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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN GRAND CAYMAN -Civil

CAUSE No. 524 of 2002

BETWEEN: IRVIN BANKS

PLAINTIFF

AND: RICHARD ARCH
MARGARET ARCH

DEFENDANTS

APPEARANCES:

Anthony Akiwumi of Stuarts for the Plaintiff

Kyle Broadhurst of Broadhurst Barristers for the Defendants

GRAND COURT
CAYMAN ISLANDS

BEFORE: MR. JUSTICE SANDERSON

Hearing Dates: March 2, 3, 4, 19, 2004
April 5, 7, and 8, 2004
August 16 and 17, 2004
May 23 and 24, 2005

JUDGMENT

1. The Plaintiff alleges that he entered into an oral lease with the Defendants to lease a restaurant on the third floor of the Landmark Building on Harbour Drive in George Town, for a period of ten years commencing July 13, 1996. The alleged terms were in part:

   (i) the premises would be rent free until September 30, 1996;

   (ii) for the three months from October 1, 1996 to December 31, 1996 the Plaintiff would pay rent of $3,000 per month; and

   (iii) from January 1, 1997 the Plaintiff would pay rent of $5,000 per month.

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2. The Plaintiff was unable to make any of those rental payments. By March 20, 1997 he was $21,000 in arrears. On March 26, 1997 he advertised in the Caymanian Compass stating that the "entire restaurant fixtures, fittings and equipment for quick sale" and that, "everything must go quickly". On March 27, 1997 the Defendants destrained on the chattels and goods located in the restaurant. The Plaintiff now sues claiming:

(i) the Defendants wrongfully forfeited the ten year lease;

(ii) the Defendants, having forfeited the lease, therefore had no right to destrian the goods;

(iii) alternatively, the Defendants are estopped from denying the ten year lease;

(iv) alternatively, the Defendants committed an anticipatory breach of the ten year lease;

(v) alternatively, if the Defendants had any legal right to distrain, they failed to comply with the relevant provisions of the *Landlord and Tenant Law* and the distraint, therefore, was illegal;

(vi) alternatively, if the Defendants did have a legal right to distrain, then it was irregular or excessive and the Plaintiff has suffered damages as a result.

3. The Defendants allege that the Plaintiff surrendered the lease and therefore issues (i), (ii), (iii) and (iv) above are disposed of in the Defendants' favour. The Defendants then say that they were entitled to destrain on the goods and that the distraint was not irregular or excessive.

Did the Defendants forfeit the lease or did the Plaintiff surrender the lease?

4. I conclude that the Plaintiff surrendered the lease. It is, therefore, not necessary to determine if the lease was a periodic month to month tenancy or a ten year lease. Although if it was required, I would conclude that the terms of the lease were, as

described by Mr. Arch, namely; the tenancy was month to month until such time as Mr. Banks obtained proper financing and established his restaurant business at which time Mr. Arch would grant a five year lease with an option to renew for a further five years. As of March 26, 1997 neither of these events had occurred and there was, therefore, no five year lease in place but rather a month to month tenancy.

5. The Plaintiff took possession of the premises on approximately July 15, 1996. He had entered into a separate contract with Mr. Arch's daughter to purchase all of the assets and goodwill of the Bayview Restaurant (which was located in the leased premises) for a price of $30,000 C.I. One of the terms of the purchase agreement was that Mr. Banks would pay an additional $10,000 to an architect for the purpose of redesigning a new entrance. He was unable and never did pay that $10,000. He had also agreed to pay for the stock and inventory on hand (an amount between $1,000 and $2,000) but he was also unable to pay that amount.

