BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCV 2007/0098

BETWEEN:

EARL HODGE

Claimant

and

ALBION HODGE

Defendant

And

VIOLET DELVILLE

Ancillary Defendant

Appearances: Ms Glennis Potts for the Defendant/Ancillary Claimant
Dr JS Archibald and Ms Corinne George for the Ancillary Defendant

JUDGMENT

[2011: 11, 24 October]

(Assessment of rent and mesne profits in absence of agreement – occupier refurbishing premises – occupier adding to premises – occupier repairing premises – whether agreement that costs of works be offset against rent when finally agreed/established – whether rent payable in respect of additions to premises made by occupier – quantum of rent payable – quantum of mesne profits payable)

[1] **Bannister J [ag]:** In ancillary proceedings brought in this action by the defendant, Mr Albion Hodge ('Mr Hodge'), against the claimant, Mr Earl Hodge, and his wife, the ancillary defendant ('Ms Delville'), Mr Hodge claims outstanding rent for first floor premises at Baughers Bay called the Chillin' Café ('the café') from April 2004. On 30 June 2010 I found that Ms Delville alone had been the tenant of the café since April 2004. It appears that from roughly the same time she had

occupied the ground floor premises, which she ran as a nightclub called the Blue Majic Night Club ('the night club'). I shall refer to the café and the nightclub together as 'the premises.' Ms Delville has paid nothing for her occupation of the premises between the time she entered into possession until the expiry of a notice to quit on 31 March 2011. At the trial I directed an inquiry as to the amount of rent to be paid by Ms Delville for her tenancy of the café and, although no such claim was made in the ancillary proceedings, it was sensibly agreed between the parties that the inquiry (and any order for payment) should include Ms Delville's occupation of the night club. This is my judgment after the taking of that inquiry.

[2] Although strictly speaking the obligation (which, subject to determination of the amount, Ms Delville has never denied) in respect of the café was for rent, while the obligation in respect of the night club (which again Ms Delville has never denied) was for mesne profits, in practice no distinction was drawn between the two liabilities at the inquiry and for simplicity's sake I shall refer generally to 'rent.'

Facts

[3] Mr Hodge acquired the premises in February 2002. At some point before April 2004 the café was let to a man referred to during the inquiry as Gus. Gus used the café to prepare and cook food, which (as I understood it) he then took elsewhere to sell. Gus paid Mr Hodge US$2,000 per month as rent for the café and was Ms Delville's immediate predecessor as its occupier.

[4] Ms Delville commenced her occupation of the premises in April 2004. She says she was introduced to the property by a Mr Floyd Penn ('Mr Penn'). Here the facts attested to by the witnesses diverge sharply. Mr Hodge says that he was approached by Mr Penn to let out the café for the purposes of a business to be carried on by Mr Penn and Ms Delville and her husband in partnership. He says that the deal was done through Mr Penn and that neither Ms Delville nor her husband was present (although at trial he had said that Ms Deville was with Mr Penn). He maintained and maintains that he considered that was really dealing with Mr Earl Hodge, through Mr Penn, and that he assumed that Ms Delville must be involved because she was his wife. He specifically denies ever having entered into an agreement with Ms Delville personally that she

should be given a tenancy of the café so that she could run a restaurant there. Mr Hodge insisted at trial and insisted at the inquiry that the upshot of his discussions with Mr Penn was that it was Mr Earl Hodge who became tenant of the café although he accepted that Ms Delville would have been "involved". He has never, so far as the evidence shows, claimed that Mr Penn was a tenant, even though he says that he was told by Mr Penn that he was to be one of the three intended partners.

[5] Mr Hodge says that a rent of US$7,400 per month was agreed between himself and Mr Penn and he produces a receipt which he says he gave to Mr Penn in exchange for an initial payment of rent. That document carries two figures – one in the sum of US$7,400 and another, in a section of the document headed 'Account', in the sum of 7,450, against which a tick appears. The receipt is expressed to be for 'House Rent.' Although Mr Penn put in an elaborate affidavit (upon which he was scarcely cross examined) stating how he negotiated the supposed rent of US$7,400, he does not mention the receipt.

