EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: BVIHCV2014/0044

In the Matter of Parcel 20/22; Block 2837F; In the Road Town Registration Section

And

In the Matter of Section 104 of the BVI Business Companies Act, 2004

BETWEEN:

T-TOBBA COMPANY LIMITED

Claimant

and

THORTON SMITH TRUST CORPORATION

First Defendant

JAMAL SMITH

Second Defendant

Before:
Eddy Ventose Master [AG.]

Appearances:

Mr. Glenroy Forbes with Ms. Monique Peters for the Claimant
Mr. Jamal Smith with Ms. Shanel Taylor for the First Defendant
Mr. Jamal Smith in person

2016: November 10
2017: January 13

JUDGMENT

1. VENTOSE, M. [AG.]: Both parties have filed applications for summary judgment. The first is an application by the Claimant for summary judgment against the First and Second Defendants filed with sworn affidavit on 30 September 2016 and the second is an application by the First Defendant for summary judgment against the Claimant filed with sworn affidavit on 29 June 2016.

Background Facts

2. The background facts as outlined in the statements of case of the Parties are as follows. The Claimant re-amended claim form claims against the First Defendant US$50,852.50 for monies due to the Claimant in relation to rental arrears, late fee charges, associated bank fees and water charges for the period April 2012 to August 2012 when the First Defendant occupied the property of the Claimant under a written commercial lease entered into between the Claimant and the First Defendant on 1 March 2011 (the "Lease").

3. The Claimant avers that the Second Defendant and Mrs. Violet Gaul, both of whom signed the Lease, did not inform it that the First Defendant was not incorporated at the time the Lease was executed. There is no dispute as to the terms and conditions contained in the Lease. The Claimant also avers that Thornton Smith, a law firm operating in the Virgin Islands (which was previously named as First Defendant) occupied the property from 1 March 2011 to 31 August 2012. The Claimant avers that: (1) the First Defendant and Thornton Smith appeared to be two entities that were connected; (2) before the proceedings, no effort was made to distinguish the separate identities of the First Defendant and Thornton Smith; and (3) the Claimant believed Thornton Smith and the First Defendant were operating in concert in accepting liability for the obligations under the Lease and the benefit of the office space in the property.

4. The defence of the First Defendant is that: (1) the First Defendant could not have entered into the Lease because the First Defendant was incorporated on 9 March 2011; (2) the First Defendant did not ratify the Lease after incorporation; and (3) it was the Second Defendant who continued to assume the obligations under the Lease. The Second Defendant, Mr. Jamal Smith, is the director of the First Defendant. The First Defendant avers that it was the Second Defendant, doing business as "Thornton Smith", who occupied the premises until 31 August 2012 and not the First Defendant. The essence of the defence of the First Defendant is that it never occupied the premises and that since it did not ratify the Lease, it is not bound by the obligations under the Lease; and that it was the Second Defendant who occupied the property and assumed the obligations under the Lease.

5. The defence of the Second Defendant is that: (1) the Claimant failed to file the Lease with the Registrar of Lands as required by section 46 of the Registered Land Ordinance (Cap 229) and that consequently the Lease was never completed and therefore unenforceable at law; (2) because of failed negotiations in relation to compensation for costs of repairs and the continued unexpected problems with the premises, the Second Defendant, as a director of the First Defendant, did not ratify the Lease after the incorporation of the First Defendant; and (3) the Second Defendant continued to occupy the premises as a tenant at will until 31 August 2012.

The Application for Summary Judgment

6. CPR 15.2 states that the court may give summary judgment on the claim or on a particular issue if it considers that the:

    a. Claimant has no real prospect of succeeding on the claim or the issue; or
    b. Defendant has no real prospect of successfully defending the claim or the issue.

7. In *Easyair Ltd (T/A Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch), Lewison J summarised the correct approach to applications for summary judgment as follows:

i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success

ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable

iii) In reaching its conclusion the court must not conduct a “mini-trial”

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is

bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction.

8. The main issues to be considered in both applications are as follows: (1) Whether the First Defendant by its actions ratified the Lease; (2) What is the effect of non-registration of the Lease as required by section 46 of the Registered Land Ordinance (Cap 229); and (3) Whether the Second Defendant has a valid claim in law against the Claimant in respect of the property.