6. The restaurant did poorly from the beginning. The Plaintiff was unable to pay rent for the months of October, November and December, 1996. By December, the Plaintiff had been unable to pay the utility bills and power was cut off. In December the Plaintiff asked Mr. Arch if he would guarantee a loan of $6,000 so the Plaintiff could pay his bills and get back into business. Mr. Arch agreed and guaranteed a loan from the Bank of Butterfield to the Plaintiff. The Plaintiff was ultimately unable to repay that loan and the bank called upon Mr. Arch to pay under the guarantee, which he did. The amount was $6,309.10. In addition, Mr. Arch paid the restaurant's utility bill in December in the amount of $1,009. Neither of these amounts were repaid by the Plaintiff to the Defendants. The Plaintiff was also unable to pay his staff in full.

7. In December 1996 Mr. Arch agreed with the Plaintiff that he would not have to pay the $3,000 per month rent for October, November and December but the Plaintiff understood that those payments were being deferred and not forgiven. The Plaintiff understood that he would still ultimately have to pay them. His plea of estoppel in respect of that $6,000 for rent, therefore, fails.

8. On January 20, 1997 the Plaintiff asked Mr. Arch if he would be agreeable to the Plaintiff trying to sell his restaurant in order to pay his debts. Mr. Arch agreed and the Plaintiff advertised the restaurant looking for investors or a purchaser. The Plaintiff was unsuccessful in these endeavours.

9. The Plaintiff closed his restaurant in the evenings and only operated during lunch in order to save on overhead expenses. By March 1, 1997 the Plaintiff had been unable to pay the agreed upon rent of $5,000 per month which commenced on January 1, 1997. He had not paid any rent since he occupied the premises on July 15, 1996. The Plaintiff was out of working capital, unable to attract any other investors and had operated at a loss every month since commencement of the operations.

10. On March 21, 1997 the Plaintiff says that he delivered a letter to Mr. Arch stating:

> "Under the circumstances I have no other choice except to close the restaurant at the close of business Thursday, 27th of March 1997 and to hold a public auction to dispose of the contents on Saturday, 29th of March 1997, in order to pay off some of our outstanding debts."

11. In addition to the rent owed to the Defendants, the Plaintiff also owed approximately $56,000 U.S. to Dr. Julien Colten who had invested in the business. At about the same time the Plaintiff wrote to Dr. Colten stating:

> "I have no choice but to close at the end of this month, our chief has given notice because of the uncertainty, and we are incurring a loss each day that we open despite working with a skeleton staff. I intend to hold an auction to sell everything off in order to pay off any outstanding debts of the company, including some bounced cheques which have still not been settled. I have no idea at this stage how successful the auction will be."

12. On March 26, 1997 the Plaintiff ran an advertisement in the Caymanian Compass offering a "liquidation sale of the entire restaurant fixtures, fittings and equipment for quick sale".

13. On March 26, 1997 Mr. Arch sought legal advice and on March 27, 1997 he and his attorney, Peter Broadhurst, attended the premises and purported to levy distress on the chattels in the restaurant in order to secure the arrears of rent.

14. The Plaintiff testified that by March of 1997 he knew he would no longer keep operating. He said in cross-examination that he was planning on leaving the premises as soon as possible, that if everything went well at the auction he would leave then and thereafter tell Mr. Arch. In any event, he was going to close the doors by the end of the month. He said that after the auction he did not intend to keep the premises or pay any further rent.

15. The *Levy of Distress* dated March 27, 1997 claimed rental arrears of $20,008.17 plus costs of distraint and valuation. The *Levy of Distress* purported to distrain all chattels in the premises which Mr. Arch had estimated to be approximately $25,000. The *Levy of Distress* states that the Plaintiff would be allowed to stay on the premises but he would be required to sign an acknowledgment that he would not remove any chattels. If he would not sign this acknowledgment he was told that a security guard would be hired to ensure that no chattels were removed. The Plaintiff was not told to vacate the premises or turn over his keys. In his evidence in chief Mr. Banks said he was asked to sign the acknowledgment or turn over the keys. In cross-examination however, he admitted that he could not challenge the Defendants' assertion that he was told he could keep the keys and stay on the premises. Both Peter Broadhurst and Mr. Arch testified that the Plaintiff was told he was entitled to stay on the premises if he signed the acknowledgment but if he did not sign the acknowledgment, then a security guard would be posted to ensure that chattels were not removed. That is also consistent with the wording of the *Levy of Distress*. I accept the evidence of Mr. Broadhurst and the Defendant in this respect.

