In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012 No: 430

MICHAEL CROW

Plaintiff

-v-

CALON HOLLIS

Defendant

JUDGMENT

(In Court[1])

Landlord and tenant-breach of special condition obliging landlord to complete renovations within specified time-breach of landlord's duty to maintain property in tenantable condition-breach of tenant's obligation to deliver up premises in tenantable condition-liquidated damages

Date of hearing: June 13-15, August 30, September 12, 2016
Date of Judgment: September 30, 2016

Mr. Ray De Silva, Moniz and George Ltd, for the Plaintiff
Mr. Christopher Swan, Christopher Swan & Co, for the Defendant

Introductory

1. By an Ordinary Summons dated October 20, 2008 issued in the Magistrates' Court, the Defendant in the present action sued the Plaintiff in this action for $10,250 being one month's rent for the month of October 2007 in respect of a St David's property ("the Property"). The Plaintiff counterclaimed for the return of his deposit in the same amount of $10,250, liquidated damages for breach of covenant in the amount of $21,000 and unliquidated damages to be assessed.

[1] The Judgment was circulated without a hearing with a view to saving costs.

2. The counterclaim was for an amount in excess of the $25,000 jurisdictional limit of the Magistrates' Court. In hindsight the parties ought to have simply abandoned their respective claims as they raised complicated disputes which could not easily be legally resolved in a cost-effective manner. Instead the Plaintiff issued a Specially Endorsed Writ of Summons in this Court on October 20, 2012 converting his Magistrates' Court counterclaim into a more elegantly drafted Statement of Claim. The Defendant converted his Magistrates' Court claim for $10,250 for the loss of one month's rent into a Counterclaim for $20,500 representing two months' lost rent.

The Pleadings

3. The respective cases are easy to summarize even though they were both cumbersome in evidential terms. The main elements of the Plaintiff's case are the following:

    - the Plaintiff leased the Property from the Defendant for an initial term running from July 1, 2004 to June 30, 2007 under a written agreement dated June 18, 2004 ("the Lease"), a term which was subsequently extended to September 30, 2007;

    - the Plaintiff vacated the Property by September 30, 2007;

    - the Defendant breached his obligation under the Lease to complete building works at the Property by August 1, 2004 and a swimming pool by September 1, 2004;

    - the Defendant breached his obligation under the Lease to keep the property in tenantable condition;

    - the Defendant failed to repay the Plaintiff's deposit.

4. The Defendant denied the breaches of covenant alleged by the Plaintiff and his Counterclaim asserted that:

    - the Plaintiff failed to vacate at the end of the extended tenancy on September 30, 2007 and agreed to pay an extra month's rent;

    - the Plaintiff failed to deliver up the Property in a tenantable condition.

Approach to the evidence

5. Each party gave evidence and was extensively cross-examined. They both attempted to give their evidence in a straightforward way and I found them to be equally credible in general terms. However, I am bound to treat their evidence with caution on the key controversial issues and to look for independent support as far as possible. These were two men who clearly had an unhappy landlord and tenant relationship, parted on bad terms and were motivated to litigate the present dispute at a length far greater than the financial value of the dispute warranted.

Findings: when did the Plaintiff vacate the premises?

6. The Plaintiff vacated the Property under extremely ambiguous circumstances. The best evidence of what transpired derives from the following sources in addition to the parties' oral evidence:

    (a) notes prepared by the Defendant of a final meeting at the Property on September 30, 2007, as commented upon by both parties in their oral evidence;

    (b) an email exchange on October 3 and 4, 2007.

7. I find that the Plaintiff did not vacate the Property on September 30, 2007. He agrees that there were discussions on September 30, 2007 about his "doing his best" to paint the interior by the end of the day and that the Defendant raised the question of his paying another month's rent if he stayed beyond month end. The Defendant's notes indicate inconclusive discussions about precisely when the Plaintiff would vacate, whether the deposit would be returned and suggest that the Plaintiff agreed in principle to pay the BELCO bill as long as he remained on the Property. It may be that the Plaintiff left the Property on September 30, 2007 leaving the keys behind as he testified, but this fact was never communicated to the Defendant.