Ratification of the Lease

9. The Lease was executed between the Claimant and the First Defendant on or about 1 March 2011. Linnell M. Abbott, a director of the Claimant, the Second Defendant and Violet Thomas Gaul (the former Third Defendant), both directors of the First Defendant, signed the Lease.

10. The Claimant avers that it understood the Second Defendant and Ms. Violet Thomas Gaul had authority to execute the Lease on behalf of the First Defendant and that section 104 of the British Virgin Islands Business Companies Act 2004 allows a company to be bound by and entitled to the benefits of any contract entered into in its name or on its behalf before incorporation once that company by action or conducts adopts the same. In support of this, the Claimant states that: firstly, Ms. Abbott was contacted on 9 December 2011 by the Second Defendant to discuss the possibility of terminating the Lease because Ms. Violet Gaul was no longer associated with the First Defendant and, secondly, the Second Defendant, via email dated 11 January

2012, wished to meet with Ms. Abbott to discuss the termination of the Lease, which Lease the Second Defendant stated as being held by the First Defendant.

11. Section 104 of the British Virgin Islands Business Companies Act 2004 provides as follows:

> Contracts before incorporation.
>
> 104.(1) A person who enters into a written contract in the name of or on behalf of a company before the company is incorporated, is personally bound by the contract and is entitled to the benefits of the contract, except where
>
> (a) the contract specifically provides otherwise; or
>
> (b) subject to any provisions of the contract to the contrary, the company adopts the contract under subsection (2).
>
> (2) A company may, by any action or conduct signifying its intention to be bound by a written contract entered into in its name or on its behalf before it was incorporated, adopt the contract within such period as may be specified in the contract or, if no period is specified, within a reasonable period after the company's incorporation.
>
> (3) When a company adopts a contract under subsection (2),
>
> (a) the company is bound by, and entitled to the benefits of, the contract as if the company had been incorporated at the date of the contract and had been a party to it; and
>
> (b) subject to any provisions of the contract to the contrary, the person who acted in the name of or on behalf of the company ceases to be bound by or entitled to the benefits of the contract.

12. In relation to this issue, the question essentially is whether the First Defendant, by any action or conduct signifying its intention to be bound by the Lease, adopted the Lease within a reasonable period after the incorporation of the First Defendant. The Claimant avers that there is overwhelming evidence to show that the First Defendant adopted the Lease after incorporation, including: (1) a draft of the first resolution of

the directors of the First Defendant dated 15 March 2011 which states, at paragraph 9, that the First Defendant adopts the Lease; (2) reconciliation detail of the First Defendant which states that a cheque was paid to the Claimant in the sum of $13,480.00 on 27 May 2011 and a further payment of $6,700.00 (as rent under the Lease) was paid to the Claimant on 29 June 2011; (3) a letter dated 5 April 2011 setting out the costs of the alterations and repairs carried out by the First Defendant on the premises; and (4) an email from the Second Defendant to the husband of Ms. Violet Gaul wherein the Second Defendant states that the First Defendant:

> has by its actions and conduct signified its intention to be bound by a written contract entered into in its name before it was incorporated. The company having been incorporated on 9 March 2011, a few days after the Lease was entered into, has been occupying the premises and paying rents …

13. The First Defendant avers that it was not possible for it to adopt the Lease because it did not possess a licence to carry on banking business or trust business and was only granted interim permission by the Financial Services Commission to be incorporated using the word "Trust" in its name for the sole purpose of applying for, and obtaining, a licence under section 4 of the Banks and Trust Companies Act 1990 (No. 9 of 1990) (the "BTCA"). Section 4(3) of the BTCA provides that:

> If the Governor is satisfied that an application to carry on banking business or trust business is not against the public interest and that the applicant is a person qualified to carry on banking business or trust business, he may grant the application and issue to the applicant a licence subject to such terms and conditions as the Governor thinks fit.

14. This section relates simply to the grant of the application and issuance of the licence by the Governor to carry on banking business or trust business. The grant of a licence under section 4(3) of the BTCA is not a necessary precondition for the First Defendant to enter into the Lease. What the section does is to make it lawful for any

person to carry on banking business or trust business in the British Virgin Islands who is the holder of a licence issued by the Governor. Therefore, section 4(3) of the BTCA does not preclude the adoption of the Lease by the First Defendant.