16. Peter Broadhurst and Mr. Arch testified that the Plaintiff would not agree to sign the acknowledgment. Instead, he threw the keys on the table and said that if you are going to add the price of a security guard you might as well take the keys. He said to them that he was surrendering under duress. He claimed the duress was that he would be forced to pay the security guard for his time and therefore he had no choice but to surrender the premises. I do not accept this constitutes duress for these reasons:

(i) he could have signed the acknowledgment and remained in possession of the premises but he chose not to do so, or

(ii) he could have kept the keys for a day or two and allowed the security guard to be present, which cost would have been modest compared to the total debt. This would have allowed him time to obtain legal advice if he chose.

17. He decided, however, to surrender possession. I am easily satisfied that he did so voluntarily. He knew he was going to surrender in a few days time because his business had failed and he was in the process of selling all assets and closing the doors permanently. He did not have the finances to carry on and his intention was to surrender the premises in a few days time.

18. When the *Levy of Distress* was delivered he concluded that the simplest thing for him to do was to surrender possession at that time and then allow the landlord to sell the chattels. He, therefore, gave the keys to the Defendant and left the premises. There was no duress. The surrender was entirely voluntary.

19. *Halsbury's Laws of England*, Fourth Edition, Volume 27(1) at paragraph 527 states:

> "There is a delivery of possession sufficient to effect a surrender when the tenant returns the keys of the premises and the landlord accepts them with the intention of changing the possession."

20. In *Elements of Land Law*, Kevin Gray, Second Edition at page 760 the author states:

> "The return of the tenants' key, accompanied by the tenants going out of occupation represents a classic instance of surrender by operation of law."

21. The surrender having occurred the Court must next determine if the duress was illegal, irregular or excessive.

Illegal Distress

22. The Plaintiff argues that the Defendants were not entitled to distrain because where there is no written lease, a landlord cannot distrain without a court order. The Plaintiff relies on Section 9 of the *Landlord and Tenant Law* (CAP. 80) (1998 Revision),to support his argument that if the lease is not in writing the landlord must first obtain a court order before he can distrain. That submission in my view is incorrect.

23. Section 7 of the *Landlord and Tenant Law* provides for the remedy of distress with respect to certain types of chattels. It contains no precondition that the lease must be by deed. That section is derived from Section 8 and Section 9 of the *Distress for Rent Act 1737* (2 GEO. 2 c.19). The common law right of restraint is set out in paragraph 26 below.

24. Section 9 of the *Landlord and Tenant Law* is also derived from the *Distress for Rent Act 1737 (supra)*, at Section 14. The purpose of Section 14 of the *Distress for Rent Act 1737* was not intended to be restrictive of Sections 7 and 8 or the common law remedy of distress. Its purpose was to allow a claim to be brought for "use and occupation". This allows for evidence to be relied upon by the landlord where the agreement is not by deed and the action is brought for use and occupation of the premises (see *Morris v. Tarrant [1971]* 2 All ER 920 at 931.

