

14/2/05 Corl.



1 IN CHAMBERS
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS
3 CAUSE NO: 11 OF 2005

4 BETWEEN:
5 (1) STACEY-ANN KELLY
6 (2) OWEN POWIS

Plaintiffs

8 AND:
9 DR. VICTOR LOOKLOY

Defendant

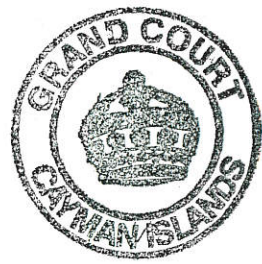
12 BEFORE: THE HON. MADAM JUSTICE LEVERS

14 APPEARANCES:
15 Counsels for Plaintiffs: S. Hall-Jones of
16 Associate Advocates Chambers
17 Counsel for Defendant: Ms. E. Nervik of Nervik &
18 Co.

20 Heard: January 27-28, 2005

21

JUDGMENT



23 Levers J.

25 By way of Ex-parte Originating Summons filed on
26 the 13th January 2005. The Plaintiffs Stacey-Ann
27 Kelly and Owen Powis ask for the following relief:

1

2 1. A Declaration that the Second Plaintiff on or
3 after the 1st October 2004 continued to occupy
4 premises situate at and known as Apartment #2,
5 83A, Orange Drive, Prospect, Grand Cayman,
6 Cayman Islands (hereinafter the "Leased
7 Premises") with the consent of the lessor
8 after the termination of the lease for a fixed
9 term of one year (hereafter the "Lease") of
10 the Leased Premises made between the Second
11 Plaintiff and the Defendant (as lessor) on the
12 1st October 2003 on a periodic tenancy of
13 twelve months duration expiring on the 30th
14 September 2005;

15 2. A Declaration that the First Plaintiff entered
16 into occupation of the Leased Premises as a
17 lessee on or about the 1st October 2003
18 pursuant to an implied tenancy alternatively a
19 tenancy by estoppel for the same term and upon
20 the same conditions as the Lease (hereinafter
21 the "First Plaintiff's Lease");

22 3. A Declaration that the Second Plaintiff on or
23 after the 1st October 2004 continued to occupy
24 the Leased Premises with the consent of the
25 lessor after the termination of the First
26 Plaintiff's Lease on a periodic tenancy of
27 twelve months duration expiring on the 30th
28 September 2005;

29 4. In the alternative to the Declaration sought
30 in paragraph 3 hereof a Declaration that the
31 First Plaintiff occupied the Leased Premises
32 pursuant to the periodic tenancy conferred by
33 section 45(2) of the Registered Land Law (2004
34 Revision);

1 5. A Declaration that in respect of the Lease and
2 in respect of the First Plaintiff's Lease the
3 Notice of Termination purported to have been
4 served by the Defendant on the Plaintiffs and
5 each of them and dated the 17th December 2004
6 (the "Purported Termination Notice") was
7 null, void and of no effect in respect of both
8 and/or either of the Plaintiffs' said
9 tenancies;

10 6. In the alternative a Declaration that the
11 Purported Termination Notice in so far as it
12 sought to terminate the periodic tenancy
13 declared to have been created as described in
14 paragraph 4 hereof was null, void and no
15 effect;

16 7. A Declaration that in any and every event the
17 Purported Termination Notice was null, void
18 and of no effect;

19 8. An injunction restraining the Defendant
20 whether by himself or by his servants or
21 agents or howsoever otherwise from the
22 unlawfully and in breach of contract
23 terminating the said Lease and the First
24 Plaintiff's Lease whether on the 17th January
25 2005 or on any other day prior to the
26 termination of the said term as Declared by
27 Order of the Court by efflux of time;

28 9. An injunction restraining the Defendant
29 whether by his servants, agents or howsoever
30 otherwise from forcibly ejecting the
31 Plaintiffs from, or preventing the Plaintiffs
32 having access to, the said Leased Premises
33 until the said expiry of the said Lease and
34 the First Plaintiff's Lease;

1 10. That the Defendant's Cross Summons dated
2 the 19th January 2005 be dismissed;

