

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. BVIHCV 2014/0010

BETWEEN:

NANNY CAY RESORT & MARINA LIMITED

Claimant

and

BOBBY'S MARKET PLACE LIMITED (d.b.a. Bobby's Market)
ELTON LEONARD (d.b.a. Bobby's Market)

Defendants

Appearances:

Mrs. Hazel-Ann Hannaway-Boreland for the Claimant

Mr. Terrence Neale for the Defendant

2014: July 3rd
2014: September 24th

JUDGMENT

[1] **BYER J.:-** This claim was initiated by way of a Fixed Date Claim Form filed on the 10th day of January 2014, and amended on 18th day of March 2014.

[2] By the claim the Claimant sought the following relief:

- (1) A declaration that the Defendants' right whether jointly, individually, acting in person, or in a "doing business as" capacity, to use or occupy the property situate at Nanny Cay Resort & Marina, including all piers, buildings and appurtenances, occupied by the Defendants, (the "Licensed Premises") is determined; the licence granted by the Claimant having expired on 30th September 2013, and having been expressly determined as of 31st December 2013;

- (2) The Defendants' licence having expired, an order that the Defendants forthwith quit and deliver up possession of the Licensed Premises in good and substantial repair, and condition to the Claimant;
- (3) An order restraining the Defendants whether by servants, agents, or otherwise, from entering or occupying the Licensed Premises.
- (4) Mesne profits and utility charges, in respect of the Defendants' occupation of the premises from 30th September 2013 until the date that possession is delivered up.
- (5) Costs; and
- (6) Such other order as the Court deems fit.

[3] The matter was heard on the 3rd of July 2014 and judgment was reserved.

The Facts

[4] The Claimant is a company incorporated under the Laws of the British Virgin Islands and operates a Resort and Marina located at Hannah's, Sea Cows Bay, Tortola.

[5] The First Defendant is a company incorporated under the Laws of the British Virgin Islands and has operated a supermarket in Road Town, Tortola, for a number of years.

[6] The Second Defendant is a shareholder and director of the First Defendant.

[7] The Claimant and the Second Defendant entered into a Licence Agreement (the initial Licence) on 15th November 2012, pursuant to which the Claimant granted to Bobby's Market a licence to occupy a specific area of their property measuring 1717 sq. feet situated at Hannah's, Sea Cows Bay, Tortola, and known as Nanny Cay Resort & Marina, to operate a supermarket for a period of one year

commencing 1st October 2012, and ending 30th September 2013 in consideration of the sum of \$3,031.88 per month.

- [8] The Second Defendant who signed on behalf of Bobby's Market encountered certain financial difficulties subsequent to the execution of the initial Licence, and as a result, Bobby's Market became delinquent in the payment of the monthly licence fee.
- [9] By letter dated 4th July 2013, the Claimant wrote to the Second Defendant personally demanding payment by 31st July 2013 of the outstanding licence fees which at the time stood at five (5) months in the sum of \$32,116.62.
- [10] The Second Defendant failed to comply with the said demand for payment within the time stipulated which prompted the Claimant to issue a notice to quit to the Second Defendant on 31st July 2013 (the First Notice), terminating the Licence Agreement for non-payment of the licence fee to take effect 31st August 2014.
- [11] The Second Defendant subsequently made payment of the outstanding arrears during the month of August 2013 but failed to adhere to the terms of the First Notice and did not give vacant possession to the Claimant within the stipulated time.
- [12] On or about 4th October 2013, the Second Defendant received a further letter dated 30th September 2013 (the Second Notice) from the Claimant, informing him that the Licence had expired on 30th September 2013, and it would not be renewed. The letter then gave a final date to vacate being the 30th December 2013.
- [13] Notwithstanding the First and Second Notice, the premises continued to be occupied by Bobby's Market which prompted the Claimant to file its claim in the terms as set out.

[14] As a consequence, the Claimant claimed *mense* profits on the property from September 2013, and compensation for coverage of water, electricity, insurance and general services associated with the occupation of the premises by the said Bobby's Market.

