 8 of its defence the Second Defendant details the lease entered into by the Claimant and the Second Defendant on or about 18th October, 2002, but contends that the activities of the Second Defendant did not commence until 14th March, 2003, due to extensive renovations to the leased property by the Claimant. In terms of the cost, it is pleaded that the Claimant and the Second Defendant contributed approximately 50% each.

[22] At paragraph 11 of its defence, in response to paragraph 3 of the amended statement of claim, the Second Defendant admit that it is the sole tenant of premises and the monthly rent is \$12,000.00. Also admitted is the payment of \$24,000.00 as rent on 31st May, 2004. The further contention is that the Notice to Quit was never served on the Second Defendant and as such it is not a trespasser, since rents were paid during the period identified.

[23] In respect of the lease itself the Second Defendant avers that by letter dated 28th December, 2002, new terms of an intended new lease were recorded; and that pursuant to the "new arrangement" the Second Defendant commenced monthly payments of \$12,000.00.

[24] At paragraphs 17 to 20, the Second Defendant addresses matters relating to the business. In particular its decline and efforts to seek the concurrence of the Claimant to sell the same which was eventually agreed with the proviso that she would not allow the Second Defendant to sell the business to any 'Syrian or any people like that'.

[25] At paragraphs 21 to 26, certain denials and admissions are pleaded by the Second Defendant. It is denied that the Second Defendant is a trespasser and that APUA is owed \$64,136.37, as claimed. On the other hand, it is admitted that APUA is owed for utilities consumed but a dispute exists as to the amount billed. Also admitted is the fact that no rents have been paid to the Claimant since 5th January, 2005.

Second Defendant's counterclaim.

[26] In its counterclaim the Second Defendant says that "at all material times the conduct and vindictive behavior of the Claimant contributed significantly to the actual decline of the business".

[27] At paragraphs 30 to 31 of its defence, the Second Defendant details the decline of the business during the period March 2003 to March 2006. Also pleaded is the depreciation of the equipment and appliances in the supermarket due to non-use during the same period.

[28] The Second Defendant counterclaims as follows:

1. Damages for loss of profits in an amount of EC\$350,000.00.
2. A Declaration that pursuant to paragraphs 16 to 17 hereof there was an intention to create a lease and the Claimant and the Second-Named Defendant acted thereon.
3. Damages for breach of the implied covenant in the lease for quiet and peaceful enjoyment of the premises by the Leasing being the Second-Named Defendant.
4. Damages for breach of the implied covenant in the Lease for unreasonably withholding consent to transfer the Lease.
5. Damages for breach of reasonable expectations as a going concern of the Second-Named Defendant.
6. A Declaration that the Second-Named Defendant is the sole tenant/Lessee of the Claimant at all material times.
7. A Declaration that the Second-Named Defendant was never served a Notice to Quit.
8. A Declaration that the Second-Named Defendant is not a trespasser.
9. A Declaration that the Second-Named Defendant is not liable to pay mesne profits to Claimant as claimed.
10. A Declaration that the Claimant be held responsible and liable to pay any outgoings to APUA from the period of 25th February, 2005 to the date judgment and be so ordered to do.
11. A Declaration that the Claimant be made liable for additional costs incurred by the Second-Named Defendant from its use of the generator subsequent to the disconnection of the APUA services as ordered by her.
12. Costs.
13. Interests on any sums found to be due and payable to the Second-Named Defendant pursuant to the Eastern Caribbean Supreme Court Act.
14. Such further or other relief as the Court may deem just.

Reply and defence to counterclaim of the Second Defendant.

[28] In Reply the Claimant joins issue with the defence of the Second Defendant.

[29] In terms of her defence the Claimant contends that except as a customer she has not entered upon or had any dealings with the business of the First and Second Defendants since the third week of December 2003.

[30] And at paragraph 10 of her defence to the Second Defendant's counterclaim the following is pleaded:

"10. The Claimant upon realizing that a lease of the 18th day of October, 2002 was entered between the Second-Named Defendant and herself advised the First-Named Defendant that the document prepared and presented to her on his behalf for signature as a document for a loan by the Bank did not represent what had been agreed by them. In the first place, the tenant ought to have been Belgrove Gregory and secondly the monthly rent ought to have been \$12,000.00 and not \$7,000.00. At the time that the lease agreement was presented for execution by the Claimant, the Claimant was ill and in bed. Of this the First- Named Defendant was aware. Hence, the agreement for the annulment of the lease of the 18th October, 2002, and new one including a monthly rental of \$12,000.00 was made as evidenced by the letter dated 28th December, 2002."

[31] Finally, at paragraphs 12 and 13, certain denials are pleaded. First, the Claimant contends that she did not request or caused the discontinuance of utility services, that is to say, water and electricity, to the premises. Second, that as of 31st January, 2005, the unpaid amount for such utilities was \$59,759.47. Third, responsibility for loss which may have occurred as alleged at paragraphs 30 to 31 of the Second Defendant's counterclaim.

Evidence

[32] In her witness statement filed on 28th November, 2006, the Claimant, Ada Browne details her relationship to the First Defendant, the various supermarkets opened by him during the period 1989 to 1994 and her employment with the First Defendant.