3 11. That the Plaintiffs do have the costs of
4 the Originating Summons and the Cross Summons
5 to be taxed on a full indemnity basis if not
6 agreed.
7

8 The application was Ex-parte and an injunction was
9 granted for a period of 14 days. Within that
10 time, the Defendant, Dr. Lookloy took out a cross
11 Summons asking for the following relief:

12

13 1. That the Ex-parte Originating Summons dated
14 13th January 2005 be dismissed;

15 2. That the Ex-parte Order made on the 14th
16 January 2005 be discharged;

17 3. That an Order of Possession be granted;

18 4. That the tenant, namely Owen Powis and any
19 other person occupying the apartment, in
20 breach of the agreement, including Ms. Kelly
21 vacate the premises within 48 days of the
22 date of the Order;

23

24 5. That the Plaintiffs be ordered to pay the
25 Defendant's costs; and

1 6. Such further and/or other relief as this
2 Honourable Court deems fit.
3

4 Mrs. Nervik on behalf of the Defendant has already
5 conceded that possession cannot be granted in the
6 manner requested under the cross summons.
7

8 THE FACTUAL BACKGROUND
9

10 The proprietor of these premises more particularly
11 described as Apartment #2 located at Block 25B,
12 Parcel 436, situated at Orange Drive, Prospect,
13 Grand Cayman, is the Defendant. He alleges that a
14 Real Estate Agent (Mrs. Anderson) acting on his
15 behalf listed the apartment for rental and that
16 the tenants dealt with Mrs. Anderson. The tenant
17 Mr. Owen Powis signed a Lease Agreement. The
18 Defendant agreed with the rental and provided the
19 agent with a Lease Agreement signed by him so she
20 could complete the rental agreement with Mr. Powis

1 and have him sign the lease. He denies that he
2 has any lease, verbal or written with Miss Kelly,
3 the Second Plaintiff in this matter. According to
4 Dr. Lookloy, sometime after the property was
5 leased he became aware of the fact that there was
6 a second party residing in the premises. He
7 stated that he assumed there was some kind of
8 personal relationship between Powis and Kelly, but
9 that he clearly remembered telling Mr. Powis that
10 he rented him the place and the only person that
11 he was prepared to deal with was him.

12

13 The rental payments were deposited to the Bank of
14 Butterfield in the Defendant's account and it was
15 highly unlikely that the Defendant would have
16 known of any internal agreement between Miss Kelly
17 and Mr. Powis. The Lease Agreement was for
18 twelve-months at a rental of \$1000 per month.

19

1 The Lease contained the usual covenants to pay the
2 reserved rent and to permit the landlord and/or
3 his agents with or without workman and others at
4 reasonable times to enter upon and examine the
5 conditions of the demised premises and most
6 importantly, not to assign underlet or part with
7 the possession of the demised premises or any part
8 thereof without the written consent of the
9 landlord, (the granting of which consent being in
10 the absolute discretion of the landlord). The
11 Lease was for 12 months and the 12 month period
12 expired on the 1st October 2004. At that time the
13 rent was in arrears but no notice was served by
14 the Defendant on the Plaintiffs and it is
15 submitted on behalf of the Plaintiff's that Clause
16 4 of the lease came into effect. That Clause
17 reads:

18

19 " That if the Tenant shall be with
20 the consent of the Landlord

1 remain in occupation of the
2 demised premises after the
3 expiration of the term hereby
4 granted the Tenant shall unless
5 it should have been mutually
6 agreed in writing to the contrary
7 be deemed to hold the same upon
8 the covenants conditions and
9 provisions as are herein
10 contained. In witness whereof the
11 Landlord and Tenants have hereto
12 set their hands and affixed their
13 seals the day and year
14 hereinbefore written."

15
16 It is perhaps useful at this stage to look at the
17 Plaintiff's allegations. It cannot be denied that
18 Mr. Owen Powis is the lessee. He alone signed the
19 lease. Mr. Hall-Jones on behalf of the First
20 Plaintiff, Stacey-Ann Kelly submits that at all
21 times Dr. Lookloy knew that she was an occupant
22 and a tenant and that the facts give rise to an
23 implied tenancy by virtue of his acceptance of her
24 occupation.