The Claimant's Submissions

[15] The Claimant by way of their written legal submissions, and fortified by the oral submissions of their attorney, Mrs. Hazel-Ann Hannaway-Boreland, submitted to this Court that there were three main questions which required the Court's determination. These were as follows: (1) What if any was the effect of the 31st July 2013 notice ("the First Notice") to quit, in view of the August 2013 payments of rental arrears?; (2) What if any was the parties' agreement for delivery of possession upon the expiration of the license period, especially given the Notice contained in the letter of the 30th September 2013 ("the Second Notice"); and (3) How is a licence or lease terminated upon the efflux of time?.

[16] In relation to the first issue, the Claimant submitted that there was in fact no dispute regarding the validity of the First Notice.

[17] Mrs. Boreland submitted that the First Notice remained valid even after the acceptance of the arrears of the licence fee which came subsequent to the issuance of the notice to quit. Counsel referring to the evidence stated that it was clear that the payment was made during the notice period and not subsequent to it; but further submitted that even it had been made after the expiration of the notice period, that the payment alone could not have constituted a waiver without more.

[18] The submission made by Counsel for the Claimant was that without more, the mere payment of rent or in this case licence fee could not amount to the creation of a new agreement upon the expiration of an old one. Counsel referred to the

quotation from the text of Hill and Redman and relied on the same: *"an act such as submission to distress or receipt of rent will not be held to create a new tenancy unless it is held, as a question of fact, that it was intended to operate as a recognition of the relationship of landlord and tenant"*¹

[19] As a result, the Claimant submitted to this Court that there having been a failure to create any legal relations subsequent to the service of the First Notice, that the First or Second Defendant must be now so bound and thus even without more, the Defendants are required to adhere to the Notice and give vacant possession.

[20] Counsel for the Claimants however sought to further argue that if this submission regarding the First Notice was not accepted by the Court, it was submitted that the very nature of the parties' obligations under the agreement on the termination of the licence period was clear from the document itself and must take effect in its clear terms.

[21] They submitted to this Court that the Licence agreement did not contain any special terms. Thus, it operated as a contractual licence which *"may be revocable or irrevocable according to the express or implied terms of the contract between the parties"*.²

[22] Thus, the Claimant submitted that in paragraph 37 of the initial Licence, it was a term of the initial Licence that Bobby's Market staff and agents were to vacate the premises, *'at the expiration or sooner determination of the term.'* Likewise, by paragraph 1 of the same, the term ended on the 30th day of September 2013.

[23] Furthermore, the Claimants submitted that there was no contractual obligation provided for in the initial Licence for the Defendants to be served with notice reminding them of the date of determination of the term; nor was there any

¹ Per paragraph 18 of the Submissions of the Claimant dated the 3rd July 2013

² Per paragraph 21 of the submissions of the Claimant dated the 3rd July 2014.

obligation for any such notice to be served within any specified period. The only contractual duty, the Claimants submitted, was for the Bobby's Market staff and agents to vacate the premises either at the expiration or sooner determination of the term; namely, by no later than 30th September 2013 in the event that it had not been determined sooner.

[24] In addition, the Claimants maintain that when the Defendants failed to abide by paragraph 37 of the Licence, the Second Notice operated as a reminder only that the Licence was now expired and was not being renewed.

[25] Therefore, the Claimant submitted to this Court that contrary to the suggestion by the Defendants that the Claimant had by its behaviour implicitly renewed the initial Licence, there was instead clear and unequivocal evidence that the Claimant had brought the term to an end.

[26] The Claimant further argued that in the event that the Court was minded to imply the higher standards generally attributable to lease agreements to this Licence, the Claimant submitted that the law on the determination of a fixed lease was however clear and did not in any event advance the position of the Defendants. That is, *'when a lease is granted for a term of years or other fixed period, then at common law upon the expiration of the last day of the term, the tenancy ends without notice to quit or other formality.'*³

[27] Counsel for the Claimant emphasized to this Court that the Licence could not be equated to a periodic tenancy, being from month to month, or from year to year, where special rules apply on the dates for service of the notice. Counsel submitted that in the case at bar and in relation to the Licence, it involved the determination of a contractual licence for a fixed term, and date of termination, without any default provision for its automatic renewal. In fact, as a general rule, Counsel submitted that it was settled that a notice to quit need not be in a specific

