THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2016/0402

BETWEEN:

COLIN IAN GASPARD and SEGUN DENIS TOBAIS also known as
SEGUN DENIS TOBIAS trading as COLLY'S CAR WASH

Claimants

and

MARCUS KENTY JOSEPH

Defendant

Before:
The Hon. Mde. Justice Kimberly Cenac-Phulgence High Court Judge

Appearances:
Mrs. Wauneen Louis-Harris for the Claimants
Mr. Alberton Richelieu for the Defendant

2018: May 25, 28;
September 27.

JUDGMENT

[1] CENAC-PHULGENCE J: The claimants, Colin Ian Gaspard ("Gaspard") and Segun Denis Tobais also known as Segin Denis Tobias ("Tobias") filed a claim for the sum of $31,450.00 or in the alternative, damages for breach of contract, aggravated damages, interest and costs. The claimants claim that they, trading as Colly's Car Wash, entered into an oral agreement on 1st December 2015 to rent premises which were owned by the defendant for the purpose of operating a car wash and bar at a monthly rental of $4,000.00 inclusive of utilities. According to

the certificate of registration, the statement of particulars in relation to Colly's Car Wash was registered on 20th November 2015 and the certificate of registration was issued on 14th January 2016.

[2] On 22nd April 2016, the claimants claim that the defendant in breach of the implied covenant of quiet enjoyment, erected scaffolding outside the demised premises thereby preventing the claimants or their customers from accessing the car wash. They also claim that the defendant caused the electricity and water supply to the premises to be disconnected which effectively meant that the car wash could not operate.

[3] The defendant denied that he had any rental agreement with Colly's Car Wash and alleged that the agreement was with Tobias only. He denied any discussions with Gaspard. The defendant denied that the rental agreement which he had with Tobias included utilities and counterclaimed for unpaid rent and utilities. The defendant denied erecting the scaffolding and disconnecting the water supply. He however admitted disconnecting the electricity supply since Tobias did not pay the utilities as had been agreed.

[4] The evidence of the claimants was given by Gaspard and Ian Jn. Baptiste in witness statements filed on 1st November 2017. The witness statements of Michail Hector and Dwight Clarke were struck as these two witnesses did not attend Court on the day of the trial. The defendant alone gave evidence in his defence by witness statement filed on 7th August 2017.

Issues

[5] The issues to be determined are as follows:

(a) Whether there was an oral agreement for the rental of the defendant's premises for the purpose of operating a car wash and bar?

(b) If, so who were the parties to the agreement?

(c) What were the terms of the agreement?

(d) Whether the defendant committed a breach of the covenant of quiet enjoyment by disconnecting the electricity and water supply to the demised premises and erecting scaffolding on the premises?

(e) What if any damages should be awarded?

(f) Whether the defendant is owed arrears of rent and payment of utilities as claimed in his counterclaim?

A. **Whether there was an oral contract for the rental of the defendant's** premises for the purpose of operating a car wash and bar?

[6] It is not disputed by either party that there was an oral agreement for the rental of the defendant's premises situate at Bonne Terre for the purpose of operating a car wash and a bar and that that agreement was effective from 1st December 2015. It is also not disputed that in April 2016, it was agreed that the rental would only relate to the car wash and not the bar.

B. Who were the parties to the agreement?

[7] The claimants, Colin Ian Gaspard ("Gaspard") and Segun Denis Tobais also known as Segun Denis Tobias ("Tobias") have brought this claim in their personal capacities trading as Colly's Car Wash. The defendant however denied that he had an agreement with the business Colly's Car Wash and instead insisted that the rental agreement was only with Tobias. His evidence was that all his discussions were with Tobias.

[8] The evidence of the claimants was given by Gaspard only. There was no evidence from Tobias. In the statement of claim filed by the claimants, they alleged that all negotiations and discussions for the rental of the premises were conducted by Gaspard with the authorization of Tobias as the agent of the business Colly's Car Wash. In cross-examination, Gaspard said that he did not personally speak to the defendant regarding rental of the premises which is in direct contradiction with what was alleged in the statement of claim. He attempted to say that he had spoken to the defendant's stepson and suggest that the

stepson acted as agent for the defendant. However, that was not part of the claimant's case and was only introduced in the witness statement of Gaspard. As pointed out by counsel for the defendant, Mr. Alberton Richelieu ("Mr. Richelieu"), this was never pleaded and cannot be relied upon as this would be in contravention of rule 8.7 of the Civil Procedure Rules 2000 ("CPR") and I agree. I will therefore have no regard to this.