25

1 Miss Stacey-Ann Kelly alleges that she went to see
2 the premises with Mr. Powis and that although he
3 alone signed the Lease, it was clear that two
4 persons were going to occupy the premises. Her
5 allegation is supported by the application form
6 filled out by the First Plaintiff in which it is
7 stated that two persons were going to occupy the
8 premises. Dr. Lookloy in his affidavit denies
9 that he had any dealings with Miss Kelly as a
10 tenant. However, he concedes that he discussed
11 rental with her, he concedes that he discussed
12 arrears with her and he concedes that she called
13 him on several occasions and he called her back on
14 her cell phone about the rent of the apartment and
15 other related matters.

16

17 Mr. Powis was called to give evidence as he had
18 not filed an affidavit and in *viva voce* evidence,
19 he stated that he was a passive observer in this

1 matter and that Miss Stacey-Ann Kelly was the one
2 who did all the negotiations and that Dr. Lookloy
3 knew from the inception that Miss Stacey-Ann Kelly
4 was in occupation of the premises. Indeed, Dr.
5 Lookloy's own affidavit states:

6

7 "I clearly remember telling Mr.
8 Powis that I rented the place to
9 him and the only person I was
10 prepared to deal with was him
11 because he was the person to whom
12 I lease the premises."

13

14 There is no evidence of Dr. Lookloy objecting to
15 her occupation; the only evidence is that he
16 preferred to deal with Mr. Powis over rental
17 matters and other related matters pertaining to
18 the tenancy.

19

20 The question therefore is, was Miss Kelly an
21 implied tenant? The undisputed evidence is that
22 Miss Kelly viewed the premises together with Mr.

1 Powis and that both persons were to occupy the
2 premises from the inception and that Miss Kelly
3 did occupy the premises from the start of the
4 tenancy. The manner of payment of rent is not
5 always essential, although, that is perhaps the
6 clearest proof. Miss Kelly alleges that she paid
7 the rent and DR. Lookloy agrees that he discussed
8 rental matters with her.

9

10 Was Stacey-Ann Kelly an implied tenant?

11

12 The law is helpful in the manner in which the
13 Court should address the matter. Instructive in
14 this regard, is section 55 (3) (b) of the Registry
15 Land Law and I quote:

16

17 "The lessor is or should by
18 reasonable diligence have become
19 aware of the commission of the
20 breach."

21

1 The Defendant in this case alleges that Miss
2 Stacey-Ann Kelly's occupation was in breach of the
3 terms of the lease, however, tacitly, he accepted
4 her occupation, he discussed matters of rent with
5 her and he did nothing to terminate the lease due
6 to what he calls 'the breach'. I therefore hold
7 that Stacey-Ann Kelly had an implied tenancy and
8 that Dr. Lookloy is estopped from denying the
9 tenancy. Both his conduct and his acceptance of
10 her occupation is a clear indication of the fact
11 that he knew that she was in occupation with Mr.
12 Powis and did nothing to terminate the tenancy on
13 those grounds.

14

15 As I have held that she is an implied tenant, is
16 she now entitled to the protection of the law?

17

18

19

1 Submissions on behalf of the two Plaintiffs

2

3 Mr. Hall-Jones on behalf of the Plaintiffs submits

4 that Section 51 (2) of the Registered Land Law

5 (2004 Revision) is applicable. Section 51 (1)

6 reads:

7

8 "Where a person, having lawfully
9 entered into occupation of any
10 land as lessee, continues to
11 occupy that land with the consent
12 of the lessor after the
13 termination of the lease he
14 shall, in the absence of any
15 evidence to the contrary, be
16 deemed to be a tenant holding the
17 land on a periodic tenancy on the
18 same conditions as those of the
19 lease so far as those conditions
20 are appropriate to a periodic
21 tenancy.

22

23 (2) For the purposes of this
24 section, the acceptance of rent
25 in respect of any period after
26 the termination of the lease
27 shall, if the former tenant still
28 in occupation and subject to any
29 agreement to the contrary, be
30 taken as evidence of consent to

1 the continued occupation of the
2 land.''