³Per paragraph 26 of the submissions of the Claimant dated the 3rd July 2014.

form, provided that it is properly served or brought to the attention of the contracting party.⁴

[28] Hence, the Claimant fervently argued that the date of receipt of the Second Notice which was contended several days after the date as it appeared on the face of the Notice itself did not nullify the Defendant's contractual obligations to vacate the premises by the expressed termination date. However, purely in an effort to assist the Defendant, Nanny Cay by the said letter gave the Defendant an additional three (3) months to vacate the premises to find alternate accommodations.

[29] Based on the foregoing, the Claimant submitted to this Court, that they are entitled to the claim as pleaded with the consequential orders as sought.

Defendants' Submissions

[30] In their trial submissions filed on 2nd July 2014, the Defendants through their Counsel, Mr. Terrence Neale sought to pray before this Court that the proper issues to be addressed were: (1) Who were the parties to the Licence? (2) Was the termination notice issued by the Claimant on 31st July 2013 purporting to terminate the Licence on 31st August 2013 withdrawn, and assuming that it was not, did it terminate the Licence? (3) Was the termination notice issued by the Claimant on 30th September 2014 valid notice for the purpose of terminating the License? (4) Is the Claimant entitled to an injunction restraining the Defendants from entering or occupying the Licensed Premises? (5) Is the Claimant entitled to *mesne* profits in respect of the Defendants' occupation of the premises from 30th September 2013 until the date that possession is delivered up?

[31] By way of the very first issue upon which Counsel for the Defendants argued before this Court, it was clear that for the Defendants it must be first and foremost

⁴ Per paragraph 27 of the submissions of the Claimant dated 3rd July 2014.

established who is in fact the proper party in these proceedings and who will be the proper party to be bound by the determination of this Court.

- [32] To this end, Counsel submitted that the Claimant should not be allowed to maintain an action against two separate legal entities when only one of these entities could in fact be liable under the Licence.
- [33] Contrary to the Claimants contentions that the Licence was with the First Defendant and not the Second Defendant, Mr. Neale submitted that the evidence substantiates that the Licence was in fact only entered into with the Second Defendant. His signature as appended to the document does not state that he signed his named for and on behalf of the First Defendant and without that requirement, the law requires that the Second named Defendant must assume the liability.
- [34] In support of this assertion, Counsel relied on the statement in the law that if an individual purports to enter into a contract on behalf of a company without making it clear that he does so, having failed to ensure that there was an indication of the correct name of the company or the inclusion of the word "limited", the person who purports to sign then becomes personally liable under the terms of any contract that he may have so executed.
- [35] The Defendants submitted to this Court that there is nothing in the evidence to suggest that the Licence was in fact entered into with the First Defendant as opposed to the Second Defendant doing business as "Bobby's Market", albeit the intention of the Second Defendant to do so. In any event, the Defendants submitted that even if the Second Defendant had executed the Licence on behalf of the First Defendant, he would, as a matter of law, become personally liable under the Licence.

- [36] As a result, the Defendants submitted to this Court that the claim against the First Defendant is without legal basis. Their argument rested on the submission that there were no legal relations entered into by the Claimant and the First Defendant and as such the claim against it should be dismissed with costs.
- [37] The Defendants further submitted to this Court that the payment of the arrears of the licence fees which were accepted by the Claimant after the delivery of the First Notice while remaining in occupation, operated to create a second licence continuing on from the initial Licence which had by that time been brought to an end by the First Notice. This second or subsequent license was therefore granted to the Second named Defendant in the same terms and conditions as the initial License.
- [38] This second licence they argued was created by the intention of the parties and despite there not being any express indication, the acts of the parties was sufficient to create a binding agreement as between the parties.
- [39] The Defendants therefore submitted to this Court that they are in agreement with the contention by the Claimant, that the First Notice was not withdrawn by the Claimants by the acceptance of the payment of the arrears of the license fee. It not having been withdrawn it was therefore sufficient to terminate the initial Licence. Upon this initial license being terminated and with the acceptance of the outstanding fees together with the remaining in occupation by the Second Defendant, a Second License under the same terms and conditions as the initial License was ultimately created.
- [40] Having therefore created a new or second license at the termination of the initial License, the Defendants therefore submitted that the Second Notice could not have effectively terminated the new license. That Second Notice was not required to terminate the initial license which had already been validly terminated by the First Notice. Therefore, the Defendants submitted to this Court that this Second

Notice is of no legal effect and that the Second named Defendant was entitled to disregard the same and remain in lawful occupation of the premises.