15. The court was not provided with a copy of the executed first resolution of the First Defendant. The cheques that were paid to the Claimant for rent due under the Lease was drawn on the account of Thornton Smith. This is clear on the face of the cheques. The issue of whether the First Defendant adopted the Lease is of course fact sensitive and the evidence presented does not show overwhelmingly that this was the case. In any event, the court should not on a an application for summary judgment conduct a mini trial to make that determination. Further disclosure might lead to other documentation, which may show a more convincing case for adoption or non-adoption of the Lease by the First Defendant. These are issues that are manifestly unsuitable for a summary judgment application and must be dealt with at trial.

Non-Registration of the Lease

16. The First Defendant in its amended defence filed on 30 March 2016 states that the First Defendant objected via letter dated 5 April 2011 that it was not the First Defendant's obligation to file the Lease with the Registrar of Lands, but those objections were not accepted by the Claimant who continued to insist that the First Defendant should register the Lease. The First Defendant also states that the failure of the Claimant to file the Lease with the Registrar of Lands means that the Lease was never completed and therefore unenforceable at law and the First Defendant could not therefore ratify the Lease after its incorporation.

17. Section 46 of the Registered Land Ordinance (CAP. 229) provides as follows:

> Registration of leases
>
> 46. A lease for a specified period exceeding two years or for the life of the lessor or of the lessee, or a lease which contains an option whereby the lessee may

require the lessor to grant him a further term or terms which, together with the original term, exceed two years, shall be in the prescribed form, and shall be completed by—

(a) opening a register in respect of the lease in the name of the lessee;

(b) filing the lease; and

(c) noting the lease in the incumbrances section of the register of the lessor's land or lease.

18. The section makes it mandatory for the Lease to be filed, for a register to be opened in respect of the Lease in the name of the First Defendant and for the Lease to be noted in the incumbrances section of the Claimant's land or lease. The wording of the section suggests that the obligation to do the various acts rests with the lessor, in this case, the Claimant. However, the Claimant has done nothing. What then is the effect of non-compliance with section 46? Abel J, when explaining the effect of section 49 of the Registered Land Act (Chapter 194 Revised Edition 2000, Laws of Belize) (the "RLA"), which is identical to section 46, in *Villas at Del Rio Limited v Hauptli* (BLZHCV 2013/0545 dated 19 June 2014) stated (at [44]) that, assuming that non-compliance with the RLA renders any dealing, such as the purported creation of a lease in excess of two (2) years without registration under and as required by (or not in accordance with) the RLA, void:

> It is trite law that a lease can be created without any formality (orally or in writing) where, inter alia, exclusive possession is granted of land and rent is paid for the use and occupation of such land, and there exists other badges and incidences of a lease, and a periodic tenancy may be thereby created.

19. The issue then of whether non-compliance with section 46 of the Registered Land Ordinance renders the Lease void is one that needs to be determined. Counsel for the First Defendant states that section 37 is applicable and section 37(1) provides, inter alia, that no lease shall be capable of being disposed of except in accordance with the ordinance, and every attempt to dispose of such lease otherwise than in

accordance with the ordinance shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right of interest in the lease. Section 37(2) states that:

> (2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorised:
>
> > Provided that such a contract shall not be unenforceable by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract-
> >
> > > (i) has in part performance of the contract taken possession of the property or any part thereof; or
> > >
> > > (ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.

20. The Claimant states that: (1) section 46 does not render the Lease void at law, and that even if this is so, section 37 does not invalidate an unregistered lease at law; (2) the Lease is a form of contract which remains valid and it is enforceable regardless of registration and that registration is ancillary to the contract and does not affect the substance of the contract; (3) the First Defendant occupied the premises and paid rents and utilities to the Claimant pursuant to the terms of the Lease; and (4) in the alternative the parties have an equitable lease or a periodic tenancy was created when the First Defendant continued in possession of the premises and continued to pay rent under the same terms as provided for in the Lease.

21. Even if as a matter of law section 46 operates to prevent the Lease from being enforceable, the question then arises as to what type of lease, if any, is created and with whom, the First Defendant or the Second Defendant? Is a periodic tenancy

thereby created? Is it a tenancy at will or an equitable lease? These too are issues that need to be determined at the trial of the matter.