[6] In his affidavit Mr Penn says that he approached Ms Delville and her husband about the supposed partnership. He says that they agreed to his proposal that Ms Delville and her husband should put up all the money to outfit the business, in return for which he would give them a 50% share in it.

[7] Ms Delville's evidence was that she had been informed by Mr Penn in about March or April 2004 that the premises were vacant. Ms Delville denies that she or her husband ever agreed to go into partnership with Mr Penn or that she ever authorised Mr Penn, or anyone else for that matter, to pay any money to Mr Hodge in respect of the premises or to agree a rent (or anything else) with him. She does agree, however, that she employed Mr Penn on a casual basis to keep an eye on the premises and the work being done on them down to about August 2004 and that for that service she paid him about US$22,000.

[8] Ms Delville says that she met Mr Hodge on an introduction from Mr Penn, inspected the premises and entered into an oral agreement that she would lease the upper part of the premises (apart from two bedrooms which were used as accommodation for staff working in Mr Hodge's ferry business) to be used as a restaurant; that she would carry out renovations and improvements of which the premises then stood in need at her own expense; and that after that she and Mr Hodge would meet

to agree a reasonable rent for the café, deducting, as she puts it, the costs incurred by her in renovating the upper storey. All of this is denied by Mr Hodge.

[9] The conflicts in this evidence are sharp. None of the witnesses concerned seemed to me to be obviously giving untruthful evidence and I must therefore attempt to find the facts based upon the balance of probabilities. I have already found at trial that a landlord and tenant relationship was formed between Mr Hodge as landlord and Ms Delville alone as tenant of the café in April 2004. Consistently with that I find as a fact that Ms Delville and her husband never agreed to go into partnership with Mr Penn or that she ever authorised him to negotiate rental or any other terms of any lease on her behalf with Mr Hodge. Mr Penn's account of the proposed partnership, under which he would allow Ms Delville and his cousin, Mr Earl Hodge, a half share in exchange for their paying for the refurbishment was not inherently credible. I therefore reject the evidence of Mr Penn that he had any authority to act as Ms Delville's agent in any negotiations over the café. No reason was suggested why either of Mr Earl Hodge or Ms Delville should have acted through the agency of Mr Penn rather than dealing with Mr Hodge directly or why Mr Hodge should have believed that Mr Penn was agent for either of them.

[10] For the same reason, I reject the evidence of Mr Hodge about the receipt and the agreement for payment of rent at a rate of US$7,400 per month. On its face the receipt itself purports to be for 'House Rent' and the figures on its face are inconsistent with each other. I accept Ms Delville's evidence that Mr Hodge let her into possession as his tenant without any rent having been agreed, on the basis that a figure would be agreed at some point in the future; that no such agreement was ever reached; and that Mr Hodge never demanded rent until he made his ancillary claim in the present proceedings. Had Mr Hodge believed that a rent of US$7,400 had been agreed, he would not have waited so many years before claiming unpaid rent in these proceedings. Mr Hodge explained the delay as due to a complex of dealings between himself and Mr Earl Hodge which meant that Mr Hodge felt no urgency about collecting the rent, but the nature of these dealings was not specified and if the facts had been as Mr Hodge suggests I can see no reason why he would have demanded and accepted the supposed initial payment of US$7,400, rather than simply leaving the whole matter open.

[11] I reject as inherently improbable the evidence of Ms Delville that an agreement was reached between herself and Mr Hodge that after the café had been refurbished a rent would be agreed and the cost incurred by her in refurbishment would be set off against it. It was common ground that in April 2004 the café needed work done on it before it could commence commercial operation, although the witnesses were not agreed as to the extent of the work required. I accept that it would be open to a landlord of business premises to agree with an incoming tenant that the tenant would carry out improvements and refurbishment and that there should be some adjustment to the rent in consequence, although ordinarily I think it would be left for the tenant to decide whether the cost to the tenant of improvements would be recouped from an increased income flow from the business proposed to be carried out from the premises. In other words, the tenant would not ordinarily expect a reduction in rent for putting the premises into his preferred condition for the purposes of his (rather than the landlord's) business. I take comfort from the evidence of Mr Anthony Campbell ('Mr Campbell'), who gave expert valuation evidence on behalf of Ms Delville, that it is normal practice for commercial tenants to renovate and modify the interior of premises at their own expense.