[33] With respect to the formation of the company, named Bgregs & Company Limited, the Second Defendant, the Claimant says this:

"Around the year 2000, the 1st Defendant advised me that due to the recent tax legislation introduced, a company was to be established to ease the burden of taxation on his business. The company was named Bgregs and Company Limited, the Second Defendant herein. I am not nor have ever been a shareholder in the Second Defendant in his defence has indicated that he is an 80% shareholder of the Second Defendant."

[34] With respect to the matter of the lease, the Claimant says that in or around October 2002, the First Defendant requested a lease of her property on Lower Market Street (the premises) to house his supermarket business. She says further that about the same time repairs were done to her

property in the amount of \$400,000.00. And further, that there was also another person who wished to rent the said property. It is Ms. Brown's evidence that her decision on the rental of the property was in favour of the First Defendant.

[35] Continuing on the matter of the lease the Claimant says this:

"7. On the 18th October, 2002, during a time of illness, I did execute a lease of my property on Lower Marker Street. Later I realized that under the terms of that lease, the lessee was named Bgregs and Company the Second Defendant with a monthly rental of \$7,000.00. Upon my realization of this, I informed the 1st Defendant that the lease did not represent that to which we had agreed. We agreed that he, Belgrove Gregory, would be the lessee and that the monthly rental would be \$12,000.00. It was on this basis that by mutual agreement the lease agreement signed by us on the 18th Day of October 2002, was declared to be null and void.

8. The 1st Defendant began operating his Supermarket business from my building in the Month of January 2003. He was experiencing cash flow difficulties and requested of me that I allow him a rent-free period. With my consent, rent did not become payable until the month of June 2003.

9. The 1st Defendant soon became in arrears in his payment of rent and on 21st April, 2004, a Notice to Quit was served on the 1st Defendant by which notice of the tenancy was determined on the 31st May, 2002, the 1st Defendant was indebted to me in the sum of \$36,000.00. The 1st Defendant has paid no further sums by way of rent and this is indebted to me in the sum of \$36,000.00 for rent mesne profits from 1st day of vacating the property."

[36] The witness goes on to give evidence that the First Defendant is indebted in the sum of \$64,136.67 for utilities consumed. She says further the accounts are in her name; but it was agreed that the First Defendant would be liable for the payments. In this connection Ms. Browne denies having requested the disconnection of the utilities of her property. She also denies being a 33 1/3% shareholder in the Second Defendant.

[37] In the circumstances, the Claimant asks the Court to award her the sum of \$36,000.00 for rent owed, mesne profits of \$12,000.00 per month from 1st June, 2004, to the date of delivery of possession; plus the sum of \$64,000.00 for utilities, interest and costs.

- [38] In an amplification of her witness statement Ms. Browne testified that she knew of the company Bgregs and Company Limited on paper work and she went on to testify that she never bought shares in the said company but before the case she was told that she was a shareholder.
- [39] On being referred to her witness statement at paragraph 14, the witness said she never received any of the \$36,000.00 owed to her or the mesne profits. And mention was also made of the \$64,000.00 owed for utilities which remains unpaid.
- [40] In cross-examination by learned counsel for the First and Second Defendants, the witness testified that she was familiar with the document, at page 67² of the Core Trial Bundle, and said further that it was her signature.
- [41] With respect to the registration of companies the witness said she was familiar with the procedure on account of the work with her husband. In the case of the subject company [the Second Defendant], the witness said that she did not file the documents relating thereto.
- [42] On being referred to page 118 of the Core Trial Bundle, Ms. Browne testified that it is a company resolution which was assigned on 31st July, 2001, which she signed and that it has to do with borrowing money from ABI Bank. She said further, that the same resolution appears at pages 119 and 120 of the Core Trial Bundle relating to different amounts.
- [43] It was then put to the witness that she knew of the company from the inception. This was denied. It was further put to the witness that she was a shareholder in the company. The witness responded by saying that she knew of the company and added that when the company was formed it was for the purpose of maximizing profits.
- [44] Regarding the lease of her property, Ms. Brown said that she signed the lease at pages 76 to 78 of the Core Trial Bundle which was supposed to be operative for 5 years and was intended to be the operative lease. It is the further evidence of the witness, that Mr. Belgrove and herself had difficulties in running the business which did not involve her flexing her muscle.

² Bring the Memorandum to "All Staff" dated November 23, 2000.