8. At the earliest, the Plaintiff vacated the Property on October 4, 2007 because the previous day he sent the following email to the Defendant:

"*Calon,*

I am writing to inform you that tomorrow I will be instructing BELCO to disconnect my electricity supply at 8 Jacob's Point Drive with immediate effect.

Mike Crow."

9. That communication is only consistent with a representation that until October 4 the Plaintiff regarded himself as responsible for the electricity charges because he was still occupying the Property. I am bound to find that the Plaintiff vacated the Property on October 4, 2007.

Findings: did the Defendant breach his obligations under the Lease by failing to complete the renovations to the Property in time?

10. The Special Conditions of the Lease provided in salient part as follows:

"*…2. This property is currently undergoing renovations and building additions but it is understood that by the parties hereto, that the completion date barring any unforeseen circumstances shall be the 1st August 2004 which shall include the installation of the swimming pool but shall not be limited to any minor ongoing works that may be necessary in the process…*

5. The Tenant agrees to pay the full rent prescribed within this agreement with effect from the 1st July 2004 with the full understanding that the construction process will still be ongoing and that there will be interruptions to his quality of life due to the nature of the work being done.

6. In the event that the Landlords are unable to have the swimming pool fully operable by the 1st September 2004 and the property with the exception of the landscaping completed by the completion date, then the parties hereto mutually agree to have a reduction of the rent amount rebated by an amount of $1000 per month effective from the 1st September 2004…"

11. The parties agreed liquidated damages of $1000 per month for failure to have the swimming pool operable by September 1, 2004 and other work (apart from landscaping) $1000 by the completion date of August 1, 2004. The phrase "*but shall not be limited to any minor ongoing works that may be necessary in the process*" in special condition 2 is almost unintelligible. However, reading the clause as a whole,

the completion date is defined so as to apply to all renovations and any other related work, minor or otherwise. On its face the Agreement was drafted by the Defendant's agent, so any ambiguities must be resolved in the Plaintiff's favour.

12. By a letter dated August 25, 2004 to the Defendant's agent, consistent with the terms of the Lease, the Plaintiff conceded that it was mutually understood that the pool might not be completed until the end of August. In fact it was not completed until late October or early November. It is common ground that the Defendant agreed to discount the Plaintiff's rent for the two months in question by 25% per month. This represented a modification of the strict terms of the Lease in the Plaintiff's favour as 25% represented $2562.50 per month, as Mr Swan in closing submissions rightly pointed out.

13. It was ultimately common ground that the pool could not be used before the end of October and that certain features related to the pool were not completed until after that. The Defendant admitted under cross-examination that the area surrounding the pool was not completed until December (partly at least because tiling work had to be redone) and the driveway even later than that. The Defendant's own notes record early January complaints by the Plaintiff through the agent demanding a reduction of rent, primarily relating to periods when the pool could not be used and electricity expenses incurred by workmen which the Plaintiff believed was being billed to his account. In April 2005 the Plaintiff admits he deducted $1429.21 from the rent in respect of spikes in his electricity bill, which the Defendant protested but never pursued. These were operational problems rather than completion issues which will be addressed separately below. However, complaint was also made about the lack of an assessment number for the lower apartment. The same notes record an occupancy certificate being issued for upper and lower apartments on January 19, 2005 and the Defendant still making arrangements to install steps to the driveway and a storage area door for the lower apartment on January 27, 2005. The Defendant admitted a kitchen counter was not completed until January 2005 at the earliest. He did not dispute that the exterior of the Property was not painted until early 2005.

