31/7/2007

Civil

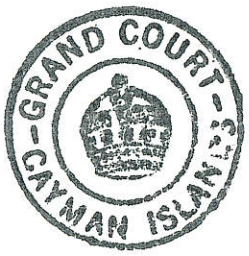
IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 216 OF 2004

BETWEEN: **JOE'S DOWNTOWN LIMITED**

Plaintiff

AND: **(1) GOLDIE PANTON**
(2) PRENTICE PANTON
(3) STANLY PANTON
(4) DANNY SOTO
(5) SHERRLYN SOTO



Defendants

AND: **JOELLE MCCRAE**

Third Party

Appearances: **Mr. Stephen Hall-Jones instructed by Mr. Scott Wilson of Diamond Law Associates for the Plaintiff and the Third Party**
Mr. Norman Hill Q.C. instructed by Ms. Keva Reid of McKinney Reid & Company for the Defendants

Before: **Hon. Justice Henderson**

Heard: **July 31, 2007**

RULING

1. THE COURT: The plaintiff, Joe's Downtown Ltd., and its sole owner and operator, Joelle McCrae, entered into a rental agreement with the defendants. In a previous ruling, I have found as a fact that the plaintiff company and Joelle McCrae, in his personal capacity, were co-tenants under the agreement. This was an oral agreement, never reduced to writing.

2. The company planned to operate a restaurant known as "Joe's Downtown" on the rented premises. There is a dispute about whether there was an oral lease or a periodic tenancy,

but I need not decide that particular issue because of the conclusion to which I have come.

3. The tenants agreed to pay monthly rent. After a period of some months had passed, the tenants were behind in the rent. Negotiations began but never reached any satisfactory conclusion.

4. Eventually the patience of the landlords disappeared and Miss Sherrlyn Soto, on behalf of the other defendants and herself, wrote as follows to the co-tenants on December 31, 2003:

> "As the rent was not paid, the locks will be changed on our building on January 1st, 2004 and all stock and fixtures should be removed by midnight tonight. If you wish to remove any items left in the building, you will have to contact your lawyer who will, in turn, have to contact our lawyer. Therefore, no attempts should be made to enter the premises after midnight tonight December 31, 2003, and any attempts to enter the premises by anyone will be deemed as trespassing and/or burglary and the Royal Cayman Islands Police will be called to investigate and prosecute."

5. The next day the landlords caused the locks to be changed. Around noon on January 1st, 2004, a representative of the landlords, Mr. Stanley Panton, attended at the building with two police constables and three security guards. The locks were changed at that time and a new code was set up on the monitored security system. Mr. Panton retained possession of the new code and the key to the new locks.

6. In a letter dated January 1st, 2004 to Mr. Peter Polack, Sherrlyn Soto said:

> "I explained we would change the locks on January 1st, 2004 as advised, and if [the tenant] needed more time, he would have to speak with Prentice or Stanley, as they would be occupying the building and would have the

new key. If they agreed to him having extra time, then he would have to pay us to have the lock re-keyed once more. He did not contact them." (Prentice and Stanley were two of the defendant landlords.)

7. On the same day, January 1st, Mr. Stanley Panton wrote to Mr. Wade DaCosta, who was then acting for the co-tenants, and demanded payment of what he called "pro-rated rent (storage fee)" from 1st January 2004 until the matter is concluded. Given the context, I consider that what Mr. Panton was requesting was not rent, but a fee for the storing of the goods and chattels left behind by the co-tenants in the premises. On the same day, Stanley Panton, in a letter to Caribbean Security, described the situation as follows:

> "This letter will confirm our telephone conversation wherein you were advised that Mr. Joelle McCrae was being evicted from the Joe's Downtown building on Mary Street and that all existing alarm codes should be removed from the system. I have asked Mr. Andrew Copeland of Hawkeye Security to contact you with regards to obtaining a security code for the building for himself, as none of the owners -- myself included -- wish to have access to the property at this time. It is also my intention to have all the locks on the doors changed to ensure maximum security at the building."

8. Finally, Mr. Panton wrote to Wade DaCosta on January 5th, 2004 and said, in part:

> "If payment of the outstanding monies is received by the property owners, Mr. Joelle McCrae can collect his equipment. However, there will be a daily rent charged for every day the building remains occupied by him."

9. In the result, the co-tenants did not pay the rent which was owing. They were allowed to remove a few items from the premises on January 1st, 2004, but had no access to the premises thereafter. Eventually, the landlords sold the chattels and goods of the co-tenants which were left behind on the premises.

10. This action is for wrongful distraint. I have conducted a trial on the question of liability only, deferring the question of damages.

11. The evidence I have quoted from the letters, which is not contradicted by any oral evidence, demonstrates that this tenancy was terminated at midnight on December 31, 2003. Thereafter, the relationship of landlord and tenant ceased to exist. The locks were changed the next day and, at that point, occupation of the premises changed from the co-tenants to the landlords.