25. Sections 7 and 9 of the *Landlord & Tenant Law* (supra) states:

> "7. Every lessor or landlord, or his steward, bailiff, receiver or other person empowered by him may take and seize as a distress for arrears of rent any cattle or stock of their respective tenant feeding or depasturing upon any common, appendant or appurtenant or belonging to any part of the premises demised or holden; and also take and seize fruits, produce, manufacture or other product which are growing, making or made on any part of the estate so demised or holden, as a distress for arrears of rent; and may cut, gather, make, cure, carry and lay up, when ripe in the barns, buildings or other proper place on the premises so demised or holden; and where there is no barn, building or proper place on the premises so demised or holden, then in any other barn, building or place which such lessor or landlord shall hire or otherwise procure for that purpose, and as near as may be to the premises; and in convenient time may appraise, sell or otherwise dispose of the same towards satisfaction of the rent for which such distress has been taken, and of the charges of such distress, appraisement and sale, in the same manner as other goods and chattels may be seized, trained and disposed of; and the appraisement thereof shall be taken when cut, gathered, cured and made, and not before:
>
> Provided always, that notice of the place where the goods and chattels so distrained shall be lodged or deposited shall, within the space of one week after the lodging or depositing thereof in such place, be given to such lessee or tenant, or left at the last place of his abode; and that is, after any distress for arrears of rent so taken of fruits, produce, manufacture or other product which are growing, making or made, as aforesaid, and at any time before the same are ripe and cut, cured or gathered, the tenant or lessee, his executors, administrators or assigns, pays or causes to be paid to the lessor or landlord for

whom such distress is taken, or to the steward or other person empowered or usually employed to receive the rent as such lessor or landlord, the whole rent which is then in arrears, together with the full costs and charges of making such distress, and which have been occasioned thereby, that then and upon such payment, or lawful tender thereof, actually made, whereby the end of such distress will be fully answered, the same and every part thereof shall cease and the fruits, produce, manufacture or other product so distrained shall be delivered up to the lessee or tenant, his executors, administrators or assigns anything hereinbefore contained to the contrary notwithstanding.

9. The landlord, where the agreement is not by deed, may recover a reasonable satisfaction for the lands, tenements or hereditaments held or occupied by the defendant, in an action on the case for the use and occupation of what was so held or enjoyed; and if, in evidence on the trial of such action, any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved appears, the plaintiff in such action may make use thereof as an evidence of the quantum of the damages to be recovered."

26. Section 9 of the *Landlord and Tenant Law* is not restrictive at all of Sections 7 and 8 of the *Landlord and Tenant Law* or the common law as its purpose is completely unrelated. As stated in *Halsbury's* Fourth Edition, volume 13 at para. 608:

"608. **An existing demise**. An actual existing demise is necessary; the common law right to distrain for rent does not arise before the relationship with landlord and tenant is complete, nor (apart from the *Landlord and Tenant Act 1709*) continue after it has been determined. A formal instrument of tenancy is not necessary [emphasis added]; possession taken by the tenant under an agreement for tenancy which can be specifically enforced gives the landlord the right to distrain. Further, provided there is a demise the nature of duration of the tenancy is immaterial, it may be a tenancy at will or a weekly tenancy. The right of distress also exists where, after the expiration of a previous tenancy, a tenant by consent of both parties continues in possession under such circumstances as to warrant the inference that there is a tacit renewal of the contract of tenancy, but there must be facts to warrant the inference of a renewal of the tenancy. The landlord cannot distrain after treating the tenant as a trespasser by bringing a claim for recovery of land. The tenancy of sufferance, which is not created by demise, does not authorise a distress, only a remedy being by claim for use and occupation."

27. The Plaintiff further argues that this distress was illegal on the basis that the Defendant forfeited the lease and took possession of the premises and having done so he could not also distrain. However, as I have already found the Defendant did not forfeit the lease. The Defendant exercised his right of distraint as he was entitled to do and the Plaintiff then surrendered the lease which was accepted by the Defendant. The Defendant was at the time he exercised the right of distraint, entitled to do so.

Irregular Distress

28. The Plaintiff argues the distress was irregular for these reasons:

(a) The Defendant did not take an inventory immediately (which is contrary to Section 21 of the *Landlord and Tenant Law*) or within five days (contrary to what is stated in the *Levy of Distress*) and even when the inventory was conducted it was not complete, in that it failed to include several personal items belonging to Mr. Arch.