[12] What I cannot imagine is a landlord effectively giving an incoming tenant a blank cheque to meet the costs of unspecified refurbishment and improvements by allowing the tenant to reimburse himself dollar for dollar out of the landlord's future rental stream for improvements desired by the tenant but not agreed with the landlord in advance. That would be a wholly uncommercial arrangement and I do not believe that Mr Hodge would ever have entered into an agreement which had that result.

[13] I therefore reject Ms Delville's evidence about the agreement for deduction of the cost of improvements from future rent once agreed. It follows that Ms Delville must pay rent for the premises for the period between 1 April 2004 and 31 March 2011 without set off for the cost of work carried out by her during that time.

Valuation

[14] Before I turn to the quantum of rent proposed by the valuation experts, there are two points of principle which I must deal with. The first arises out of the fact that certain of the improvements carried out by Ms Delville involved the addition (at her own expense) of covered decks which extended the usable space at the premises. The question is whether she should have to pay rent in respect of that additional space. The second point arises from the fact that (as I find) Ms Delville replaced the roof in 2009 (she had done some necessary repairs to it at an earlier stage). The question is whether some reduction in the rent should be allowed for what, in an ordinary commercial lease, would have been a liability of the landlord.[1]

[15] The first question (addition to the area of the demised premises) is bedeviled by the manner in which each expert approached the question of valuation. Each considered that the correct method of carrying out the calculation was to seek out comparable premises, divide the rent payable in respect of them by the square footage occupied and apply the resulting figure to the square footage of the premises as extended (Ms Jennifer Dunn ('Ms Dunn'), for Mr Hodge) or to the original area before extension by Ms Delville (Mr Campbell for Ms Delville). In my judgment however, it is necessary to distinguish between valuation *method* and what the tenant is paying rent *for*. If one supposes that the experts had valued the premises by reference to the projected income stream expected to be generated by the tenant (as would normally be the case with, for example, a gas station), it can be seen that there is no necessary arithmetical correlation between area occupied and rent payable. No evidence was available as to how the rents for either valuer's comparable premises had been calculated as between landlord and tenant. Certainly there was no evidence that they had been calculated by reference to square footage and nothing more and it was Mr Campbell's evidence that rents for restaurant and nightclub premises are arrived at by agreeing a figure per month independently of the area of the demised premises, although he said that the parties may do a cross check by calculating the rent so arrived at as an amount per square foot.

[1] this was common ground

[16] The tenant pays for the premises let. If the tenant extends those premises during the currency of a formal lease, the terms of the lease will determine whether or not he is liable to pay an additional rent in respect of the extension. Where, as here, there were no agreed terms other than that Ms Delville was to occupy as Mr Hodge's tenant, the only terms that are to be implied are that she would have quiet enjoyment of the café, that in default of agreement she would pay a reasonable rent and that the lease would be terminable on reasonable notice. If a different valuation approach, such as one based on a discounted cash flow, had been taken by the experts, it would have been appreciated immediately that the extensions made to the premises were irrelevant to the amount of rent to be paid. If premises are capable, when let, of extension and if the landlord has no objection to them being extended, what is being let are premises intended to be and as extended by the incoming tenant. That, as a matter of law, is the demise. Although there is no evidence that Mr Hodge agreed to the extensions as such, he had no objection in practice to their being carried out and I find as a fact that he was well aware of their construction and raised no objection to clearance of vegetation, for example, to enable them to be carried out. I also find as a fact that Ms Delville expected, when she entered into possession, that she would be able to extend the premises without objection from Mr Hodge – otherwise she would not have gone in. Mr Hodge says that Mr Penn had told him that more space or a different layout was going to be needed.