[41] Thus, being in lawful occupation of the premises as submitted by the Defendants, there is therefore according to the Defendants no legal basis for the granting of an injunction restraining the Defendants from enjoying the rights under the second Licence until the same has been properly and legally determined.

[42] Finally, on behalf of the Defendants, Counsel Mr. Neale submitted that once the Court finds that the Second named Defendant is in lawful occupation of the premises, the Claimant would not be entitled to their claim for mesne profits or any consequential orders due upon any granting of the order for possession.

[43] As a result of all their above arguments, the Defendants submitted to this court that the Claimant had also failed to prove its claim against the Second Defendant, and as such, the same should be dismissed with costs on a prescribed basis.

COURT'S CONSIDERATIONS AND ANALYSIS

[44] Having assessed the submissions of the parties both orally before the court and in writing, I am in agreement with Counsel for the Defendants that the first critical issue that has to be determined before the matter proceeds is who is the correct and proper party to this claim.

[45] By the Licence agreement ("the initial Licence") dated the 15th November 2012, it is clear that the parties are stated as the Claimant herein and an entity referred to as "Bobby's Market". It is the Second Defendant who purportedly executed the initial Licence on behalf of this entity.

[46] It is also apparent when consideration is given as to how the matter progressed before this Court prior to trial that it was only upon the filing of the Affidavit for the

Second Defendant on the 25th February 2014 in response to the claim that it became apparent that there was in fact no legal entity known as “Bobby’s Market” in existence as stated in the Claim Form.

[47] By amendment granted by this Court on the 18th day of March 2014, the Claimant therefore amended the Claim Form with the names of the Defendants as they now appear before the Court.

[48] At the trial of this matter, Counsel for the Defendants submitted to this Court that there can only be one proper Defendant before the Court. The claim is in relation to the breach of a contractual licence; thus, as was argued by the Defendant’s counsel, there can only be a claim as between the parties to that licence.

[49] Thus, the Defendants argued that regardless of what course of dealing or documents produced by the Claimant under a certain name or even evidence as to the Second Defendant’s purported intention it was not sufficient to ground the claim legally against two separate individuals.

[50] In this regard, Counsel for the Defendants relied on the learning regarding the legal effect of a director who intends to sign on behalf of a company who does not make it clear in the execution of the document that it was his intention to so sign. This inadvertence as revealed in the law results in that director becoming personally liable under any such contract.

[51] I am in agreement with this submission.

[52] By Section 26 of the BVI Business Companies Act 2004 (“the Act”) provision is made for the following:

“26.1 (1) Subject to Section 17(6), a company shall ensure that its full name and, if it has one, its foreign character name, is clearly stated in

(a) *every written communication sent by, or on behalf of, the company; and*

(b) *every document issued or signed by, or on behalf of, the company that evidence or creates a legal obligation of the company.*

(2) *A company that contravenes subsection (1) commits an offence and is liable on summary conviction to a fine of \$1,000.00". (my emphasis)*

[53] When this is read with the learning in the text, Palmer's Company Law⁵ which references Section 108 in the United Kingdom which is in all material respects similar to the Section 26 in the Act, it is clear that the legal fall out is that the director who does not ensure that the terms or provisions of the section are adhered to will become personally liable.