[9] There is no evidence from the claimants that when the discussions were held with the defendant it was made known to him that the negotiations were being made on behalf of Colly's Car Wash. In fact, Colly's Car Wash had not been issued with a certificate of registration at the date when the negotiations took place. It is also curious that Tobias gave no evidence to suggest that the defendant knew that the rental agreement was with Colly's Car Wash. The defendant was adamant that he had discussions with Tobias and that Tobias never introduced Gaspard to him as his business partner.

[10] Gaspard in his witness statement said that the arrangement for the business was that he would collect the monies that were made at the car wash and then he would bring it to Tobias who would then write a cheque to Marcus for the rent. They would then share the balance. The evidence showed that Tobias wrote personal cheques to the defendant for the monthly rental amounts. All the receipts for the payment of the monthly rental are written to Dr. Tobias (Tobias) and not to Colly's Car Wash.

[11] The evidence shows that Gaspard worked at the car wash and had a slot which he operated and paid a daily amount just like the other four slot occupants. The totality of the evidence suggests that the negotiations for the rental of the premises were undertaken by Tobias and not Gaspard. I do not find that there is any evidence to suggest that the rental of the premises was by Colly's Car Wash and I accept the evidence of the defendant that he was not aware of Colly's Car Wash as a business or that the business was registered at the time he entered into the

agreement to rent the premises. Much was made by counsel for the claimants, Mrs. Wauneen Louis-Harris ("Mrs. Louis-Harris") about the fact that the defendant said in his witness statement that his discussions with Gaspard were scanty but then in cross-examination he said that he had not had discussions with Gaspard. Whilst I appreciate that this may appear to be a contradiction, it is apparent when I review the evidence that the defendant is consistent that he did not have discussions with Gaspard in relation to rental of the property and I accept this evidence. Gaspard's evidence suggests at some points that he is the owner of the business with no mention of Tobias (see lawyer's letter dated 25th April 2016 written to the defendant) whilst at other times he mentions Tobias as his business partner.

[12] On the totality of the evidence, I find that Tobias was the one who negotiated and entered into the agreement to rent the premises with the defendant albeit it was for the purpose of operating the car wash and bar under the name of Colly's Car Wash which was a business formed by Gaspard and Tobias.

C. What were the terms of the agreement?

[13] Gaspard's evidence was that the agreement was that the monthly rental was $4,000.00 and that that sum would include the utility bills for the premises. This is vehemently denied by the defendant whose evidence was that the agreement with Tobias was that in addition to the monthly rental of $4,000.00, the utilities would be paid. The defendant in his witness statement said that he noticed that the car wash was not in operation on or about 22nd April 2016 (which is the date the claimants allege the defendant disconnected the electricity and water and erected the scaffolding on the premises). He said he discovered that the utilities for January to April 2016 had not been paid. The arrangement with respect to the payment of the utilities according to the defendant was that the entire bill would be sent to the tenants and the bills would be paid in the respective proportions by the tenants. He said he had seven tenants in his witness statement but in cross-examination, he said he had ten tenants and that the bills were divided equally

among the tenants. The defendant explained this by saying that at the time he had seven tenants but maybe now he had ten. It is not clear how many tenants were actually to contribute to these utility bills.

[14] The defendant said the utilities were never paid by the claimants yet there is no evidence of him engaging in discussions with Tobias with whom he had the rental agreement about the non-payment. No evidence was led to show that other tenants were paying their portions of the utility bills although the defendant said in his witness statement that he observed that while the other tenants were paying the utility bills, the claimants never paid their portion of the bills.

[15] The only evidence produced by the defendant was a set of water and electricity bills with handwritten notations which are supposed to represent the amounts owed by the car wash. Interestingly, the evidence was that in April 2016, the claimants approached the defendant to negotiate a reduction in the rent from $4,000.00 to $2,000.00 as they were having difficulty maintaining the operation of the bar which was proving financially burdensome. That reduction was agreed. There is no evidence from the defendant suggesting what the new terms were.

[16] No indication is given by him that he even discussed the matter of any outstanding payments for utility bills with the claimants at any time. I find it rather strange that the defendant would agree to a reduction in the rent knowing that there were outstanding utility payments dating back to one month after the initial agreement was entered into. In his defence, the defendant alleged that he agreed to the reduction out of compassion. But he said nothing to Tobias to even highlight the existing default to give an opportunity for it to be remedied.