14. Thereafter, the main contemporaneously recorded complaints appear to have centred on the landscaping (which the Lease contemplated would be completed at an uncertain date after completion) and miscellaneous repair and replacement issues. The Plaintiff's case was that the landscaping was not completed before May 2005. The Defendant conceded that after the major landscaping work was completed well before then, getting grass to grow properly was problematic for several months thereafter. As the Defendant's own notes record his contacting the landscapers on March 10, 2005 to complete their work (he explained in his oral evidence that this entailed planting palm trees), on balance I find that the landscaping and any other outstanding items of minor construction work were probably not completed before the end of April. The Defendant testified that he himself dug a trench for a gas line to the pool house, an

item of work he complained the contractor ought to have performed and which his notes suggest was completed on April 5, 2005. It is true that the same notes record the landscapers being asked to level out part of the yard on or about May 30, 2005 at the Plaintiff's request. I assume in the Defendant's favour that this was remedial work carried out to accommodate the Plaintiff because of problems getting grass to grow evenly rather than part of the original landscaping plans.

15. The Defendant failed to complete the renovations within the time agreed under the Lease. Pursuant to special condition 5, as modified by mutual agreement as regards September and October 2004, the Plaintiff is entitled to recover in the present action $1000 for each of the succeeding six months when the promised work was not completed i.e. $6000.

Findings: did the Defendant fail to keep the Property in tenantable condition?

16. The Plaintiff made the following main complaints:

- the Property had various leaking windows and doors resulting in water damage to the master bedroom and living room and dampness and mould in one of the children's bedrooms and cracked door frames;

- the landscaping was not maintained to an acceptable standard;

- the pool was not properly maintained and was not useable for 21 of the 36 months of the tenancy (including September, October and November,2004).

17. It was common ground that the Defendant was responsible for maintaining the exterior of the Property, the grounds and the pool. The Lease imposed the following express obligation on the Defendant (clause 4(a)):

> "*To keep the roof and exterior of the structure of the demised premises, drains soil and other pipes and sanitary and water apparatus in tenantable repair, order and condition throughout the tenancy.*"

18. It is clear that the tenancy began in a tempestuous manner with the Plaintiff, while the renovations were being completed, bombarding the Defendant or his agent with a litany of complaints, the most significant of which were documented by letters from the Plaintiff and recorded by the Defendant in detailed diary notes. The last letter of his own which the Plaintiff relied upon was dated January 5, 2005. The Plaintiff reserved the right to seek a reimbursement in respect of the full rent he was paying in respect of various unresolved issues, but does not seem to have reiterated this position after the renovations were completed in or about April 2005 (he made a unilateral

deduction in April, but this was in respect of electricity charges, not maintenance issues by his own account). The Defendant's broad response was that he dealt with most issues raised, ignoring many demands for alterations which fell outside his obligations under the Lease. Under cross-examination he admitted that throughout the tenancy the Plaintiff would ask for various matters to be addressed, but contended that before he could deal with the matters the Plaintiff himself would deal with the issues. How serious were these concerns?

19. The parties parted in a decidedly contentious manner but their final discussions, by common accord, involved the Plaintiff both asking for his deposit back and debating whether to paint the premises before he left. The Defendant demurred and demanded an extra month's rent if the Plaintiff did not leave on time. If the Plaintiff had been paying his full rent for roughly 34 months and not been able to use the pool for 21 of those months, this was a very odd parting discussion for him to have with the Defendant, even if the Plaintiff was by then preoccupied with a custody battle over his children and unable to contemplate further contention.

20. The Plaintiff relied upon photographs to demonstrate what he contended were areas of dampness and cracks in doorframes caused by water damage as well as to support case that various areas had not been properly painted before he moved into the Property in any event. This evidence was inconclusive. The clearest evidence was that many electrical sockets were left uncovered, a comparatively minor complaint. There was no credible independent support for the Plaintiff's complaint that the Defendant failed to maintain the Property, particularly during the last 27 or so months of the tenancy after the renovations were completed. It seems inherently improbable that serious maintenance issues persisted throughout this period without the Plaintiff writing a single letter of complaint.