- [45] In reference to the letter at page 124 of the Core Trial Bundle dated 28th December, 2002, the witness accepted that she signed it and with regard to clauses 2(a)-(c) she explained that it was supposed to be a compromise which would have permitted the lease to be transferred. She said that she did not agree with this, but she added that the rent was agreed at \$12,000.00 per month and that the [original] lease was null and void and was not with the company.
- [46] With respect to the receipts appearing at page 128 of Core Trial Bundle, Ms. Browne said that she recognized them as being in relation to rent for her property. And in relation to the content thereof, the witness testified that Mr. Belgrove asked her to write them in this form.
- [47] On being referred to paragraph 11 of her witness statement, Ms. Browne said that someone at APUA handed her a bill for \$44,000.00. She denied instructing APUA and contends that she went there only to get a run down.
- [48] In relation to the restriction of the electricity, Ms. Browne said that she remembers Jerome Gregory being present at a meeting called for the purpose. And it is her further testimony that she informed Mr. Jerome Gregory that the money owed had to be paid since being a property owner she familiar with APUA's procedure.
- [49] After referring to paragraphs 11 and 12, of Jerome Gregory's witness statement, it was again put to the witness that she asked APUA to cut off the electricity. This was again denied. Further, the witness was referred to a letter³ dated 3rd March, 2005, at page 172 of the Core Bundle of Witness Statements and Documents and the response was in this form: "I see the letter. I did not order the electricity to be disconnected. I have no idea about the water. I did not know of the water. I spent \$400,000.00 to renovate the building. I did not tell Belgrove Gregory that I will give him \$500,000.00".
- [50] It is Ms. Browne's evidence that she recalls the meeting mentioned at paragraph 20 of Belgrove Gregory's witness statement but denied that the purpose was to discuss clauses 2(a)and(c) of the letter at page 124 of the Core Trial Bundle. It was then put to Ms. Browne, by learned counsel Ms. Mary B. White that she was asked to allow the business to be sold as a going concern. The response was that she could not recall any other meeting with the three of us.

³ The letter is written by Belgrove Gregory to the General Manager of APUA seeking permission to use a generator.

- [51] With regard to the company resolutions, at page 118 of the Core Trial Bundle, Ms. Browne testified that its purpose was to borrow \$400,000.00. She went on to testify that she signed the document with Mr. Gregory on behalf of the company in order to obtain money to be used by the company.
- [52] In reference to pages 178 and 196 of the Cored Trial Bundle, Ms. Browne testified that she had not seen them before. She also denied that they were discussed with her by Belgrove Gregory.
- [53] Regarding the status and ownership of the company, the witness testified that Mr. Gregory owned the supermarket which had merchandise and equipment such as, freezers, furniture and shelves, but there was no vehicle. However, according to the witness there were liabilities.
- [54] In relation to the issue as to whether or not Belgrove Gregory is a party to the action, the Claimant testified that he is the person to whom she rented the building and he owes her. She added: "Belgrove Gregory rented from me not the company. He owes APUA for the utilities. He does not owe me for the utilities, he owes APUA. Bgregs and Company Limited is not liable." The witness then went on to deny that she brought the company to its knees.
- [55] On being referred to paragraph 16 of Jerome Gregory's witness statement concerning a meeting held on 25th February, 2005, Ms. Browne said that the purpose of the meeting was to discuss bills to be paid and she did not recall the sale of the business being discussed. She then added that it was his business and he could have sold it to anyone he wished.
- [56] Finally, it was put to the witness that Market Point Supermarket is in debt because of her actions, she disagreed.
- [57] In re-examination, Ms. Browne said that there was some talk about Syrian people. She added: "Apparently I said something. The talk referred to selling to Syrians. I am not sure."
- [58] In further re-examination, the witness testified that: "The transfer of the lease was never discussed. I never refused to transfer the lease to a buyer".

Belgrove Gregory

- [59] In his witness statement filed on 27th November, 2006, Belgrove Gregory says that he is the General Manager of a company called Bgregs & Company Limited trading as Market Point Supermarket. It is also his evidence that the company is limited by shares of which are owned by Ada Browne and himself in the amounts of 20% and 80%, respectively. Also that the property housing the said supermarket is owned by the Claimant.
- [60] At paragraphs 7 to 10 of his said witness statement, Mr. Gregory explains the memorandum to all staff of the supermarket dated 23rd November, 2000, and the attendant circumstances and consequences.
- [61] It is Mr. Belgrove's evidence that a lease was entered into between the company and Ada Browne on or about 18th October, 2002, but no business activity took place therein until about 14th March, 2003. He also gives the reasons for the delay.
- [62] At paragraph 14 of the said witness statement the evidence is as follows:
"14. The Company admits [that it] has been the sole and only tenant for which a monthly rent of \$12,000.00 is paid. The Notice to Quit has never been served on the Company. A Notice to Quit was served on me in my personal capacity. I was not at the business when I instructed the staff by telephone to accept it. At that time the company was the tenant".
- [63] The witness admits the payment of rent by the Company, but denies that it is a trespasser.
- [64] At paragraphs 18 to 20 of his witness statement, the witness details the new intended lease with respect to the said premises. Reference is made to certain terms of the lease including that which says that the lease agreement signed on 18th October, 2003, "shall now be null and void." The terms of the intended lease were contained in a letter dated 28th December, 2002, recorded telephonically and then signed by the witness as General Manager of the company and by Ada Browne, as parties and Maynard Sowerby, as witness. He says that under this new arrangement he paid rent in the amount of \$12,000.00 monthly; but also admits that no rents have been paid since 5th January, 2005.

