THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NUMBER SLUHCV2004/0133

BETWEEN:

CASTRIES CAR PARK FACILITY LTD

Claimant

AND

GLADYS TAYLOR

Defendant

Appearances:

Cadie St. Rose-Albertini for Claimant
Kelvin John and Natalie Augustin for Defendant

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2005: April 11, 12, 21

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Introduction

1. SHANKS J: The Defendant has owned and managed a successful optical business in St Lucia for about 20 years. She has traded through a series of limited companies: in or about 1985 she and her husband (who is an optometrist) acquired St Lucia Optical Co Ltd; the business of that company was transferred to Island Eye Care Ltd in 2000 when she and her husband separated; in April 2001 the Defendant merged that

company with another to form Vision Express Co Ltd. The business has three branches: one in Vieux Fort, one in Gablewoods Mall and one in Castries. In 2001, the Castries branch was moved from Mongiraud St where it had been for 15 years to a new shop on the ground floor of the new Conway Centre which was being constructed as part of the Castries Car Park facility.

2. The Defendant (acting in her personal capacity) signed a three year renewable lease for the new shop with the Claimant company dated 24 November 2000 commencing on 14 February 2001 at a rent of $6,795 per month. In September 2001 she started to withhold 50% of the rent because, she says, the Claimant was in breach of certain oral assurances given at a meeting on 26 September 2000 by Michael Sargusingh, the CEO of National Insurance Property Development & Management Co Ltd (NIPRO), who were responsible for managing the building for the Claimant.

3. There were arrears of $85,522 at the end of the three year term of the lease. The Defendant failed to serve notice to renew in time but she remained in occupation for some months during which she paid the rent in full. The Claimant now claims the $85,522 arrears. The Defendant says in answer to the claim that the rent charged is too high because it is based on a square footage greater than that comprising the shop and she counterclaims for the losses she says she has suffered by reason of the Claimant's failure to comply with Mr Sargusingh's assurances and other breaches of the lease. The pleaded counterclaim also relies on misrepresentation but Mr John made it clear in his closing submissions that the misrepresentation claim is no longer being pursued.

Issues and evidence

4. The issues I must deal with are as follows:

    (1) whether the Claimant is entitled to claim the full rent shown in the lease or whether it should be reduced to reflect the square footage of the shop;

    (2) what assurances were given by Mr Sargusingh to the Defendant on 26 September 2000;

(3) whether any such assurances gave rise to a contractual obligation on the part of the Claimant;

(4) whether the Claimant was in breach of any such contractual obligation or any of the terms of the lease;

(5) what loss if any flows from any such breach.

5. For the Claimant I heard evidence from Mr Sargusingh, Dr Frederick Isaac (his successor after a gap as CEO of NIPRO), Emma Hippolyte (a director of the Claimant) and Gregory Serieux (Building Services Supervisor of NIPRO). For the Defendant I heard from Frank Myers (an expert chartered accountant), Helen Montoute (the manager of the Vision Express Castries branch), John Lucas (a retired financial director who gave evidence about the normal practice in relation to fixing rents) and the Defendant herself. I also received written submissions from both sides before trial.

Rent

6. The lease states in cl 1 that the leased premises are "…all that area of office space and the appurtenances belonging thereto…comprising an area of…1,359 square feet on the ground floor being part of the building known as Conway Business Centre". The monthly rent is stated to be $6,795. It is not disputed that that rent is based on a figure of $5 per square foot and a total square footage of 1,359. Nor is it disputed that the area of the shop itself is 974 square feet with the balance of the 1,359 comprising an entrance lobby, corridor and washrooms which were to be shared in common with the neighbouring tenant, the Post Office.

7. The Defendant called evidence (which I accept) that it is not the normal practice for a tenant to be charged the full rate per square foot in respect of common areas. Based on this she says she has been overcharged. The Claimant apparently disputes the practice contended for by the Defendant and states that the Defendant was in any event the sole occupant of the common parts at the time the lease was executed, notwithstanding the clear intention that the common parts should be shared in due course. I think the Claimant is wrong about this but nevertheless I do not see how the Defendant can avoid paying the rent provided by the lease for the following reasons.