21. Further, it is noteworthy that the Defendant initiated proceedings for the full October 2007 rent a year after the Plaintiff vacated the Property, despite having retained the full deposit. The Plaintiff's present claims were only raised in response to proceedings initiated by the Defendant. If the broad thrust of the Plaintiff's case is accepted, he was quite obviously the aggrieved party, having spent most of the tenancy in a property which was not properly maintained and having been wrongfully deprived of his deposit having left the Property in the same condition as when he first took up possession. Yet at the end of the tenancy he not only abandoned his deposit; in addition, inconsistently with his practice during the early phases of the tenancy, the Plaintiff did not even write a letter reserving his rights. This version of events seems inherently improbable.

22. It may well be that the Plaintiff's family burdens were so heavy that he had no strength left to vigorously fight a landlord and tenant battle, as he implied when seeking to explain his stance in the September 30, 2007 meeting with the Defendant, a position which was on any view inconsistent with his present claims. On the other

hand it is incomprehensible why, if the Property was in an un-tenantable condition between May 2005 and September 2007 the Plaintiff should have transformed from an extremely demanding and vociferous tenant into one who was apparently as meek as a mouse.

23. I accept entirely Mr DeSilva's submission that this Court can award damages for breach of the covenant to maintain and/or repair based on a rough and ready assessment of the reduction in value of the premises to a tenant flowing from the landlord's breach of covenant: *Regus (UK) Ltd-v- Epcot Solutions Ltd.*[2008]EWCA Civ 361; *Earle-v-Charalambous* [2006] EWCA Civ 1090. However, these cases also illustrate the obvious point that clear evidence of specific breaches of covenant which have been drawn to the landlord's attention and not remedied within a reasonable time is required to enable a court to assess the value of damage which is more than trivial.

24. I find that the picture painted by the evidence overall on this issue in relation to which the Plaintiff bears the burden of proof is far too shadowy to justify a finding in his favour. The Plaintiff has not proved his claim that the Defendant failed to properly maintain the Property during the tenancy after the unhappy initial period when the renovations were being completed.

Findings: is the Plaintiff entitled to the return of his deposit?

25. The Lease provided for a Security Deposit in the amount of $10,250 (one month's rent) which the Agent was entitled to apply towards the cost of cleaning, repairing or replacing furnishings in the event that the tenant breached his obligations under Clauses 2(f) and/or 2(m)(i)-(iii) of the Lease. Clause 2(f) concerns maintaining fixtures and fittings. Clause 2(m) defines the tenant's obligation to deliver up the premises in "*Tenantable Condition*", an obligation which has three strands to it:

    (i) the obligation to return the Property in the same condition as the tenant received it as detailed in an attached report;

    (ii) the obligation to have tile and flooring professionally cleaned;

    (iii) the obligation to paint the walls and ceilings to a standard comparable to when the tenant took up occupation.

26. There was no report detailing the condition the Property was in at the beginning of the Lease and the requisite standard was accordingly in dispute. It was common ground that at least some of the Property required painting after the Plaintiff took up

occupation. I reject the suggestion that that no painting at all was warranted, in part because the Plaintiff himself admittedly planned to repaint the interior until he locked horns with the Defendant once again on September 30, 2007. Based on the Defendant's more compelling still and video images of the Property's interior, I am bound to find that the Plaintiff did not leave the Property in a tenantable condition.

27. How much of the deposit was the Defendant entitled to retain? By letter dated December 10, 2007, Mr DeSilva requested particulars of how the deposit monies had been applied. Those particulars were supplied by Mr Swan by letter dated December 14, 2007. The following items were supported by what I find to be sufficient proof of payment taking the Defendant's evidence at trial into account:

    - Home Paint Ltd. invoices and debt notifications: $ 752.73;
    - S.A.L. Limited invoice: $12.03;
    - Picky Painters invoice: $6400.00
    - Total: $ 7164.76.

28. At trial Mr DeSilva, in addition to disputing all invoices (and the painting one in particular) unsurprisingly vigorously challenged a Marshall Maintenance Company Ltd "estimate" dated November 13, 2007 of $2100 for cleaning as insufficient proof of payment of this sum. I am unwilling based on the Defendant's word alone to find that this expense was incurred by him in circumstances where there is no satisfactory explanation for not producing explicit proof of payment.