(b) That the Defendant did little or nothing to sell the chattels. He sold a few items (for less than $1,000), he gave some to charity, he never held an auction and it is uncertain where other chattels went. Some were just left in the building when the Defendant subsequently sold it.

29. Although a landlord is not necessarily required to sell the chattels distrained (see *Halsbury's Law of England*, 4th Edition, vol. 13, 744) a landlord cannot simply abandon the distress, give away or lose the chattels or sell them for less than the best price than can be obtained for them. If the landlord simply abandons the distress then the chattels will revert to the tenant.

30. The Defendants prepared an inventory, approximately 9 weeks after the distraint. There is no persuasive evidence as to what happened to or where many of the chattels went. Mr. Arch was unable to satisfactorily answer why no auction was held. If he had held the chattels and they were available to the Plaintiff or he had sold them for the best price, he may not have been liable for irregular distress. He did not, however, do either and therefore is liable for the damages caused.

31. The Plaintiff claims that the chattels distrained in respect of the restaurant were worth $56,357 and that his personal chattels left on the premises were worth $9,455 for a total of $65,812. Mr. Chris Pope of Island Supply gave opinion evidence for the Plaintiff, valuing the restaurant's chattels at $56,357. He was not asked to value the personal

chattels of the Plaintiff that were left behind. That value was an estimate provided by Mr. Banks.

Personal Chattels

32. On March 27, 1997 Mr. Arch told Mr. Banks that he would be allowed to remove his personal items from the restaurant. Mr. Banks took some with him that day. Mr. Arch also told Mr. Banks that if he wanted to later remove any other personal items from the restaurant he should call Mr. Arch. On at least one occasion subsequent to March 27, 1997 Mr. Banks made arrangements to have some further personal items picked up. It is not clear why Mr. Banks did not pick up the items he now claims. There is no evidence that he was ever denied the opportunity to pick any of these items up.

33. The majority of the items that Mr. Banks now claims damages for relate to paintings. It seems that Mr. Arch still has these paintings along with a few other personal chattels and they are in storage. Mr. Arch says he is willing to return them to the Plaintiff.

34. The values placed on the personal items by Mr. Arch are estimates only.

35. For the foregoing reasons the Plaintiff's claim in the amount of $9,455 against the Defendants is dismissed. The Defendant Mr. Arch is ordered to return the items which he has in storage, (and had identified in these proceedings), to the Plaintiff.

Restaurant Items

36. The Plaintiff relied on the appraisal of Mr. Chris Pope in the amount of $56,357. Mr. Pope was well qualified to give such an opinion. He did not, however, actually examine the chattels in question. He examined the appraisal prepared by Mr. Jason Brown of Trinjam and adjusted the appraisal according to his previous recollection of the individual items. His adjustments and total valuation however were somewhat difficult to follow and there was a disparity of approximately $6,000 between the figures contained on his work sheets and the final appraisal amount. Finally, he did not value the chattels on the basis of a forced sale.

37. The Defendants relied on the appraisal of Jason Brown of Trinjam Building Consultants, dated June 2, 1997. Mr. Brown was a quantity surveyor but had experience in evaluation of restaurant assets. He viewed the chattels in question on May 30, 1997. His valuation of those assets was $25,500. His valuation did not, however, include the chattels that were located in the basement of the building, including:

(i) a walk-in freezer,

(ii) a vegetable cooler

(iii) stainless steel shelf and other shelving,

(iv) chafing dishes,

(v) register,

(vi) plates, containers and soup warmer.

38. The new price of these chattels was estimated by Mr. Pope to be approximately $14,000. Mr. Pope estimated the value of these chattels to be $6,880 at the time of distraint.