[17] I should add that it was part of Mr Campbell's evidence that where a tenant pays to extend premises the landlord will not normally charge rent on the extension. I do not find that helpful, since he is clearly dealing with the usual situation, where the contractual relationship will be governed by a lease in express terms, so that what happens when a tenant constructs an extension will turn on the terms of the lease. That is not this case. Ms Dunn's evidence, which seemed to me to be more persuasive, although not decisive, was that she had never seen extensions treated as not forming part of the demised premises.

[18] In my judgment, therefore, and for the reasons given in paragraphs [15] and [16] above, the extensions formed part of the demised premises and Ms Delville must pay rent for them. If that rent is to be calculated by reference to floor area, they are to be included within it.

[19] As to the second question, whether there should be some deduction for the roof replacement carried out in 2009, both experts agreed that this should be amortised over the period during which Ms Delville occupied the premises. Mr Campbell said that such amortisation was 'appropriate', without giving reasons why it was appropriate in the present case, where there is no express division of the respective liabilities of landlord and tenant for repairs. Again, it seems to me that the question of how this cost (some US$119,000) should be treated is essentially a matter of law for the Court. In my judgment and in the absence of any agreed terms covering the situation, Ms Delville must be taken to have improved the premises for the benefit, ultimately, of Mr Hodge. Whether or not he was aware that she was carrying out the work (in case it matters, I find as a fact that he was) there is no evidence that he ever agreed to pay for it. In those circumstances the cost is, in my judgment, irrecoverable, whether directly or by way of amortisation. That is because there is no principle of restitution in the case where a person improves the property of another in the absence of any express or implied agreement for reimbursement and in circumstances where the person carrying out the improvements is aware that the property improved belongs to that other. Dr Archibald QC, who appeared together with Ms Corrine George for Ms Delville, referred me to no authority to the contrary. That is the position in respect of the improvements and refurbishment other than the roof replacement which Ms Delville carried out and Mr Campbell was, unsurprisingly, of the view that that would be the usual position under a commercial lease. The replacement of the roof stands, in my judgment, in no different position. No deduction, whether by way of set off or amortisation[2] is to be made, therefore, in respect of the roof replacement.

Quantum

[20] I can now turn to the quantification of the rent payable on the bases summarised above. Each expert sought comparables. Ms Dunn, for Mr Hodge, basing herself upon her chosen comparables, assessed the rent for the café in its improved and extended state at US$20 per square foot per annum and the nightclub, in the same condition, at US$15 per square foot, each figure being given as at 31 March 2011. She justified the distinction as being based on user. I did not find the distinction convincing. There were, by definition, no user covenants in the lease and I can see no principle requiring any distinction to be made in the circumstances of the present case

[2] which in the present case yields an almost identical commercial result

between the rent payable for the café and the rent payable for the night club. Ms Dunn's figures translate into US$1.67 per square foot per month for the café and US$1.25 per square foot per month for the nightclub. The median between these two figures is some US$1.40 per square foot per month and although it is true to say that that was not a figure which she herself put forward, in my judgment, her evidence is to be treated as contending for that figure as being the appropriate payable in respect of the premises as at 31 March 2011.

[21] Mr Campbell, for Ms Delville, identified a number of possible comparables, but the rents varied between a low of US$13.20 per square foot up to a high of US$27.27. The gross floor area of the premises considered varied from 1,600 square feet up to 8,000 square feet. Two of Mr Campbell's comparables (the largest in area) included night clubs. The other three did not. Mr Campbell's opinion was that the appropriate rent for the premises as at April 2004 was US$3,500 per month. He arrived at this figure on the basis of an adjusted floor area of 4,297 square feet, because he excluded all of the decking extensions and allowed only one half of the night club floor area. It follows that it was the opinion of Mr Campbell that in April 2004 the appropriate rent for the premises was US$0.81 per square foot per month, before deducting the amortised costs of the replacement roof which, for the reasons given above, is not permissible.