[17] I cannot accept the evidence of the defendant that the agreement was for payment of $4,000.00 rent monthly and payment of utilities in addition. I find it more plausible to accept that the defendant would have factored utilities into the rental amount especially since it would have been easier to manage the utility bills since

they were in his name. I therefore find that the agreement with Tobias was for rental of the car wash and bar for the monthly sum of $4,000.00 inclusive of utilities.

D. Whether the defendant committed a breach of the covenant of quiet enjoyment

[18] The defendant admitted in his defence that it was an implied term of the agreement to rent the premises that the claimant should have quiet enjoyment of the demised premises. A landlord must ensure that no one, be it the landlord himself or an employee or his agent shall interfere with his tenant's right to possession of and to the lawful use and enjoyment of the premises. "Enjoyment" in this context means to have the use and benefit of a right rather than to derive pleasure from it. Interference with the right of quiet enjoyment must be substantial and what amounts to substantial will always be dependent upon the facts of the case.

[19] The evidence of Gaspard was that after they paid the defendant the final cheque in April 2016, he came and shut down the business. The statement of claim puts that date at 22nd April 2016. Gaspard's evidence was that the defendant sent an electrician to disconnect the electricity in the morning. He said he called the defendant and he was not responding well but in cross-examination he said that when he tried to call the defendant, he did not answer his phone. He also said that the defendant came on that morning and said the car wash was closing down and then he put yellow tape around the area and then scaffolding and benches to block customers from driving into the premises where the car wash was. However, the witness Ian Jn. Baptiste admitted in cross-examination that he did not witness there being any argument between Gaspard and the defendant despite having said so in his evidence in chief. I find Ian Jn. Baptiste to be very unreliable as a witness as his evidence in cross examination totally contradicted his evidence in his witness statement. It was clear that he had no knowledge of what had transpired. The only thing he could support was the fact that the

electricity was cut and the car wash could not operate.

[20] In cross-examination, Gaspard said that he did not see the defendant put up the scaffolding. In fact he said he left after the electricity was cut and when he passed by later he saw the scaffolding and benches.

[21] The defendant in his witness statement at paragraphs 6 and 7 said the following:

> "That I never at no time caused scaffolding to be built outside the demised premises in a manner to interrupt the operation of the car wash business. In fact no scaffolding was erected on the premises by me. The Claimants left the premises of their own volition as they indicated to me that they were experiencing financial difficulties."
>
> "I never disconnected the water and electricity supply to the premises."

[22] Interestingly, in his defence at paragraph 8, the defendant denies any knowledge of scaffolding being erected on 22nd April 2016 outside the demised premises but admits to discontinuing the electricity supply to the demised premises since Tobias did not pay the utility bills as agreed and it proved financially burdensome on him as the electricity bill was in his name.

[23] After having made that admission in his defence, the defendant denies cutting the electricity. I am afraid that I cannot believe the defendant when he said that he did not cut the electricity. He may not have done it himself but I believe Gaspard's evidence that the electricity supply was cut. This constitutes a substantial interference with the claimant's quiet enjoyment of the premises especially since the defendant would have known and was aware that the premises were being utilized for the purpose of a car wash business and the disconnection of the electricity would have meant that the business could not operate.

[24] I do not find it necessary to even decide on the issues of the disconnection of the water which although alleged in the statement of claim, Gaspard gave no evidence in his witness statement of the water supply being disconnected.

The defendant very cleverly gave evidence that he did not erect scaffolding and I do not believe that any acts of interference committed were committed by him personally but I accept and find that on a balance of probabilities, they were carried out on his instruction.

[25] It is clear from the evidence that the defendant was not at the premises when the electricity was disconnected. Ian Jn. Baptiste in his witness statement said that the defendant and Gaspard had an argument on the day the electricity was disconnected but in cross examination, he admitted that contrary to what he had in his witness statement, he did not see the defendant and that it was the electrician who had come to cut the electricity and that there had been no argument between the defendant and Gaspard.

E. What if any damages should be awarded?

[26] Having found that the defendant did commit a breach of the covenant of quiet enjoyment, the question is what measure of damages he is entitled to. Generally, an award of damages for breach of the implied covenant of quiet enjoyment is assessed according to normal contractual principles. The measure of damages is the amount of damages sustained, but limited to the matters that are, or may be supposed to be within the contemplation of the parties when the contract of tenancy was made.

[27] A claim for damages for breach of the covenant for quiet enjoyment is a claim in contract and therefore, a court will not award the tenant either aggravated damages for his distress and inconvenience or exemplary damages to punish the landlord.[1]

[1] See: Branchett v Beaney [1992] 3 All ER 910 at 917.