39. The Defendants rely heavily on the fact that the Plaintiff had purchased all of these chattels plus the goodwill of the business for $30,000, approximately nine months before the distress. In my view the best evidence of actual value is what a chattel can actually obtain on the open market, as opposed to any appraisal. It is most unlikely that the chattels went up in value in the nine months after they were purchased by the Plaintiff. They likely went down in value. The Plaintiff, however, argues that he purchased them for less than fair market value. The evidence of Mr. Pope supports that contention but the evidence of Mr. Brown does not.

40. I prefer the evidence of Mr. Brown, primarily because he saw the chattels, his valuation was based on a forced sale and Mr. Banks actually paid $30,000 for all of these chattels including goodwill some nine months prior to the distress. I must, however, add something to the value as estimated by Mr. Brown, in respect of the items in the basement (as well as a 27 inch television which seems to have disappeared). I conclude the $3,750 is a reasonable estimate given the evidence I have available. Accordingly I conclude that

the total value of the restaurant chattels distrained to be $25,500 plus $3,750 for a total value of $29,250.

41. The Plaintiff is, therefore, entitled to recover $29,250, less distraint costs and the set-off in respect of the other amounts that are admitted owing by the Plaintiff. Those amounts are:

1.	Rent for the period October 1, 1996 - March 31, 1997.	$21,000.00
2.	Payment made by the Defendant on the bank guarantee.	$6,309.10
3.	Utilities paid by the Defendant for the benefit of the Plaintiff.	$1,009.00
	Total	$28,318.10

42. The total amount recoverable by the Plaintiff is the difference, which is $931.90 ($29,250.00 minus $28,318.10).

43. The Plaintiff made a further claim for electricity which was charged to him but was in part used to provide lighting for showcases on the ground floor where the Plaintiff did not occupy the premises. This was due to cross-wiring. The Plaintiff did not present evidence from which I could come to any reasonable conclusion as to the cost of the power that was used to light the show cases. Accordingly, a minimal award of $200 is appropriate.

Excessive Distress

44. The Defendant distrained on all of the chattels in the premises, except he allowed Mr. Banks the opportunity to remove any personal chattels. I take it, therefore, the distress was limited to those chattels that the Plaintiff had purchased from Mr. Arch's daughter. Mr. Arch knew that these chattels and goodwill had been sold for $30,000 nine months earlier and had been used in the interim. He had earlier guaranteed a loan in the amount of $40,000 in respect of the previous purchase of these chattels. He estimated the market value of the chattels he distrained to be $25,000 at the date of distress. The rental arrears

claimed at that time were just over $20,000. Goods sold at a forced sale usually receive less than market value. He would also incur distress costs. In these circumstances the distress was not excessive.

Elevator

45. The Plaintiff argues that the elevator granting access to the third floor of the premises was broken down for a two week period and as a result the Plaintiff is entitled to set off any damages he suffered as a result of that failure, against the rental amount that was owing.

46. No estimate for loss of business was presented. In fact the restaurant was losing money and at that time was closed down during the evening in order to reduce overhead. There was no period of time when the Plaintiff was making any profit. Further, the restaurant on the third floor always had access by stairs and no evidence was led that would indicate walking up two flights of stairs diminished the Plaintiff's business. Finally, there was no evidence before me that the failure of the elevator was caused by the Defendants, although this was suggested by the Plaintiff. Accordingly the Plaintiff's claim for damages as a result of the failure of the elevator is refused.

Counterclaim

47. The Defendant claims $2,300 in legal fees in connection with the distress. No other costs such as auction or brokerage fees, storage fees, or transportation charges were identified or itemized. I am not satisfied that the Defendants' legal fees to obtain advice are appropriate or are necessarily included in the costs of distress. No authority was cited in respect of that proposition and the claim is therefore dismissed.

48. The Defendants also counterclaimed for $5,000 for rent due for the month of April 1997. Since this was a month to month tenancy, the tenant would ordinarily be required to give one month's notice of termination, absent an agreement to the contrary. The Defendants did not cite any authority to support their entitlement to claim $5,000 for the loss of April's rent, after the surrender had occurred and been accepted on March 27.