"It is dangerous for the directors to neglect compliance with the injunctions of section 108, for, in addition to pecuniary penalties, any director or other officer of a limited company, or any person on its behalf, who signs or authorizes to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque, order for money or goods, etc., wherein the name of the company is not mentioned in manner specified, is personally liable to the holder of such bill of exchange, etc., for the amount thereof unless the same is duly paid by the company (s. 108 (4)). Thus, in Alkins & Co. v. Wardle and Others, the South Shields Salt Water Baths Co. Ltd. was misdescribed in a bill as the Salt Water Baths Co. Ltd., and it was held that the directors were personally liable on the bill. Further, in Hendon v. Adelman and Others, the directors of L. & R. Agencies Ltd. purported to sign a cheque for the Company by writing "L.R. Agencies Ltd."; MacKenna J. held that they were personally liable under Section 108 (4)(b) because, by omitting the connecting ampersand, they had not used the correct name of the company. It makes no difference that the holder of those instruments has not been misled by the misdescription."⁶

[54] Having heard this argument, Counsel for the Claimant was unable to refute the legal import of what had occurred upon the execution of the initial Licence but instead sought to submit that the decision to have both Defendants was wholly due to the confusing and contradictory conduct of the Second Defendant himself.

⁵ Paragraph 7 - 04

⁶ Paragraph 7 - 04 Palmer's Company Law 1982

- [55] In looking at this matter in the round, the Court is however not persuaded by the trite answers given by the Claimant in response to the troubling issue as to who should be the proper person before the Court and thereby who will be bound by the decision of the Court.
- [56] It cannot be that one party to a contract can be at liberty to bind another person to the obligations under a contract when that person is not legally a party to the contract.
- [57] Thus in the instant case, it is apparent that the Claimant had discussions with the Second named Defendant in person prior to the creation of the contract for the licence of the business premises. It is he who signed and to him whom all correspondences was directed. On the Licence it is clear that there was an indication as to who the party was to be and who was to sign for that party. There however, does not seem to have been any attempt prior to the filing of the claim, by the Claimant to ensure that the Licensee was in fact a legal person, nor was there any evidence that any attempt was made to clarify whether the Second Defendant without more, could execute the document.
- [58] What is clear is that it was only subsequent to the response of the Second named Defendant in February 2014 that the Claimant seems to have made any effort to search within the appropriate records to clarify the parties.
- [59] Having done so, and the amendment having been granted, it is now the question as to whether the First and Second Defendants can be equally liable.
- [60] This Court is however persuaded that as unfortunate as it may have been that the Claimant may have been misled as to who was to be the proper party as the Licensee that is not enough in my mind to substantiate the cavalier attitude exhibited as to the legal implications of what has now materialized.

- [61] I therefore accept that the Second Defendant intended to bind the First Defendant and not enter into these obligations in his own or personal capacity; however whatever his intention may have been, it cannot override the clear terms of the legislation nor its legal import. It is that legislation that makes it clear that the Second Defendant having failed to make it pellucid that he was executing the agreement on behalf of the First Defendant must now find himself personally liable.
- [62] It was therefore always incumbent upon the Claimant to ensure that they had brought the proper parties to the Court. It is not enough to wave a wand, cast a net and then hope someone is captured in the net. Having done so in the instant case has resulted in the net being cast too wide or far and as such the Claimant must bear the result of the fishing expedition.
- [63] The Claimant having had up to the time of the trial to make the necessary adjustments to their case and having failed to do so must therefore now stand the consequences of having a Defendant before the court against whom no order can be made.
- [64] I therefore agree with Counsel for the Defendant that the case against the First named Defendant should be dismissed and for the matter to be considered as against the Second named Defendant. I will deal with costs regarding this order at the conclusion of the matter.
- [65] This court must now consider the seminal and pivotal issues that emerged from this trial.

What was the effect of the Notice issued by the Claimant on the 31st July 2013 as regard to payments made in August 2013 of a sum amounting to arrears?

[66] By paragraph 37 of the obligations of the Licensee under the initial Licence, the Licensee was required at "*the expiration or sooner determination of the term peaceably to surrender and yield up to the Licensor the Licensed premises...*"

[67] Acting in accordance with this clause, the Claimant by letter dated 31st July 2013 (the First Notice) informed the Second Defendant that having been in arrears for an extended period, the Claimant was giving the Defendant one month to vacate and by so doing determined the initial Licence.