[22] It is not possible to compare the square foot figures given by Ms Dunn and those given by Mr Campbell directly, since the latter gives his figure as at 1 April 2004 while the former gives hers as at 31 March 2011. The experts were broadly agreed, however, that rents would be subject to increase at a figure between 3% and 5% per annum and Mr Campbell produced figures showing the effect of an increase over time at 3% per annum[3] between 1 April 2004 and 31 March 2011. If one takes Mr Campbell's base figure of US$3,500 per square foot per month as at 1 April 2004 and applies an annual 3% uplift, the corresponding figure as at 31 March 2011, according to my arithmetic, (which needs to be checked), is US$4,020. Dividing this figure by the 4,297 square feet which Mr Campbell was including in the demise, gives a figure per square foot per month as at 31 March 2011 of US$0.97, or US$1 rounded. It is this figure, in my judgment and according to my calculations, which needs to be compared with the figure of US$1.40 which I derive from Ms Dunn's evidence.

[3] adjusted at the beginning of years 3 and 6 by cumulative index

[23] It is quite obvious that it has proved extremely difficult for the experts to obtain true comparables for the premises. Each will have done her/his best to assist the Court. I cannot overlook the fact that (if I have done the arithmetic correctly) Mr Campbell's figure adjusted to 31 March 2011 (US$1 per square foot per month) is still lower than the lowest of his selected comparables (US$1.10 per square foot per month). When the Court is faced with differences of this sort in these circumstances there is some authority[4] to support the view that the safe course is to take a median figure as being the most likely to produce a just result and that is what, in the absence of any suggestion from either Counsel as to the proper approach to be taken in these circumstances, I propose to do. Accordingly, I find that the market rent for the premises as at 31 March 2011 was US$1.20 per square foot per month.

[24] Given my conclusions in paragraphs [15] to [18] above, this figure must be applied to an overall floor area of 6,100 square feet. In other words, to an area covering the totality of the café area and the totality of the night club area, including the extensions effected by Ms Delville but excluding the 1,085 square feet, or thereabouts, comprising two bedroom units which each valuer had mistakenly assumed to have been included within the demise. Thus, the appropriate annual rent for the premises as at 31 March 2011 was, in my judgment and subject to checking the calculations carried out above, US$7,320 per month or US$87,840 per annum.

[25] These figures must be adjusted backwards, as it were, to arrive at a figure for the year commencing on 1 April 2004 and for each year thereafter. Ms Dunn referred in her evidence to two instances known to her where an annual increase of 5% was applied. Mr Campbell said that it was reasonable to assume that for a hypothetical period of seven years an annual increase of 3% would have been agreed. In this regard, I prefer the actual examples given by Ms Dunn to the hypothetical figure proposed by Mr Campbell. The 31March 2011 figures must, therefore, be adjusted backwards year by year to yield a base figure which, when increased by 5% per annum, produces an annual rent as at 31 March 2011 of US$87,840 per annum.

[4] per Lord Hoffmann in **SAAMCO v York Montague** [1997] AC 991 at 221G to 222A

[26] There will be liberty to apply in case the parties are unable to agree their calculations according to the principles set out above. The total amount of rent for the period from 1 April 2004 to 31 May 2011 so agreed or fixed in default of agreement must be paid by Ms Delville to Mr Hodge.

Interest

[27] Ms Potts asked for an award of interest on the outstanding amounts. She relied upon **International Railway Company v Niagara Parks Commission**[5] as authority. That case decided that interest in equity is payable when a purchaser enters into possession of property before paying the purchase price. It has nothing to do with the present case, which is a common law claim for unpaid rent. There is no statutory basis in this jurisdiction upon which a defendant may be ordered to pay pre-judgment interest on a common law debt or damages and accordingly there will be no award of interest.

Commercial Court Judge

24 October 2011

[5] [1941] AC 328