3
4 In this case, the Lease expired by effluxion of
5 time in October 2004. Mr. Powis must therefore,
6 be a holding over tenant even if Miss Stacey-Ann
7 Kelly was not to be considered an implied tenant.
8 However, as I have already held that she was a
9 tenant, both parties were holding over as of
10 October 2004. Rent was paid in November 2004, in
11 the sum of two thousand and odd dollars and was
12 accepted. This can be taken as evidence of
13 consent to continued occupation of the land at
14 that time. No notice of termination had been
15 served. A notice was served in December by way of
16 letter which was not a notice as designated under
17 the law. The Defendant now comes with allegations
18 of breaches of covenants by Miss Kelly, none of
19 which he specifically addressed in the letter

1 (notice) written by him, demanding the premises
2 back within 30 days.
3
4 Section 51 (1) of the Registered Land Law provides
5 that with the consent of the lessor after the
6 termination of the lease, the tenant shall in the
7 absence of any evidence to the contrary (and there
8 is no evidence in this case to the contrary) be
9 deemed to be a tenant holding the land on a
10 periodic tenancy on the same conditions as to
11 those of the lease so far as those conditions are
12 appropriate to a periodic tenancy. Periodic
13 Tenancy is defined under the Land law. It means a
14 tenancy from year to year, half year to half year,
15 quarter-to-quarter, month-to-month, week to week
16 of the like. Mr. Hall-Jones submits that it
17 cannot be anything other than a yearly tenancy in
18 this case. He submits that the lease is for 12
19 months and therefore the periodic tenancy (holding

1 over) must be for 12 months. Mrs. Nervik on the
2 other hand submits that as the rental is being
3 paid or has been defined to be paid on monthly
4 basis, the assumption of the periodic tenancy of a
5 year to year is rebutted and the tenancy becomes a
6 month to month tenancy. Mrs. Nervik relies on the
7 case of Adler v Blackman at page 14 [1952] All
8 E.R. V2. In that case, the rental was specified
9 to be paid weekly. The court held that the
10 presumption that at the end of the tenancy for a
11 year the tenant had held over on a yearly tenancy
12 was rebutted by the fact that the rent specified
13 in the lease for a year was quoted at \$3 per week
14 and was not calculated by reference to a yearly
15 sum. It was further held that the conduct of the
16 parties in serving and accepting a notice to quit
17 given on the basis that the tenancy was a weekly
18 one rebutted the presumption of a yearly tenancy.

1 The tenancy was, therefore, held to be a weekly
2 one and the notice to quit was valid.
3
4 Mrs. Nervik relies on the case and submits that in
5 this case, the holding over period is a month-to-
6 month tenancy as the lease specified the rental on
7 a monthly basis. In this case, however, there is
8 no conduct of the parties which can rebut the
9 yearly tenancy, there being no acceptance of the
10 notice to quit given on the basis that the tenancy
11 was a weekly one or a monthly one and the only
12 rebutting evidence that there is, is that the
13 rental was quoted on a monthly basis. Acceptance
14 of rent is not a prerequisite to consent. Consent
15 to holding over is inferred by conduct and/or by a
16 written agreement. The acceptance of rent is only
17 evidential. It is now a matter of construction of
18 statute and the lease document. Under the terms
19 of the lease,

1 " If the tenant shall with the
2 consent of the landlord remain in
3 occupation of the demised
4 premises after the expiration of
5 the term hereby granted, the
6 tenant shall unless it shall have
7 been mutually agreed in writing
8 to the contrary be deemed to hold
9 the same upon the covenants,
10 conditions and provisions as are
11 herein contained."

13 Mr. Hall-Jones submits usually leases define
14 holding over period as on a month to month basis.
15 Indeed, at common law, the tenant would become a
16 month-to-month tenant. The Law provides that:

17
18 " He shall in the absence of any
19 evidence to the contrary be
20 deemed to be a tenant holding the
21 land on a periodic tenancy on the
22 same conditions as those of the
23 lease so far as those conditions
24 are appropriate to a periodic
25 tenancy."