[68] It may be instructive at this juncture to examine the terms of the Notice that was sent to the Second Defendant. The contents of the correspondence are set out in its entirety hereunder.

" Termination of License Agreement Bobby's Market Place

31st July 2013

Dear Elton,

I am writing to inform you that Nanny Cay Resort and Marina is terminating your License agreement to operate a Super Market at Nanny Cay. You currently have five months rent in arrears which is unacceptable. I have worked with you over the last few year [sic] but you [sic] position has not improved. We will give you one month to vacate the premises. I had written to you on the 4th July 2013 giving you until the end of July to come current but no funds have been deposited. I have enclosed a copy of your current statement which includes August rent. As you will see there is a balance of \$37,922.25 outstanding.

I hope you understand our decision. Please do not hesitate to contact me if you have any further questions.

Yours sincerely,

Miles Sutherland Pilch"

- [69] It was therefore apparent that the License was brought to an end.
- [70] The Second Defendant in his evidence in chief told this Court that upon receiving this letter and "*despite my difficult financial situation, I was able to obtain the necessary funds to pay the outstanding arrears.*" (my emphasis)
- [71] It was not led in evidence by either side but in the written submissions to this Court, it was proffered by the Claimant as being common ground that these arrears which were referred in the First Notice were in fact paid by the Second Defendant between the 8th and 22nd August 2013. This was not disputed by Counsel for the Defendant and the Court therefore accepts this and further finds that both payments would have been made within the given notice period as given under the First Notice, namely before the 31st August 2013.
- [72] Upon the Second named Defendant making the payment, the Claimant by their representative Mr. Miles Sutherland Pilch told this Court in cross-examination that he did not inform the Second Defendant that despite the payment having been made that the Second named Defendant was still required to vacate the premises under the Licence by 31st August 2013.
- [73] The Second Defendant during his evidence told this Court that upon payment of the arrears, as far as he was concerned, he was allowed to remain in possession of the premises and that there was no further need to consider vacating.
- [74] In fact, he stated to the Court on cross-examination that when he paid the outstanding sums, he and the Claimant's representative, Mr. Sutherland Pilch or Mr. Miles as he called him had even entered into discussions about upgrading the facilities which he admitted had been an ongoing concern of the Claimant for some time, even previous to the issue of the failure to pay the licence fee. He therefore told this Court that "*I always thought once I had satisfied those obligations there would be a new lease.*"

[75] Counsel for the Defendants therefore submitted to the Court that having made this payment, which albeit for the outstanding fees and not current fees which was accepted by the Claimant, together with the continued occupation by the Second named Defendant were sufficient to amount to the creation of an implied contract evidencing a new licence agreement under the old terms.

[76] In this regard, Counsel Mr. Neale sought to rely on Chitty on Contracts in the following terms:-

*"there may be an implied contract where the parties make an express contract to last for a fixed term and continue to act as though the contract still bound them after the term has expired. In such a case the Court may infer that the parties have agreed to renew the express contract for another term."*⁷

[77] The Claimant, on the case that has been presented to this Court refutes this contention and states clearly that the mere acceptance of rent (or in this case at bar licence fees) cannot, without more, be sufficient to create a new tenancy or contractual obligation unless such act is agreed to by the parties to have that effect.

[78] The evidence of the Claimant's representative Mr. Sutherland Pilch on cross-examination regarding the First Notice was, "*I was determining the tenancy as of 31st August 2013.*"

[79] The Court is therefore constrained to find any clearer evidence of intention on the part of the party who had the right to grant and determine the licence that there was no other intention save and except to sever the legal relations of the parties.

[80] The Court so finds that this was so despite his clear and forthright answer on cross-examination when he told this Court that he had never specifically told the Second named Defendant that he would still have to leave regardless of whether he paid the outstanding sums or not.