[28] It was held in the case of Grosvenor Hotel Co. v Hamilton[2] that a tenant could recover for loss of profits but this must be properly pleaded and proven.

[29] The claim is for $31,450.00 of which $31,200.00 is claimed as loss of profits. The other $250.00 is claimed as the cost of the lawyer's letter and service. There is no proof of this amount of $250.00 and this amount is not allowed.

[30] The evidence given by Gaspard in support of the claim for loss of profits was that he worked every day including Sundays. Gaspard said that when the business started a daily entry of the names of the workers, the dates and how much each worker paid to him was made and each worker signed. However, Gaspard only produced a ledger for a portion of the month of March 2016 which showed different amounts being paid to him by different workers, ranging from $20.00 to $50.00. It appeared that Gaspard himself was also paying for use of a slot in the car wash. Although he said that each worker signed the book when they paid, a close look at the extract he produced showed a consistent signature of one person. Gaspard in cross examination said that that signature was not his and he agreed that the signatures looked the same. This would seem to indicate that his statement that each person signed when they paid him was not true.

[31] Gaspard also produced a few receipts issued to customers for work done at the car wash. He said on average he made $10,000.00 a month but the receipts he produces do not support this. The receipts span November 2015 to January 2016 and barely total $3,000.00. Gaspard in cross examination explained that it was not all the time receipts were issued. He said certain customers would request a receipt but generally he termed the business a 'bounce and draw work.' He says he lost a profit of $30,000.00 but does not provide any evidence to prove this loss. There is no evidence of the cost of the services of the car wash and how many of each service was provided weekly on average. The claimant cannot expect the court to rummage through the receipts to find his evidence. Such loss of profits

[2] [1894] 2 QB 836.

needed to have been proved and evidence provided and particularized in his witness statement.

[32] In cross examination, when asked whether he had anyone doing accounts in relation to the business, Gaspard responded, 'my business partner, Segun, paying the bills and receiving monies.' Yet, there is not one shred of evidence of the accounts of the business to support the allegation of a monthly income of $10,000.00. There is no evidence from Tobias although it would appear from Gaspard's evidence that Tobias was the one taking care of the money.

[33] Gaspard also produced ledgers in relation to the bar but by the time the incident which led to this claim arose, the bar was no longer being rented so there can be no claim in respect of the bar.

[34] Counsel for the claimants, Mrs. Louis-Harris in her closing arguments invited the Court to consider the nature of the business and the fact that it was relatively new. She argued that because of the nature of the business it would not be reasonable to expect receipts to be submitted for every day. She further submitted that there was enough evidence to prove the loss of profits.

[35] Counsel for the defendant, Mr. Richielieu submitted that whereas he could accept that given the nature of the business, receipts would not have been issued all the time, the claimants nonetheless had not provided any basis to support their claim of a monthly loss of $10,000.00. There was no evidence of what was done at the car wash to show how this figure was arrived at. Mr. Richelieu relied on the case of Grant v Motilal Moonan Ltd et al[3] where Chief Justice Bernard said the following:

> "I quite agree that special damage, if sought, must be pleaded and particularised (see *Ilkiw v Samuels* [1963] 2 All ER 879) and that it must be 'strictly' proved. In regard to the latter requirement the question which necessarily arises, in my view, is what is the degree of this 'strictness' that

[3] (1988) 43 WIR 372 at 377D and 378.

> is required? The nearest answer to this seems to be that which Bowen LJ gave in the leading case, *Ratcliffe v Evans* where he said ([1892] 2 QB at pages 532, 533):
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> "In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated *and proved.* As much certainty and particularity must be insisted on, both in pleading and *proof* of damage, *as is reasonable, having regard to the circumstances* and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pendantry.' [*emphasis supplied*]"

[36] Mr. Richelieu also referred to the statements of Archie JA in Anand Rampershad v Willie Ice Cream Ltd.[4] where he said this:

> "The rule is that the Plaintiff must prove his loss. The correct approach is as stated by Lord Goddard CJ in Bouham-Carter v Hyde Park Hotel [1948] 64 Law Times 177
>
> Plaintiffs must understand that if they bring an action for damages it is for them to prove their damages. It is not enough to write down the particulars, so to speak, throw them at the head of the Court saying "this is what I have lost. I ask you to give me these damages. They must prove it."