8. The basic idea is that where a contract has been reduced to writing and signed by the parties they are bound by the written terms. There is nothing on the face of the lease to indicate that the rent should not be $6,795. Even if the premises are misdescribed when they are said to comprise an area of 1,359 square feet (and I am not sure they are: the lease says office space *and appurtances*), the Defendant knew exactly what she was getting because she inspected the premises (no doubt more than once) before she signed the lease. If (and this is hotly disputed by the Claimant) a mistake was made and the rent was misstated it would be necessary for the Defendant to have the lease rectified to correct the mistake before she could go behind its clear terms. No application to rectify the lease was made and I doubt that there was sufficient material for one to have any chance of succeeding. The Defendant is therefore, I am afraid, bound by the clear terms of the lease she signed in relation to rent.

Meeting of 26 September 2000

9. The Defendant's evidence was that she heard about the Castries Car Park facility in or around September 2000 and made enquiries whether there was any retail space available for rent. She held a meeting on site with Mr Sargusingh on 26 September. It is not disputed that there were still contractors on site. The Claimant says that Mr Sargusingh told her that NIPRO was seeking a quality tenant willing to fit out the premises to a high standard which would be consistent with the high standard which was intended for the building and the projected high user of the car park. Mr Sargusingh seemed to be optimistic about the development and marketing of the Castries Car Park. According to paragraph 6 of her witness statement he specifically informed her:

    (i) SIGNAGE – that there would be signage at the side of the road to indicate the businesses and stores in the building.

    (ii) MARKETING – The Car Park Facility would be well utilized and marketed to ensure that they attract all sorts of visitors and members of the public.

    (iii) LANDSCAPE – the areas in front of the Car Park would be well landscaped, the ugly fenced barbed wire would be removed and picnic tables would be installed.

(iv) POST OFFICE – the premises adjacent to Vision Express would be occupied by the Post Office within three months of Vision Express opening.

(v) SECURITY – the premises would have adequate 24 hour security.

(vi) CONWAY RESIDENTS – that Conway Residents would be relocated with two years and the site would be used for further office development.

From her discussion she was convinced that the Car Park would be a more prestigious location than Mongiraud St and that a move would be good for the business and increase sales.

10. Mr Sargusingh in his evidence had a somewhat different account of what was said at the meeting. Since I found both he and the Defendant to be truthful witnesses I must decide whose evidence to prefer based on my assessment of the inherent probabilities.

(1) *Signage*: Mr Sargusingh accepted that he discussed with the Claimant the provision of a directory of all the businesses in the building and that he told her he was planning an illuminated directory in the planter at the west entrance of the building which would be seen by people entering the building but he denied saying any more about signage. This evidence seems to me consistent with the Defendant's letter of 26 September 2000 (page 2 point (6)) and seems to me likely to reflect more closely what was discussed than the rather general words in the Defendant's witness statement.

(2) *Marketing*: Mr Sargusingh denied that he discussed marketing strategies with the Defendant. I think he may have discussed these matters in general terms but it seems unlikely that he would have made any statement to the effect that the car park would be well used or that the marketing would ensure a particular kind of visitor and I reject that evidence of the Defendant.

(3) *Landscape*: Mr Sargusingh accepted that he told the Defendant that the plan was to grass the area outside the premises and put picnic tables there for people to use, in particular civil servants. This is broadly as the Defendant's account which is also confirmed by the

letter of 26 September 2000 at page 1 para (1), and I therefore accept her account.

(4) *Post office*: Mr Sargusingh admitted that he told the Defendant that the next door tenant would be the Post Office; he denied telling her that it would open within three months of her business. In cross-examination he pointed out that he had no control over when they would open and would not have given such an indication: I accept his evidence about this for that reason.

(5) *Security*: Mr Sargusingh did not remember discussing security. I accept the Defendant's account that he told her the premises would have adequate 24 hour security. I note however that this allegation was not pleaded in the Defence and Counterclaim and I do not therefore consider it further.