26
27 (It is already accepted that a
28 periodic tenancy can mean a year-
29 to-year, six months to six
30 months, a three months to three
31 months.)
32

1 Mrs. Nervik submits that whatever the law may say,
2 the word term (that is the duration of the lease)
3 cannot mean the same as the conditions of the
4 lease. That the word conditions in the law
5 applies only to the covenants and the word
6 "condition" is an exclusive term and cannot
7 incorporate the words "term or duration" of the
8 lease. She says that when the lease states, "to
9 hold the same upon the covenants, conditions and
10 provisions as are herein contained", that does not
11 include the duration of the lease. However, she
12 does not explain why the word covenant is used as
13 distinct from condition and provisions.

14

15 Dr. Lookloy's complaints as to the alleged
16 breaches of covenants are:

17

18 1. That the rental was frequently paid late. He
19 is estopped from alleging that breach as he

1 accepted the rent in November 2004, which
2 brought the rent up to date, save and except
3 for \$358;

4 2. He complains that he was not allowed to view
5 the premises as he did not have a key.

6 Section 2 of page 1 of the Lease Agreement
7 states, "to permit the landlord and or his
8 agents with or without workman". By
9 implication that means that the landlord
10 should have asked for permission and there is
11 no such evidence that permission was asked
12 for and refused;

13 3. Under the terms of the lease or by effluxion
14 of time if the tenancy was to be determined
15 sixty days notice was required. That was not
16 given by the landlord. He is therefore,
17 estopped from complaining of these breaches.
18 The material time is in October 2004. Mrs.
19 Nervik relies on subsection 2 of paragraphs 4

1 and states that the landlord shall be under
2 no liability to rebuild the demised premises
3 and either party shall have the right to
4 terminate the tenancy by giving the other
5 seven days notice in writing of such
6 intention. This of course cannot be read on
7 its own, it must be read in the context of
8 the entirety of the paragraph, which deals
9 with the destruction of the premises. Mrs.
10 Nervik asks for the right forfeiture. Under
11 section 55 (3) (b), Dr. Lookloy has waived the
12 right of forfeiture. Acceptance of rent and
13 the fact that Dr. Lookloy should have by
14 reasonable diligence become aware of the
15 commission of the breaches estopps him from
16 relying on these breaches. Having held that
17 he is estopped from relying on the breaches,
18 what are the consequences of a holding over
19 period of one year? Where in a tenancy

1 agreement for 1 year, the rent is expressed
2 to be so much per week and the tenants rolls
3 over paying the same weekly rent only a
4 weekly tenancy should be assumed. Both
5 parties must be taken to have consented to a
6 continuance of the tenancy after the
7 expiration of the lease, and, that being so,
8 the implication was, in the absence of any
9 evidence to rebut it, that there was a
10 tenancy from year to year on the terms of the
11 former lease so far as not inconsistent with
12 such tenancy. The question is the real
13 intention of both parties. It may well be
14 that this Court would have held that the
15 rental payable in the lease being expressed
16 on a monthly basis, the holding over periodic
17 tenancy would be on a month to month basis if
18 there had been no lease. However, in this
19 case, there is a written document which talks

1 of "covenants, conditions and provisions as
2 are herein contained." Even if I was to hold
3 that covenant and conditions are distinct
4 from the duration of the term of the lease,
5 what does the incorporation of the word
6 "provisions" mean? I can only hold that in
7 the absence of a proper notice being given at
8 the termination of the first year's lease,
9 that the word provisions in the lease, which
10 must include the duration make the holding
11 over periodic tenancy a year to year tenancy.
12 I therefore hold that the Defendant has not
13 rebutted the presumption of a yearly tenancy
14 and that the Plaintiffs have the right to the
15 protection of law. The Defendant must now,
16 if he wishes to repossess the premises, take
17 action within the terms of the Registered
18 Land Law (1995 Revision). Even if I am wrong
19 that it is not a yearly tenancy, the notice

1 not complying with section 45 of the
2 Registered Land Laws (1995 Revision) is void.

3

4 Dated this 14th day of February 2005.

5

6

7

8 Judge of the Grand Court