[37] The Court does not require receipts to be able to make an award of damages especially where it is understandable that receipts may be the exception rather than the rule given the nature of the business, but a claimant must assist the Court with sufficient information to enable an assessment to be made of the damage suffered. I find that the claimants did not do that. It is accepted that the actions of the defendant in cutting the electricity supply to the demised premises would have caused loss to the claimants. The defendant would have been aware that the purpose for renting the premises was to operate a car wash. There is no escaping that the defendant must pay damages to Tobias with whom he had the rental agreement for the property.

[4] T & T Civil Appeal No. 20 of 2002.

[38] In the absence of satisfactory particularization and proof of loss of profits, I make an award to Tobias, the 2nd claimant in the sum $4,000.00 for breach of the covenant of quiet enjoyment and of nominal damages in the sum of $3,000.00 for loss of profits as a result of the breach with interest on the total sum at the rate of 6% per annum from the date of judgment to the date of payment.

[39] I make no award for aggravated damages. As stated above, these are not recoverable in a claim for breach of contract.

F. Whether the defendant is owed arrears of rent and payment of utilities as claimed in his counterclaim?

[40] In relation to the defendant's counterclaim, I have already found that the rental agreement included the utilities and therefore the defendant is not owed any payment for utilities. As indicated, the defendant did not prove on a balance of probabilities that the utilities had to be paid separate from the rental amount. The claim for arrears of utility payments therefore fails.

[41] The defendant in his counterclaim claims arrears of rent in the sum of $8,000.00 as follows: $4,000.00 for 1st December 2015 to 1st January 2016; $2,000.00 for 1st March to 1st April 2016 and $2,000.00 for 15th April to 15th May 2016. In relation to the claim for arrears of rent, the evidence revealed the following:

(a) The first BOSL cheque no. 00088 dated 2nd December 2015 in the sum of $4000.00 paid to Warren Charles who Gaspard said was the stepson of the defendant. (Confirmed by the defendant in cross-examination). That cheque was stated to be for car wash and bar rental.

(b) The second cheque no. 00091 dated 5th January 2016 in the sum of $4000.00 paid to the defendant and stated to be for car wash and bar rental Jan 2016. (Receipt No. 2212035 shows payment for Jan 2016). It is noteworthy that nowhere on this receipt does it show any arrears or balance due. If indeed the rent for December was not paid,

then it ought to have been reflected as a balance due on this receipt.

(c) The third cheque no. 00098 dated 11th February 2016 in the sum of $4000.00 paid to the defendant and stated to be car wash and bar rental Feb 2016. (Receipt No. 2212048 paid on 24th March 2016 for the month of Feb. 2016)

(d) The fourth cheque no. 00099 dated 24th March 2016 in the sum of $4000.00 paid to the defendant and stated to be car wash and bar rental March 2016. There was no receipt for this cheque.

There is a receipt dated 15th April 2016 for the sum of $2000.00 which states 'for the Bar at Bonne Terre-final payment and the bar keys were returned'. There is no receipt for the month of March 2016, although there is a cheque written for that amount dated 24th March 2016 which was exhibited by the claimants.

[42] In his witness statement the defendant claims arrears of rent for the same months of December 2015, March and April 2016 but in the sum of $10,000.00. However, in cross-examination, when asked what period the claimants owed rent for, the defendant responded two months. When asked which two months, he said he was not sure.

[43] The evidence presented by the defendant in support of his contention that he is owed rent for the periods outlined is not supported by the evidence. The defendant himself does not appear to be quite sure what arrears are owed to him. I therefore find that the defendant has not proved on a balance of probabilities that he is owed the arrears of rent which he claims and his claim therefore fails.

[44] In conclusion, the entire counterclaim has not been proven on a balance of probabilities and is therefore dismissed.

Order

[45] The Order is as follows:

(a) There was no rental agreement between the 1st and 2nd claimants trading as Colly's Car Wash and the defendant but only with the 2nd claimant in his personal capacity.

(b) Damages are awarded to the 2nd claimant, Segun Denis Tobais also known as Segun Denis Tobias in his personal capacity in the sum of $7,000.00, comprising $4,000.00 for breach of the covenant of quiet enjoyment and the nominal sum of $3,000.00 as loss of profits for one month together with interest on the total sum at the rate of 6% per annum from the date of judgment to the date of payment.

(c) Prescribed costs to the 2nd claimant in the sum of $1,050.00.

(d) The counterclaim of the defendant is dismissed with prescribed costs to the claimants in the sum of $1,386.07.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar of the High Court