49. In *Woodfall, Landlord & Tenant* (London: Sweet & Maxwell, 1978) at p. 17.040 it states:

> "Effect on rent and other covenants
>
> Where the lease contains a covenant to pay rent, the covenant is independent of the estate in the land, and remains enforceable as regards rent which had accrued due at the date of the surrender. [8] Where there is no such covenant, the tenant is liable for compensation for use and occupation. [9] Where the lease contains a rent review clause, and before the surrender the landlord has set in motion the procedure for review, he has an accrued right to have the rent reviewed, and that right is preserved on surrender. [10]
>
> If the rent is payable in advance, and the surrender takes place between rent days, the tenant is not entitled to a refund of any part of the rent, in the absence of agreement to the contrary[11]. But where rent is payable in arrear the landlord is entitled to recover an apportioned part of the rent.[12]
>
> A surrender releases the tenant from liability for future rent.[13]"

50. In *Dalton v. Pickard [1926]* 2 K.B. 545 C.A., the landlord and tenant agreed to a surrender of the premises. The landlord then claimed for dilapidations. Vaughan Williams L.J. stated at page 546:

> "It is said that some of those covenants are covenants that raise a continuing obligation. With respect to the future I think that the obligations have come to an end, but in so far as they have been breaches of a covenant anterior to the surrender I think the right of action accrued."

51. Similarly in *Richmond v. Savill [1926]* 2 K.B. 530 C.A., the Court of Appeal held that a surrender of the premises operates to extinguish future obligations under the lease but not breaches of obligations that have already occurred.

52. In the case at bar, the Plaintiff would have been required to give one month's notice of termination in order to terminate his tenancy and avoid paying future rent. His failure to do so would normally result in him being liable for one month's rent. However, that obligation was a future one and was extinguished upon the surrender of the lease on March 27, 1997.

Plaintiff's Cause of Action

53. Finally, the Defendants claim that the Plaintiff had no cause of action against them because the lease was not with the Plaintiff nor did the Plaintiff own the chattels in question. The Defendants say that the lease was with the Plaintiff's company and the chattels were also owned by that company, namely Old Caymanos Ltd. The documentation and correspondence provided are not entirely clear but it generally supports the Defendants' position. However, in the pleadings the Plaintiff alleged that he was the holder of the lease and owner of the chattels. This was admitted by the Defendants in their pleadings. The Defendants were permitted to cross-examine the Plaintiff on this issue and because that permission was granted the Defendants' counsel says he did not feel it necessary to apply to amend his pleadings. The case therefore proceeded on the basis of the pleadings as stated above. On that basis the Defendants have admitted that the lease and chattels were in the name of the Plaintiff.

54. If the Defendants had canvassed this matter fully at the commencement of trial and applied to amend their Statement of Defence then the Plaintiff would almost certainly have applied to amend his Statement of Claim to plead, at least in the alternative that the claim be made by Old Caymans Ltd. If those amendments were granted then the result would be that the factual and legal issues that I have decided in this case would have been identical and the result unchanged. Accordingly I proceeded on the basis of the allegations and admissions contained in the pleadings and it is not necessary to determine from the evidence whether or not the Plaintiff or his company held the chattels or lease. That has been admitted in the pleadings and if amendments were allowed to change the claim it would make no difference to the end result.

Conclusion

55. In conclusion the Plaintiff is entitled to judgment against the Defendants in the amount of $1,131.90 and the Defendant Mr. Arch is ordered to return to the Plaintiff the paintings and other personal items that he has in storage and has identified in his evidence in this trial.

56. The parties shall have one week from receipt of this judgment to provide further written submissions on the question of costs if they are unable to agree.

Dated: July 7/05

D G Sanderson

Sanderson, J.
Judge of the Grand Court

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GRAND COURT CAYMAN ISLANDS