- [65] At paragraphs 20 to 23, Mr. Gregory's evidence is that in the face of the further decline of the business, efforts were made to persuade the Claimant to invoke clauses 2(b) and (c) of the new and intended lease arrangement. According to Mr. Gregory these were unsuccessful.
- [66] Mr. Gregory also contends that the Claimant is not entitled to mesne profits and he also denies that he is a trespasser. And as far as money owed to APUA is concerned, he admits that the company owes, but not in the amount of \$64,136.37.
- [67] Mr. Gregory maintains that the Claimant did order APUA to disconnect the services of water and electricity supplies to the company. He says further, that the fact that the Claimant ordered the disconnection was confirmed by APUA when he protested the said action of disconnection.
- [68] In cross-examination by learned counsel, Mr. Francis, Mr. Gregory testified that as far as the amounts owed to APUA are concerned, it is one third of the amount stated.
- [69] With respect to the shareholding in the Company, Mr. Belgrove testified that he holds 1000 shares while the Claimant holds 500 or two-thirds and one-third respectively. He explained further that the Claimant had money in Bgregs trading as Market Point Supermarket and when decision was taken to change, they both had inputs and for this reason they bought shares in the company.
- [70] Referring to page 103 of the Core Bundle of Witness Statements and Documents, Mr. Belgrove testified that this document indicates that on 1st December, 2000, the company took over the assets and liabilities of Belgrove Gregory trading as Market Point Supermarket.
- [71] With respect to his relationship with his sister, Mr. Gregory gave the following evidence: "Over the years my sister and I got on. "Over the years my sister and I got on, she lent me a lot of money over the years. I do not owe her money. We formed a company and that money went into the company. She loaned me about \$300,000.00 over time. She would have had bank drafts made out each time. I am not denying that there were loans. The company was formed on 17th October, 2000. Both of us were directors and Ada Browne was also the company secretary from day one."

- [72] On being referred to the lease at page 121 of the Core Trial Bundle, it is Mr. Gregory's evidence that both the Claimant and himself agreed that it was null and void. He explained that one of the reasons for the nullity is that the Claimant wanted to rent the building to him and not to the company. He added that they did not discuss who was to get the rent.
- [73] On being cross-examined on the performance of the company, Mr. Gregory admitted that the company was not doing well and that was the reason why he was trying to sell it. He said further, that the profit went from \$53,685.59 in 2001 to \$15,717.62 in 2002.
- [74] Returning to the matter of the lease Mr. Gregory testified that after the lease of October, 2002, there was no lease with any other person. Further, that Market Point Supermarket continued to be operated from Mr. Browne's building and the rent became delinquent.
- [75] Mr. Gregory was next referred to a letter at page 34 of the Core Trial Bundle to Ms. Browne relating to delinquency in paying and it was put to him that the letter was an acceptance of personal liability for the payment of the rent. This was denied by Mr. Gregory. And on the related issues of the format or content of the receipts, it was put to the witness that this was done at his request; but this was also denied.
- [76] In re-examination, Mr. Gregory said that the overdraft facility was not fully drawn down and that its purpose was to facilitate the moving of the business to new premises.
- [77] On the issue of the company's accounts which he prepared, Mr. Gregory said that they were never audited but they were accepted by the bank and advanced funds based on them.

Jerome Gregory

- [78] In his witness statement filed on 27th November, 2006, Mr. Jerome Gregory says that he is related to both Ada Browne and Belgrove Gregory.
- [79] Concerning the business relationship between Ms. Browne and Mr. Gregory, Mr. Jerome Gregory says that disagreements were frequent and he after had to act as a mediator. One such disagreement which he identified is the disconnection and re-connection of the electricity. Another is the permission sought from Ms. Browne to sell the business.

- [80] In cross-examination, Mr. Jerome Gregory said that he was aware of a company named Bgregs and Company Limited which was formed by Belgrove Gregory, but he did not know the details regarding that company.
- [81] With respect to the meeting of 25th February, 2005, mentioned at paragraph 12 of his witness statement, Mr. Jerome Gregory said that at that meeting his aunt said that she was told that the power to the building was to be cut off. He went on to say that Ms. Browne did not mention that she had asked anyone to disconnect the electricity.
- [82] In re-examination, Mr. Gregory said that the structure on Market Street has three stories. He also said that at the meeting on 25th February, 2005, there was a discussion about other matters such as the selling of the business, and my uncle's financial status. Finally, Mr. Gregory said that the suggestions regarding the sale of the business were rejected.

ISSUES

- [83] The following are the issues to be determined by the Court:
1. Whether the premises were rented to the First Defendant or the Second Defendant by the Claimant.
 2. Whether the Claimant is owed arrears of rent, public utilities and mesne profits, and, if so, in what amounts.
 3. Whether the Claimant is liable on the counterclaim of the First Defendant and the counterclaim of the Second Defendant.

Issue No. 1

Whether the premises were rented to the First Defendant or the Second Defendant by the Claimant.

- [84] It is common ground that a lease was executed by Ada Browne and Bgregs and Company Limited on 19th October, 2002. The lease provided for a term of 5 years from 1st January, 2003, and the rent was fixed at installments of \$7,000.00 per month.