(6) *Conway residents*: Mr Sargusingh denied saying that the Conway residents would be relocated within two years; I accept his evidence about this since he seemed to me a careful man and, again, the relocation of local residents was something over which he would have no control. I also note that this allegation was not pleaded in the Defence and Counterclaim.

Contractual obligations

11. I therefore find that Mr Sargusingh gave assurances in relation to the directory and landscaping the area outside the premises on which the Defendant has established her factual case. Since Mr John expressly stated that he was no longer pursuing a claim in misrepresentation she can rely on these assurances only if they had contractual force. The general rule is that where the parties have reduced their agreement about something to writing (in this case the lease dated 24 November 2000) neither party can rely on evidence which is extrinsic to the document to add to, vary or contradict its terms. There is an exception to this rule where the evidence indicates that there is a "collateral agreement" which does not relate to a term of the written agreement which goes to the essence of the whole transaction but which was intended to be legally binding and is supported by consideration (see Treitel *Law of Contract* 10th Ed pp 182/3).

12. It seems to me that since Mr Sargusingh gave the assurances before the Defendant entered into the lease and she made it clear that they were matters of significance to her (see the letter of 26 September 2000) they can be said to form the basis of a collateral agreement, the consideration for which was her agreement to sign the lease itself. I had considered that the assurances may be too vague in terms of timing to give rise to contractual obligations but on consideration I think the answer is that the Claimant was obliged to carry out the assurances within a reasonable time.

13. I therefore find that the Claimant was contractually obliged within a reasonable time to:

    (a) provide an illuminated directory of all the businesses in the building at the west entrance of the building;

    (b) grass the area outside the premises and put picnic tables there and remove the barbed wire fencing.

14. It is also convenient to mention here certain express terms of the lease on which the Defendant relies:

    (a) cl 3(d)(iii) required the Claimant to maintain repair and keep in good condition the "forecourts pathways approach roads and [missing words] within the curtilage of the Building"

    (b) cl 3(h) required the Claimant to permit the Defendant to exhibit "signs or notices at the entrance to the building and in or about the Leased Premises provided always that such signs or notices shall have been first approved by [the Claimant] (such approval not to be unreasonably withheld)…"

. I should note that cl 3(d)(iii) was not expressly pleaded by the Defendant although I doubt this has caused any prejudice to the Claimant.

Breaches

15. *Directory*: It was not disputed that no directory was provided while the Defendant was a tenant (a period of nearly four years). No explanation was given for this and it seems clear to me that the Claimant's failure to provide a directory within a few months of the start of the tenancy was a breach of contract. Both Ms Hippolyte and Mr Sargusingh

accepted the importance of signage in general (which would include a directory) to a business like the Defendant's and that loss might result from the failure to provide a directory.

16. *Landscaping*: It is not disputed that the Claimant failed to install picnic tables or remove the barbed wire fence at any stage. However, it seems they did grass the area in front of the Defendant's premises and plant some trees. The Defendant took exception to these trees because they blocked the view of the shop from the west and became a haven for rats and chickens. It seems to me that the Claimant was in breach of the collateral contract in relation to landscaping but the breach was somewhat limited.

17. *Maintenance of curtilage of building*: There are some rather general complaints about the condition of the area outside the Defendant's shop at paras 18-20 of her witness statement and some photos taken in October 2004 were produced by the Defendant. The photos unsurprisingly gave a poor impression but they were taken while some work was being carried out removing the trees and extending a block wall which partially replaced the barbed wire fence so they were perhaps of limited value. The Claimant of course produced some photos showing a gleaming and well kept area but they were taken in February 2005 long after the Defendant had left so they were of even less value. Overall, in the absence of a detailed case being put to a representative of the Claimant in relation to maintenance I do not think I can find there has been a breach of cl 3(d)(iii).