29. I find that the Defendant was entitled to apply $7164.76 of the deposit for breach of the Plaintiff's covenant to deliver up the Property in tenantable condition and that Plaintiff is entitled to the return of the balance of the deposit: $10,250-$7164.76= $3085.24.

Findings: is the Defendant entitled to damages in respect of unpaid or lost rent?

30. The Defendant sought one month's rent on the grounds that the Plaintiff agreed to pay October's rent and/or was required to give one months' notice which he failed to do after continuing to occupy into the month of October. Further and/or alternatively, the Defendant counterclaimed for two months' rent for loss of rental opportunity during the time when the Property was being restored.

31. The Defendant has failed to prove a binding agreement to pay October's rent. It is common ground that this was discussed and the Plaintiff agrees that he put this forward as a proposition (in the course of an acrimonious and inconclusive final

meeting on September 30, 2007) but there is no clear evidence that any concluded agreement was ever reached in these terms. I have already found that the Plaintiff vacated the premises on October 4, 2007. It follows that the Defendant would, any other terms of the Lease apart, only be entitled to recover 4 days rent.

32. The second alternative limb of the Defendant's Counterclaim, the force of which I did not fully appreciate in the course of the hearing, was that under the Lease once the termination date (June 30, 2007) passed, in the absence of a fresh tenancy being agreed, the tenancy became a monthly one. This is not only the general legal position: "*a tenancy for successive rental periods of a month or less shall be terminated at the end of a rental period by not less than one month's previous notice*" (Landlord and Tenant Act 1974, section 11(c)). Clause 2(m)(iv) of the Lease provides as follows:

> "*After the termination day, if the TENANT continues to occupy the premises with the express consent of the LANDLORDS or their agent, unless the parties have agreed, otherwise in writing the TENANT shall be deemed to occupy the Premises under a monthly periodic tenancy which may be terminated at any time by either party giving to the other at least one calendar… month's written notice of termination.*"

33. It was common ground that a three months' extension ending on September 30, 2007 was agreed. I have found that the Plaintiff did not vacate the Property until October 4, 2007, the precise date of his vacation being unclear when the parties haggled inconclusively on September 30, 2007. At that juncture, the Plaintiff was, by his own account, not sure whether he wanted to vacate that day or at some point during the following month. This is why he discussed paying for the whole of October and getting back his deposit, hoping that the deposit could be applied to October's rent and he would not have to rush to move out and could take his time to clean and paint the premises. The Plaintiff first gave effective notice that he was vacating the Property the following day by email dated October 3, 2007. Under the Lease, unless the parties otherwise agreed in writing, there was a monthly tenancy and the Defendant was entitled to receive one month's notice of termination. He in fact received 28 days' notice, three days' short of one calendar month. I would assess the daily rent at $123,000 ÷ 365=$337 (rounded up from $336.986). On this basis, the Defendant is entitled to recover the following sum in respect of rent for the month of October: $337 x 28 = $9436.

34. As far as the third alternative limb of the Counterclaim is concerned, the Defendant adduced no or no reliable evidence that the Plaintiff's failure to deliver up the Property in a tenantable condition caused the Defendant to lose two months' rent. Missing was any evidence of a tenant willing to rent the property from October 1, 2007 and who either sought other accommodation or took up possession on December

1, 2007 rather than two months' earlier. This part of the Counterclaim was not proved and fails. Absent such evidence, the Defendant cannot be said to have suffered any "*loss of rent*" attributable to the Plaintiff's breach of covenant: Lease, Clause 2(m)(v).
.

Summary

35. The Plaintiff is awarded $6000 by way of contractually agreed liquidated damages for late completion of the renovations ($1000 per month x 6) + $3085.24 by way of partial return of his deposit totalling $9,085.24. The Defendant is awarded $9436 in respect of rent for the October, 2007 in lieu of 28 days' notice of termination of the monthly tenancy. Unless either party applies to be heard as to costs within 21 days by letter to the Registrar, I would make no Order as to costs on the basis that neither party has achieved success in 'real world' terms.

Dated this 30th day of September, 2016_____
IAN RC KAWALEY CJ