[85] The execution of the lease was effected by Ada Browne as lessor and Belgrove Gregory as a director of Bgregs and Company Limited, the lessee.

[86] It is also common ground that on 28th December, 2002, Belgrove Gregory addressed a letter⁴ to Ada Brown on the Market Point Supermarket letter head. The full text of the letter is in these terms:

"Dear Mr. Browne,

As per our telephone discussion today, I would like to record our new terms concerning the leasing of your property on lower market street as follows.

1. The lease agreement signed by us on October, 18th 2002 shall now be null and void.
2. A new lease shall be executed by us as soon as possible to reflect the following basic terms:
 - (a) monthly rent of \$12,000.00
 - (b) a term of five years with option for an additional five years.
 - (c) Ability to transfer lease to a buyer with the same terms and conditions except that the rent shall be negotiated.

Sincerely yours
Belgrove Gregory
Manager

Agreed: Ada Browne - Dated: December 28, 2002
Witness: Maynard."

[87] It is in this context that the question whether the First Defendant or the Second Defendant was the tenant of the Claimant's premises.

Submissions

[88] The submissions on behalf of the Defendants are in support of the proposition that the Second Defendant was the tenant of the Claimant's premises.

"15. I submit that the determination of the identity of the Lessee is to be found not by referring to the Lease agreement of 18th October, 2002, or the memorandum of December 28th, 2002. The various correspondences and document exchanged between the Claimant and the First Defendant do provide the answer.

⁴ Core Trial Bundle page 124.

16. Furthermore, also of no importance to the determination of the main issue in this claim, are the following:

- (i) Memo of staff of intended take-over of the supermarket by the Second Defendant – P103.
- (ii) Banking resolutions P115/117.
- (iii) Corporate Resolutions p118-120
- (iv) All other documents pertaining to B.Gregs & Co.

This submission is made for there is nothing in the evidence to prove that any effective step(s) had been taken by the Company to purchase the entity known as Market Point Supermarket.

17. The documents which are relevant, it is submitted, include:

- (a) Receipts for rent paid in the name of Belgrove Gregory/B Gregs & Co. P 125-128
The Claimant gave evidence that the receipts were so written as requested by the First Defendant.

The First Defendant gave testimony that he did not scrutinize the receipts and was not aware of the manner in which they were written.

I submit that the receipts show involvement by both Defendants.

- (b) The correspondence found on p. 33 i.e. Notice to Quit; p34 Letter from Belgrove Gregory to Ada Browne; p37 Letter from Dave Hamilton to Belgrove Gregory.

All of these documents paint a picture of a transaction particular to the First Defendant.

18. I submit that any payments made by way of the banking account of the Second Defendant, is of no determining significance. The First Defendant was the only signatory to the account of the Second Defendant. He was the majority shareholder of that entity and could direct the manner in which its accounts were used.

Under the above circumstances, I submit that the preponderance of evidence falls on the side of the First Defendant being the Lessee and this liable for the sums claimed."

[89] At paragraphs 17 to 37 of her final submissions on behalf of the First Defendant and the Second Defendant the following are the salient propositions:

"23. [The Claimant] admitted that the purpose for forming the company was to purchase all the assets and liabilities of (the business proprietorship named 'Belgrove Gregory trading as Market Point Supermarket effective 1st December.

28. [With one exception] all supplies/creditors address themselves to Market Point Supermarket (pages 216, 217, 219, 220, 223, 224, 225, 226, 228, 229, 230, 231).

30. At pages 209 to 213 Loan Facilities were advanced to Bgregs and Company Limited, the Borrower, Belgrove Gregory provided personal guarantees and collateral of another sort.

32. Apart from the official nexus of Bgregs and Company Limited to Market Point Supermarket (prs. 20 to 23) supra and pages 56, 107). I respectfully point the Honourable Court to pages 103 and 124. The plural pronouns 'we' (103) and 'us' (124) are employed. In the 'we' it is to be imputed that Ada Browne as an officer of the company".....have formed a company named Bgregs and Company Limited which will trade under the name Market Point Supermarket.

33. Similarly at page 124 there are two 'us's. The Lease signed on 18th October, 2002, by Ada Browne in favour of the company was in fact a Lease made to the company trading as Market Point Supermarket (pages 76 to 78). That nexus had already been established.

34. Ada Browne ought not to be believed when she states at page 143 pr 7 – that she did not realize what she was doing.

36. On the evidence and the reasons adduced above, I respectfully implore the Honourable Court to find as a matter of fact that Belgrove Gregory in his personal capacity ought not to be a party in this matter and that the relief sought should be granted to delete his name from this action and from any associated liability. Further that the company, Bgregs and Company Limited be found as a matter of fact to be the tenant, thus the intended Defendant in the matter.

37. That the company was formed and operated as such has not been disputed by Ada Browne. She acknowledged that she was a party to the incorporation; she had equity in the company as a spinoff from investment made in the old Market Point Supermarket. She further acknowledged that she signed the corporate Resolutions agreeing to the borrowing that the proceeds of those facilities were requisite to the Company".

[90] It has already been established that in terms of a tenancy or otherwise, the document that must be construed is the letter to the Claimant from the First Defendant, Belgrove Gregory.