⁷ Chitty on Contracts 13th ed. para 1- 076

[81] This Court therefore finds on a balance of probabilities having heard the evidence, that there was no such intention on the part of the Claimant to create any further legal relationship with the Second Defendant and neither was it inferred from the mere act of acceptance of the outstanding sums. There was no evidence from either party in examination in chief or cross-examination upon which this Court is satisfied that there could have been a legitimate reliance on the part of the Second named Defendant that a new licence had been created to which he was now a party and under which he was entitled to remain in possession. Further, neither side has shown any evidence that subsequent to the payment of the accepted arrears that the Second Defendant made any payment for the period subsequent to the expiration of the 31st August period that represented a current fee period. The Court is therefore not convinced that there was any conduct sufficient or at all which amounted to the withdrawal of the First Notice or creation of a new licence.

[82] I am fortified in this view upon a perusal of the authorities from as early as the 19th Century including the case of *Doe v Batten*.⁸ That case showed that the Courts have steadfastly been of the opinion that the acceptance by the landlord of monies due and owing previous to the expiration of the lease (and in some limited cases after the expiration of the notice period) could not in and of itself amount to the creation of a new tenancy. In fact "...*the agreement to continue the tenancy must be proved. It must be shown that the parties were ad idem as to the terms.*"⁹

[83] The question therefore to be asked in any given case must therefore be, "*what the real intention of both parties was? If the truth of the case is that both parties intended the tenancy should continue there is an end to the plaintiff's title, if not, the landlord is not barred of his remedy by ejectment...*"¹⁰

⁸ 1 COPW 243

⁹ *Davies v Bristow* [1920] KB 428 at 438

¹⁰ Per Lord Mansfield in *Doe v Batten* op cit

[84] It is therefore quite clear that what is required to amount to “acceptance” must be gleaned in keeping with the intention of the parties. Thus, “*when a landlord has brought a tenancy to an end by means of Notice to quit a payment of rent after that date will operate in favour of the tenant if it can be shown that the parties intended that there should be a new tenancy. A new tenancy must be created.*”¹¹ (my emphasis).

[85] However, this Court is of the opinion that this intention from all the evidence cannot be gleaned in the present circumstances.

[86] In the definite words of Lord Goddard CJ,¹² “*there is no evidence on which a new agreement could be inferred*”.

[87] The First Notice therefore definitively determined the Licence. There was therefore no renewal of the Licence after the payment of the arrears sum.

[88] Having so determined, the other issues raised by the parties with regard to the purported 30th September 2013 notice (the Second Notice) and what the Claimant would be entitled to, can be dealt with summarily.

What was the legal effect, if any of the purported 30th September 2013 notice (the Second Notice)?

[89] By letter dated the 30th September 2013 (the Second Notice), the Claimants informed the Second named Defendant of the following:

“30th September 2013

Dear Elton,

¹¹ Per Lord Goddard CJ in Clarke v Grant [1950] 1KB 104 at 105

¹² Op Cit

Re: License Agreement for 1717 sq. ft. Building at Nanny Cay, Tortola, British Virgin Islands – between Nanny Cay Resort and Marina and Bobby's Market

Further to our letters of July 2013 I am writing to inform you that the current License Agreement between Bobby's Market and Nanny Cay Resort and Marina (License) expires today 30 September 2013. In view of the history of delinquency, including the events set out in the referenced letters, Nanny Cay Resort and Marina will not be renewing the said License.

Therefore, by this letter you are hereby given notice that the License has effectively expired and determined as of today's date 30 September 2013. You are therefore given notice to vacate the premises and remove all shop supplies, implements and all other Bobby's Market belongings by no later than 30 December 2013. However, in the event that you would prefer to vacate on an earlier date, Nanny Cay Resort is willing to facilitate the same upon receipt of 48-hours' notice.

Yours sincerely,

Miles Sutherland Pilch"

[90] From the evidence of Mr. Sutherland Pilch, it was clear that after the expiration of the First Notice, the Second Defendant continued in occupation of the premises illegally. As such, according to Mr. Sutherland Pilch, this Second Notice was given in the terms of "a reminder" that the Second named Defendant was still required to leave. For the Claimant, it therefore seemed to have amounted to a Second Notice to quit but it however could not have been anything close to a "courtesy letter" as Counsel for the Claimant sought to categorise it in her submissions before this Court. For as Counsel for the Second Defendant quite eloquently put it, there is no such specie with regard to the relations between landlord and tenant.