12. The tenants could have collected their equipment -- that is to say, the landlords would have allowed them to take possession of the goods and chattels on the premises -- but only if they paid the rent owing and the additional storage fee demanded by the landlords. The witness statement of Stanley Panton makes this position clear. At paragraph 5 Mr. Panton says:

> "Mr. McCrae just needed to pay his debts to us and he could have left the property with all the items that he said belonged to him, as the locks were only changed to prevent him continuing to do business without paying the rent. Everything was kept locked inside the building at 102 Mary Street after January 1st, 2004 while I tried to get Mr. McCrae to pay his debt to us, after which he would have been allowed to remove everything."

13. The weight of the evidence is entirely against the proposition that the co-tenants were in occupation of the premises at any time after the locks were changed on the morning of January 1st, 2004.

14. The law of distraint is one of the more obscure and arcane areas of the common law, and this case is a vivid illustration of that. The leading text on the subject is *Gray and Gray,*

Elements of Lands Law, 3rd ed., Butterworth's, 2001. At page 1295 et seq., the authors say this about the right to distrain:

> "The landlord's right to distrain arises as soon as any rent is in arrears during the subsistance of the tenancy, and the right continues for six months after the termination of the tenancy if the former tenant is still in occupation of the same premises. The remedies of distress and forfeiture are mutually exclusive. Distress is premised on the affirmation of a landlord tenant relationship, whilst forfeiture marks an unequivocal election by the landlord to terminate that relationship. It follows, therefore, that distress cannot lawfully be levied where the landlord has already exercised his right to re-enter the demised premises."

15. There are footnotes cited in that passage which are pertinent. The assertion that the right continues for six months after the termination of the tenancy if the former tenant is still in occupation of the same premises is derived from the Landlord and Tenant Act 1709, sections 6 and 7. The assertion that distress is premised on the affirmation of the landlord tenant relationship, whilst forfeiture marks an unequivocal election by the landlord to terminate that relationship, contains a reference to this footnote:

> "The landlord cannot 'have its cake and eat it too'. *Country Kitchen Limited vs Wabush Enterprises Ltd.*, (1981) 120 ELR 3rd 358 at 362. The mutually exclusive nature of the remedies cannot be reversed by express contractual provision: *Re Coopers & Lybrand Ltd. and Royal Bank of Canada* 1982, 137 ELR 3rd at 356 at 360."

16. Finally, the assertion that distress cannot lawfully be levied where the landlord has already exercised his right to re-enter the demised premises refers to a footnote containing this:

> "*Kirkland vs Briancourt*, (1890) 6 ELR 441. Forfeiture will be established by any act so inconsistent with the continuance of the tenant's term that the landlords were estopped from denying it was at an end: *Oastler vs Henderson*, (1877) 2 QBD 575 at 577. Thus, the landlord's right to distrain is lost if he changes the locks on the doors of the demised premises and denies the tenant entry: *Country Kitchen Ltd. vs Wabush Enterprises Ltd.*, supra; *Re Coopers & Lybrand Ltd.*, supra. But not if he merely sends a letter demanding payment of existing arrears of rent: *Cameron vs Elderado*

Properties, (1981) 113 ELR 3rd, 141 at 145."

17. I should say, because most of the authorities cited are Canadian authorities, that the text is an English text and purports to state the law as it is in England and Wales.

18. The principle established by the Act of 1709 is carried over, to a limited extent, in Cayman Islands' legislation. Section 23 of the *Landlord and Tenants Law* (1998 revision) provides as follows:

> "Such arrears may be distrained for after the end or determination of such term or lease at will in the same manner as if such term or lease had not been ended or determined: provided that such distress is made within the space of six months after the determination of such term or lease and during the continuance of the possession of the tenant from whom such arrears became due."

19. The phrase "such arrears" which begins that section is a reference to the previous section, section 22, which deals with arrears of rent owing to a landlord who has passed away and whose executors or administrators wish to exercise the right of distraint. Thus, a parallel to the English legislation exists here but only applies in very limited circumstances where an executor or administrator of a landlord seeks to distrain.

20. In my view, the case is governed ultimately by the passage I have read from *Gray and Gray*, which I take to be representative not only of the common law but of the law of the Cayman Islands. The right to distrain is an incident of the landlord tenant relationship. It disappears (in the absence of statutory provision to the contrary) once that relationship is determined.

21. The landlord and tenant relationship between the present parties was determined, at the latest, when the locks were changed and, quite likely (although I need not decide this), when Miss Sherrlyn Soto delivered her letter of December 31st, 2003. In either event, the right to distrain had disappeared by midday on January 1st, 2004 and any distress levied thereafter was, I find, unlawful. Liability has therefore been established.

22. I should not leave this decision without remarking again that it illustrates just one arcane aspect of the law of distress. There are several others. In my view, the whole topic should be referred to the Law Reform Commission for its recommendations as to how the law might be brought into accord with modern landlord and tenant relationships.

...

23. THE COURT: I will award judgment to the defendants on their counterclaim for unpaid rent in the amount of $34,550 plus interest thereon at the appropriate rate. That amount is to be set off against any damages which maybe awarded to the plaintiffs ultimately.

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24. THE COURT: My judgment is stayed until the assessment of damages on condition that the plaintiffs move expeditiously to have that assessment set down.

Dated this 31st day of July, 2007

GRAND COURT - CAYMAN ISLANDS

Henderson, J.

Henderson, J.
Judge of the Grand Court