[91] It is common ground that the letter contemplates the execution of a new lease "by us as soon as possible." It is also common ground that no new lease was in fact executed but the Claimant property was occupied either by the First Defendant or the Second Defendant and the rent was paid in the amount contemplated by the said letter. The question is who was the tenant or otherwise.

[92] To begin with, learned counsel for the Defendants made a number of submissions which are aimed at showing the Claimants' involvement in the operation of the Second Defendant, including her office as the corporate secretary. These submissions overlook the basic rule of corporate personality which permits an individual to be a shareholder of a company and then in his or her personal capacity contract with the said company. What is more is that one of the leading cases

on point: *Lee v Lee's Air Farming Ltd*⁵ is cited. However, as far as learned counsel is concerned, the reasonable inference would be that the Claimant's concerns and intentions were with the Second Defendant. But there is much in the law and the evidence. First, the basis for nullifying the original lease was that the Claimant was confused *inter alia*, that she did not intend to contract with the Second Defendant. This is admitted by the First Defendant. Therefore, can it be reasonably said that on a second occasion the Claimant would again contemplate the Second Defendant? Thus the use of the word 'us' in two instances in the letter of 28th December, 2002, must reasonably and properly be interpreted to mean the Claimant and Mr. Belgrove Gregory. This conclusion is supported by another letter from Mr. Belgrove Gregory. It reads thus:

"Dear Mrs. Browne,

Concerning the arrears of rent for your property in All Saints Road, I am offering to update my delinquency by paying \$24,000.00 per month beginning May 2001.
I am enclosing the first check for \$24,000.00.
I hope this will be acceptable to you.

Sincerely
Belgrove Gregory
Manager".

- [93] There are some obvious points to be made regarding the letter: First it is dated May 31, 2004, which is some time after the intended new lease. Second, the use of the pronoun 'I' which can only refer to Belgrove Gregory himself. Third, the use of the phrase 'my delinquency' which, again, can only refer to the said Gregory himself.
- [94] Ms. Browne's attorney-at-law was quick in responding to Mr. Gregory's letter of May 31, 2004, and did so on 4th June, 2004. And among the matters raised were that the acceptance of the sum of \$24,000.00 in no way affects the notice to quit served and the liability for mesne profits.
- [95] With respect to the notice to quit Mr. Belgrove in his witness statement at paragraph 14 says in part that: "The Notice to Quit has never been served on the Company. A Notice to Quit was served on me in my personal capacity. I was not at the business when I instructed the staff by telephone to accept it. At that time the Company was the tenant."

⁵ [1961] AC 12 (PC).

- [96] What matters to the Court in these circumstances is the fact that Mr. Gregory was duly served with the Notice to Quit having instructed his staff to accept it on his behalf.
- [97] As indicated above, it is common ground that no new lease was ever executed, but the rent of \$12,000.00 was paid as agreed and the premises were occupied. The question that arises is the nature of the legal circumstances.
- [98] **Walsh v. Lonsdate**⁶ is authority for the proposition that an agreement for a lease is as good as a lease. This would tend to give some life to the letter 28th December, 2002, but at the same time section 46 of the **Registered Land Act**⁷ prescribes certain conditions with respect to leases or for a period exceeding two years. These include the requirements that such a lease must be on the prescribed form, it must be placed on the Land Register and it must be filed. Added to the foregoing, section 3 of the said Act proscribes any other law, practice or procedure relating to land registered under the Act "so far as it is inconsistent with this Act."

Conclusion

- [99] In all the circumstances, it is the conclusion of the Court that Belgrove Gregory is the person to whom the Claimant intended to rent her property. Further, given the fact that no new lease was executed and having regard to the relevant provisions of the **Registered Land Act**, the payment of the rent of \$12,000.00 per month and the acceptance of personal delinquency by the First Defendant; the absence of any documentary evidence to show that the company did in fact purchase the assets and liabilities of Market Point Supermarket; it is in the Court's further finding, that the First Defendant occupied the Claimant's property on a month to month tenancy, rather than the Second Defendant.

Issue No. 2

Whether the Claimant is owed arrears of rent, public utilities and mesne profits, and if so, in what amounts.

⁶ [1882] 21 Ch D 9

⁷ Cap. 374 (Revised Laws of Antigua).