[91] This Court now having determined that there was no tenancy created subsequent to the expiration of the First Notice this Court is of the opinion that whatever the

intention of this Second Notice may have been, it in fact was of no legal effect at all. This purported notice could not speak to a nonexistent new licence nor could it speak to a licence that was already determined.

[92] As was stated by Demming J. in the case of Lowenthal v Vanhoute,¹³ when a notice to quit has been given, a subsequent notice to quit is of no effect unless it can be inferred from other circumstances that a new tenancy has been created after the expiry of the first notice. "*The Law is now well settled that where a tenancy has been determined by notice to quit, it is not revived by anything short of a new tenancy and in order to create a new tenancy there must be an express or implied agreement to that effect. A subsequent notice to quit is of no effect unless with other circumstances it is the basis for inferring an intention to create a new tenancy after the expiration of the first. The mere facts that the tenant continues in possession and a suit is not instituted are insufficient.*"¹⁴

[93] I therefore find that the Second purported notice was of no legal effect as against the licence created in 2012.

Whether the Claimant is entitled to mesne profits and utility charges from 30th September 2013 until possession.

[94] The definition of Mesne profits as set out in Halsbury's Law of England 4th ed. para 255 is "*the amount of the open market value of the premises for the period of the Defendant's wrongful occupation. In most cases the rent paid under any expired tenancy will be strong evidence as to the open market value.*"

¹³ 1947 1 ALL ER 116

¹⁴ Per S Barman J in Bhagabat Patnaik and Ors v Madhusudhan Panda and Ors AIR 1965 Ori 11

- [95] Thus, a claim for mesne profits is only applicable where a person who had a legal right to possession either by way of tenancy or license remains in possession after the valid notice to quit has expired.
- [96] In this case, having determined that the licence had in fact been terminated as of 31st August 2013, I now also find that the Claimant is entitled to its claim for mesne profits for the continued occupation by the Defendant as of the 1st September 2013.
- [97] This court is of the view that the Second Defendant's intimation during cross-examination that knowing full well that he operated an enterprise, he also knew that he was required to make payments but that he could not make those payments without a statement as to the amount is an untenable position to take of a man who is touted as an experienced businessman.
- [98] To this Court it matters not if the Claimant under the licence was to create a statement in which the charges for the utilities as provided by paragraph 9 of the Licence were to be inserted or not. What is clear is that the Second Defendant was well aware by the terms of the licence that at the very minimum he had to make a payment of \$3,031.88. Yet, even this sum was not paid.
- [99] Further, the Second Defendant has failed to convince this Court from his evidence either orally or by way of any documents that he in fact made any attempt to pay the sums even though the same may not have been accepted upon the admitted instructions of Mr. Sutherland Pilch.
- [100] This Court therefore finds that the Claimant is entitled to their claim as contained in their Fixed Date Claim Form as amended for mesne profits together with all the utility charges not from 30th September 2013, but rather from 1st September 2013 until the delivery of possession.

[101] The order of the Court is therefore as follows:-

1. That the claim as against the First named Defendant be struck out for failing to adduce a cause of action against it.
2. It is declared that the Second Defendant's right to use or occupy the property situated at Nanny Cay Resort and Marina including all piers, building and appurtenances occupied by the Second Defendant was determined as of 31st August 2013.
3. That the Second named Defendant's licence having expired, it is hereby ordered that the Second named Defendant quit and deliver up possession of the licensed premises in good and substantial repair and condition to the Claimant within ninety (90) days of this order.
4. The claim for an injunction is denied.
5. The Second Defendant is to pay mesne profits and all utility charges due to the Claimant from 1st September 2013 until the date of possession.
6. Costs to the First named Defendant for the dismissal of the case against it are to be prescribed costs on the basis of an unvalued claim pursuant to Part 65.5(2)(b) CPR 2000 as amended.
7. Costs to the Claimant on the remainder of the claim are to be prescribed costs on the basis of an unvalued claim pursuant to Part 65.5(2)(b) CPR 2000 as amended.

Nicola Byer
High Court Judge