The Counterclaim

22. The First and Second Defendants in an application filed on 29 June 2016 sought: (1) summary judgment in favour of the First and Second Defendants on the counterclaim; and/or (2) an order striking out the statement of claim of the Claimant pursuant to CPR 15.2 for not disclosing any reasonable ground for bringing the claim against the First and Second Defendants. The grounds of the application are as follows: (1) the failure by the Claimant to file the Lease in accordance with section 46 of the Registered Land Ordinance; and (2) Clause 9 of the Lease is illegal because the Claimant failed to obtain a separate water meter for each tenant as required by the Water Supply Ordinance (CAP 153) and the Water Supply (Rates and Charges) Regulations.
23. The Second Defendant counterclaims against the Claimant, stating that by Clause 12(b) of the Lease and/or section 52(c) of the Registered Land Ordinance, the Claimant had an obligation to keep the roof, main walls, main drains and other common installations in repair. The Second Defendant avers that it suffered damage to its air-condition units, carpets and painted walls as a result of leakage from the ceiling, windows and doors that caused flooding during the passage of Hurricane Irene on 21 August 2011. The Second Defendant also avers that the premises was therefore unfit for use and that it was entitled to: (1) suspend the rent or portion thereof until the property was again fit for use; (2) a reduction in rent; (3) a refund of monies spent on improving the premises to make it fit for use; and (4) a refund of its deposit.

24. The Claimant in its affidavit in response to the application for summary judgment filed on 30 September 2016 avers that it cannot properly reply to the application because the application is ambiguous and uncertain. The Claimant also avers that the Second Defendant failed to file affidavit evidence in support of its application for summary judgment as required by CPR 15(5)(1)(a), which provides as follows:

Evidence for purpose of summary judgment hearing

15.5(1) The applicant must –

(a) file affidavit evidence in support with the application…

25. I agree with Claimant that the application should be struck out for non-compliance with CPR 15(5)(1)(a). The alternative is to grant leave to the First and Second Defendants to file an affidavit in support of the application for summary judgment. However, this would make little difference because the very nature of the counterclaim, as explained below, makes it unsuitable for summary judgment.

26. The counterclaim by the Second Defendant against the Claimant is for damages for breach of the provisions of the Lease that was entered into between the Claimant and the First Defendant not the Second Defendant. In the alternative, the Second Defendant grounds the counterclaim on section 52(c) of the Registered Land Ordinance which provides that:

52. Save as otherwise expressly provided in the lease, there shall be implied in every lease agreement by the lessor with the lessee binding the lessor—

(c) where part only of a building is leased, to keep the roof, main walls and main drains, and the common passages and common installations, in repair;

27. The immediate difficulty that the Second Defendant faces is that section 52(c) of the Registered Land Ordinance assumes a lessor/lessee relationship between the parties. The Second Defendant would have to lead evidence to show what type of tenancy existed between itself and the Claimant to be able to invoke section 52(c). In addition, the Second Defendant would need to provide evidence of the damage for which he counterclaims for damages against the Claimant. These are matters for the trial judge who would be in a better position to make such a determination based on all the evidence before the court.

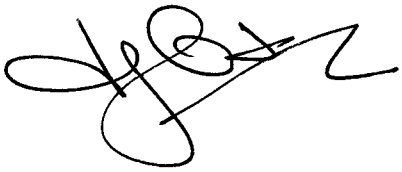
Conclusion

28. The Claimant's claim against the First and Second Defendants and the Second Defendant's counterclaim against the Claimant are not suited for summary judgment.

29. IT IS HEREBY ORDERED as follows:

    (1) The Claimant's application for summary judgment against the First and Second Defendants is refused.
    (2) The Second Defendant's application for summary judgment against the Claimant is struck out.
    (3) Leave is granted to the Claimant to amend the claim form and statement of claim to reflect the order of the court dated 7 July 2016 striking out the statement of claim against the Third Defendant within 28 day's of today's date.
    (4) The First and Second Defendants may file an amended defence if necessary within 28 days of service of the further amended claim form and statement of claim.
    (5) The hearing referred to in paragraph 5 of the order of the court on 10 November 2016 is hereby vacated.
    (6) The matter shall proceed in accordance with the CPR.
    (7) No order as to costs.

30. I wish to thank Counsel for the parties for their submissions and authorities.



Eddy Ventose

Master [AG.]