- [100] It follows from the Court's conclusion that the First Defendant was a month to month tenant that he would be liable for any arrears during the common ground that this amounts to \$36,000.00.
- [101] As far as mesne profits are concerned the same reasoning would apply with respect to the period following the expiration of the Notice to Quit. It is dated 21st April, 2004, and required Mr. Belgrove Gregory to quit and deliver up the premises "now known as Market Point Supermarket" on or before 31st May, 2004.
- [102] It is the submission by Ms. Mary B. White, on behalf of the Defendants, that the company was the tenant at the material time it was served contrary to Part 5 Rule 7. She continues in this mode: "This is complicated by the fact that Ada Browne insists that the Notice to Quit was served on Belgrove Gregory in his personal capacity. The Company cannot therefore be led to be a trespasser as of 1st June, 2004."
- [103] There is no need to repeat the determination as to the tenancy, but the further point is that Ms. Mary B. White has ignored the clear evidence of her client that he instructed a staff member by telephone to accept the Notice to Quit. Indeed, in his letter of 31st May, 2004, no issue as to the Notice to Quit was raised by Mr. Gregory. Instead he sought "to update my delinquency". In any event, Part 5 of CPR 2000 has no relevance to these circumstances.
- [104] It is therefore the determination of the Court that Belgrove Gregory was duly served with the Notice to Quit and as such it is valid and effective.
- [105] Despite the notice, the First Defendant did not give up possession until 31st January, 2007. This means a total of 31 months at \$12,000.00 per month yielding a total of \$372,000.00 payable by the First Defendant as mesne profits.
- [106] The Court notes that learned counsel, Ms. Mary B. White, has advanced certain arguments based on the **Rent Restriction Act**,⁸ but the observation by the Court is that these do not arise from Defendant's pleaded case.

⁸ Cap 378 (Revised Laws of Antigua and Barbuda)

[107] As far as the arrears of utilities are concerned, the quantum can only be changed by the provider. There is no evidence that such an event took place and since there is no dispute that the services were rendered during the period of the occupation of the property the First Defendant liability falls accordingly. The evidence is that a total of \$64,136.37 is owed for the utilities which must be paid by the First Defendant.

Issue No. 3

Whether the Claimant is liable on the counterclaim of the First Defendant and the counterclaim of the Second Defendant.

First Defendant's counterclaim

[108] It will be recalled that the First Defendant counterclaimed: 1. a declaration that Belgrove Gregory in his personal capacity is not a party to the proceedings; 2. a declaration that the First Defendant in his personal capacity as Belgrove Gregory is not liable for any or relief remedies claimed against him by the Claimant; 3. an order that the Defendant in his personal capacity be struck off or removed from this matter; 4. an order that the First Defendant shall not be liable for any relief and or remedies claimed against him by the Claimant; 5. such further or other relief as the Court may deem just; 6. costs.

Analysis and Conclusion

[109] The ruling of the Court that Belgrove Gregory in his personal capacity was a month to month tenant of the Claimant's property is sufficient to negate all of the reliefs sought by the First Defendant. In addition there are certain critical aspects of the evidence which go to show that Belgrove Gregory in his personal capacity is a proper party to the proceedings and as such amendable to the reliefs sought by the Claimant. First, there is nothing in the evidence to prove conclusively that Bgregs and Company Limited in fact took over the assets and liabilities of Market Point Supermarket. Indeed, the memorandum dated 23rd November, 2000 was not even signed. Second, the letter of 31st May, 2004, to the Claimant is on the letter head of Market Point Supermarket is signed by "Belgrove Gregory, Manager". Third, in the said letter, in relation to the arrears of rent, Belgrove Gregory speaks of "my delinquency."

[110] In all the circumstances the First Defendant's counterclaim is dismissed.

The Second Defendant's counterclaim.

- [111] Stripped of non-essentials, the Second Defendant seeks the following: 1. Damages of \$350,000.00 for loss of profits; 2. Declaration as to intention to create a lease between the Claimant and the Second Defendant; 3. Damages for breach of covenants for quiet enjoyment, reasonable expectations [to sell the business as a going concern], implied covenant in the lease for unreasonably withholding consent to transfer the said lease; 4. Declaration that the Second Defendant was the sole tenant/lessee, was never served with a notice to quit, is not a trespasser and is not liable to pay mesne profits.

Submissions

- [112] For the Second Defendant the submissions by Ms. Mary B. White are as follows:

"50. Essentially the Company seeks compensation from Ada Browne for her direct and malicious conduct in contributing substantially to the demise of the Company as a viable business.

51. Learned Counsel went to great length in his oral submissions to analyze in a somewhat micro fashion, the accounts submitted by the Company (pages 196 to 198). These are unaudited accounts, and with respect, Learned Counsel's approach was flawed since he failed to appreciate that these accounts reflected not only the debts "purchased" as at the 1st December, 2000, but additional debts incurred since that date! Indeed, the efficacy of the financial statements could not have been that impaired as Learned Counsel attempted to project, since they were the basis on which the Bank (ABI Bank Ltd.) continued to advance loan facilities to the Company (page 210, pr4; 212, pr4). And Ada Browne acquiesced by signing the Corporate Resolutions to facilitate the said borrowings (pages 118 to 120).

52. Clearly, the Bank must have perceived that there was viability in the Company to service its debts, thereby justifying their continued financial assistance to the Company. So what went wrong?

53. The evidence is that the Company decided against taking legal action against Ada Browne when she arbitrarily and unilaterally raised the rent from \$7,000.00 to \$12,000.00 per month (page 124). Clause 2c was unable to maintain the additional \$5,000.00 which the evidence for the Company reveals was not contemplated in its financial planning. Learned Counsel suggested to the Court that \$7,000.00 was below market. He did not substantiate it.