18. *Signage*: In July 2001 the Defendant presented the Claimant with proposed signage for the business. It consisted of an 8 x 4 ft sign which she wished to attach to the Jn Baptiste St side of the building. By letter dated 24 July 2001 (p198 trial bundle) Mr Sargusingh stated that the Claimant had decided "…not to allow any signage on the building". Ms Hippolyte explained in evidence that the reason for this decision was to protect the building's aluminium cladding from damage. It is unfortunate that that was apparently not explained to the Defendant because her evidence was that the sign she proposed would be attached adhesively and could be removed without damage to the cladding but this was not discussed between the parties. It may be therefore that the refusal by the Claimant to allow this sign was unreasonable. However, I think it is clear

that the proposed sign does not come within the terms of cl 3(h) for the simple reason that the proposed sign was not "at the entrance to the building" but attached to the side of the building. For this reason, I reject the allegation that the Claimant was in breach of cl 3(h).

Damages

19. For the reasons set out above I have found that the Claimant was in breach of contract in failing to provide a directory and in relation to landscaping. However, there is a fundamental difficulty in the way of any damages claim for these breaches: any loss must have been suffered by the companies carrying on the business (Island Eye Care and subsequently Vision Express) and not by the Claimant personally; but there was no suggestion in the pleadings or evidence that any contract was made with her as agent for a company and only she personally was a party to the proceedings. Mr John attempted valiantly to deal with this difficulty but I am afraid none of his arguments was sufficient to answer the point.

20. The point, I am afraid, disposes of the Defendant's counterclaim. I should say, however, that even if it had not arisen, there would have been real difficulties in the way of the damages claim. The claim is set out at para 17 of the Counterclaim. Sub-para 1 relates to the rent overpayment claim which I have dealt with above. Sub-paras 2, 3 and 5 deal with costs which would have been incurred in any event even if the Claimant had performed all its contractual obligations fully. Sub-paras 6 and 7 would be recoverable if at all by way of an award of costs. That leaves sub-para 4.

21. The claim at sub-para 4 is, as I understand it, based on the reduction in business done by the Castries branch after the move to the Castries Car Park. This claim fails to take account of the fact that the only loss that can be claimed would be that actually caused by the breaches of contract which are proved and not just the difference between what the business made before and after the move. As Mr Myers puts it in his report, assessing such a loss is inevitably "subjective and fraught with difficulty". It is clear that there are numerous possible reasons for the poor level of business after the move which have nothing to do with any breach of contract by the Claimant and which will have been of much greater significance: a general recession (referred to by the

Defendant herself in a letter dated 15 November 2001); the location of the new shop itself (Mr Myers expressed the clear view that he would have advised the Defendant not to move to it if he had been asked at the time: see para 21 of his written replies dated 29 March 2005); the fact that the car park has not achieved the desired level of use (not something for which the Claimant can be held responsible; Ms Hippolyte pointed out that it was largely because the government had failed to enforce parking regulations in Castries sufficiently); the fact that the residents of Conway were not relocated as had been planned (again not something over which the Claimant had any control); the late opening of the Post Office next to the leased shop. It would have been extremely difficult for the court to make any sensible assessment of the impact of the relatively minor breaches of contract and the damages awarded would inevitably have been very modest.

Result

22. For the reasons set out above I therefore give judgment on the claim for the sum of $85,522 with interest at 6% from 14 February 2004 (which I assess as $85,522 x 14/12 x 6% = $5,986) and I dismiss the counterclaim.

Costs

23. I will hear the parties on costs but at the moment I am strongly inclined to make no award of costs to the Claimant taking account of its conduct both before and after the claim was filed. As I have noted the Claimant failed to install a directory or carry out improvements to the area outside the shop for a period of three years and no explanation was forthcoming as to why. I have the feeling that the Defendant's understandable complaints and worries were not dealt with sympathetically. Advantage was taken of the fact that she overlooked the need to serve notice of renewal of the lease so as to remove her at the end of the three years. The Reply and Defence to Counterclaim is full of quite unjustified and intemperate accusations of fabrication and sham against the Defendant which I could not understand the purpose of (see paras 3, 10, 11(d) and 16 in particular). At trial the Claimant's witnesses refused quite unnecessarily and in the face of common sense to acknowledge that it would not be normal to charge a tenant the same rate per square foot for common

parts as for the main shop. These matters cumulatively lead me to conclude that the Claimant should not be awarded the costs of these proceedings.

Murray Shanks
HIGH COURT JUDGE (Ag)