- [113] The submissions by Mr. Ralph Francis on behalf of the Claimant are in these terms:

"20. Counterclaim of the Second Defendant: p87 to 89

I submit that the Second Defendant has led no evidence to substantiate any of the heads of damage counterclaimed.

21. The Second Defendant counterclaimed for the following:

Loss of profits in the amount of \$350,000.00; it has been admitted that for years, the business had been losing money.

"Spiteful conduct of the Claimant in requesting the discontinuance of electricity supply" – No evidence led to this. To the contrary, there were arrears of nearly \$60,000.00 for electricity consumed, which by itself, resulted in the suppression of the supply.

Equipment value rapidly declined because of not being used – no evidence to establish value; decline of value and nexus with non-use led.

22. I submit that the Second Defendant has failed to prove its counterclaim. I would further submit that not much attention was paid to this at trial. I ask that it be dismissed.

23. In conclusion, I ask that this Honourable Court should find in favour of the Claimant and dismiss the counterclaims with cost and interest on the claim and costs on the counterclaim."

Analysis and Conclusion

[114] It must be that the Second Defendant's counterclaim is well intended, but as learned counsel for the Claimant, Mr. Ralph Francis has submitted, the evidence has simply not been adduced. For it cannot be that liability will rest simply on the proposition that one person caused the electricity to be disconnected and without more liability will arise in different directions.

[115] In the circumstances, the Court finds it necessary to make the point that there is no evidence of the type of equipment used at the supermarket. Rather, the balance sheet as of 11/30/02 under fixed assets lists Machinery and Equipment to a value of \$459,834.00.⁹ The balance sheets, as admitted by Mr. Gregory, are not audited. And he sought to persuade the Court of their veracity by saying that the bank advanced money based on these documents. But the point is that a bank and a Court of Law are in two different spheres of life. The former takes risks in an effort to make a profit and the latter does not in the interest of justice. More importantly, however, when Mr. Belgrove Gregory was cross examined on the balance sheets income statements he admitted that the net income of \$15,717.62 for the month ending 11/30/02 was an indication that the company was doing well and hence his reason for trying to sell it. And the fact that

⁹ Core Trial Bundle of Witness Statements and Documents, page 196.

Mr. Belgrove is a qualified accountant must be a major constituent of the equation.

[116] Central, it would appear, to the counterclaim is the contention that the Claimant caused the electricity to the premises to be disconnected. This evidence is given by Mr. Belgrove Gregory and Mr. Jerome Gregory. In spite of this, the Court accepts the Claimant's evidence that she did not cause the disconnection. In any event, given the level of arrears, it becomes difficult for the Court to accept that disconnection would not come sooner rather than later, at the initiative of APUA.

[117] In all the circumstances, the Court agrees that the Second Defendant's counterclaim is not proven and is hereby dismissed.

Interest

[118] It is within the province of the Court to award interest on the damages. Accordingly, interest at the rate of 8% is awarded with respect to the \$36,000.00 for arrears of rent from 1st June, 2004, to judgment. Further, interest is awarded at the rate of 6% on the award of \$372,000.00 from 1st June, 2004 to 31st January, 2007.

Costs

[119] The Claimant has succeeded against the First Defendant and the Second Defendants. In addition the Defendants have not succeeded on their counterclaims. Accordingly, the First Defendant must pay the Claimant prescribed costs on the value of the award in accordance with Part 65.5 (2)(a) of CPR 2000. The First Defendant must also pay the Claimant costs on its counterclaim in accordance with Part 65.5 (2)(b)(iii) of CPR 2000. Further, the Second Defendant must pay the Claimant costs on the value of the counterclaim in accordance with Part 65.5 (2)(b)(i) of CPR 2000.

ORDER

IT IS HEREBY ORDERED AND DECLARED as follows:

1. The First Defendant in his personal capacity was a month to month tenant on the premises for the period 28th December, 2002 to 31st May, 2004.

2. By virtue of the said monthly tenancy the First Defendant is liable for the arrears of rent which amount to \$36,000.00.
3. The First Defendant is also liable for mesne profits for the period 31st May, 2004 to 31st January, 2007 in the amount of \$372,000.00.
4. The First Defendant is further liable for the arrears of public utilities owed to APUA, on the Claimant's account, in the amount of \$64,136.37.
5. The First Defendant's counterclaim is dismissed.
6. The Second Defendant's counterclaim is dismissed.
7. The First Defendant must pay the Claimant interest on the arrears of rent (being \$36,000.00) at the rate of 8% from 1st June, 2004 to judgment, and further interest at the rate of 6% on the mesne profits (being \$372,000.00) from 1st June, 2004 to 31st January, 2007.
8. The First Defendant must pay the Claimant costs on the value of the award in accordance with Part 65.5 (2)(a) of CPR 2000, unless otherwise agreed.
9. The First Defendant must pay the Claimant costs on its counterclaim in accordance with Part 65.5 (2)(b)(iii) of CPR 2000, unless otherwise agreed.
10. The Second Defendant must pay the Claimant costs on its counterclaim in accordance with Part 65.5 (2)(b)(i) of CPR 2000, unless otherwise agreed.



.....
Errol L. Thomas
Judge (Ag.)