[2010] JMCA Civ 33

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 62/2009

BEFORE: THE HON. MR JUSTICE SMITH, JA
THE HON. MRS JUSTICE HARRIS, JA
THE HON. MR JUSTICE DUKHARAN, JA

BETWEEN BRADY & CHEN LIMITED APPELLANT

AND DEVON HOUSE DEVELOPMENT LIMITED RESPONDENT

Mrs G. Gibson-Henlin, instructed by Henlin Gibson Henlin for the appellant

Mrs S. Minott-Phillips and Miss Simone Bowie instructed by Myers Fletcher & Gordon for the respondent

27,28, 29 July 2009 and 30 July 2010

SMITH JA

[1] The appellant is a limited liability company whose directors are Messrs Bruce Chen and Peter Brady. The respondent is also a limited liability company with an issued share capital of two shares. It is wholly owned by the Government of Jamaica – one share being held by the Accountant General and the other by the Permanent Secretary in the Ministry of Industry Commerce and Technology.

[2] On 1 April 2007 the appellant and the respondent entered into a written lease agreement for a term of five years, with an option to renew, in respect of all that part of land comprised in certificate of title registered at Volume 216 Folio 76 of the Register Book of Titles known as the Grog Shoppe Restaurant and Pub. The leased land is part of the Devon House Complex situate at 26 Hope Road, Kingston 5.

[3] By Legal Notice published in the Jamaica Gazette on 31 October 2006, the said land was vested in the Commissioner of Lands in trust for Her Majesty in right of the Government of Jamaica from 2 October 2006. Prior to this, Devon House was declared to be a National Monument by the Jamaica National Heritage Trust (see endorsement on the certificate at page 112 of Record).

[4] On 30 December 2008, the appellant wrote the respondent stating that it would not be able to continue with the lease arrangements of the Grog Shoppe beyond 28 February 2009. I will reproduce this letter in full later.

[5] On or about 8 January 2009 the parties met at the Devonshire Restaurant to discuss the appellant's letter and the payment of outstanding rental, among other things. The parties are not agreed as to whether the "surrender" of the lease was discussed.

[6] The respondent placed the following advertisement in the Sunday Gleaner of 15 February 2009:

> "**DEVON HOUSE DEVELOPMENT LIMITED**
>
> Is inviting the expressions of interest for the operation of the Grog Shoppe Restaurant at Devon House.
>
> The Grog Shoppe is one of the restaurants located at Devon House Heritage Site offering comfortable outdoor and indoor dining in an unmatched serene ambience.
>
> The Grog Shoppe has developed an enviable reputation of providing unique Jamaican food and beverage consistent with the Devon House brand name.
>
> The successful applicant will be responsible for:
>
> - Managing and maintaining the high standards of the Devon House facility.
> - Developing new and exciting products in keeping with the historical relevance of Devon House.
> - Promoting and marketing the facility as a feature of the wider tourism product at Devon House.
>
> Applicants should possess all relevant and valid permits to operate a restaurant. Interested parties are invited to submit a detailed business plan with a brief description of qualifications and experience to Devon House no later than March 6, 2009."

[7] Between 24 February and 12 March 2009 the parties exchanged many letters concerning the lease agreement. From these letters, it emerged that the parties were not in agreement as to whether or not the

appellant's letter of 30 December 2008 was an offer to surrender the lease and, if it were, whether the respondent had accepted it. I will return to some of these letters later.

[8] By letter dated 12 March 2009 the respondent threatened to send in the bailiff to remove the appellant in the event that the appellant did not immediately vacate the premises. In response to this threat, the appellant, on 18 March 2009, filed a claim form seeking a declaration that the lease agreement was not surrendered and that the appellant was entitled to remain in possession. The appellant also sought an injunction restraining the respondent from re-taking possession of the leased property.

[9] On 19 March 2009 the appellant obtained an ex parte injunction against the respondent for 14 days. This interim injunction was subsequently extended to 8 April 2009 when the inter partes hearing for interlocutory injunction went before Gloria Smith J. The learned trial judge in a written judgment delivered on 18 May 2009, in dismissing the appellant's claim with costs, held:

> "(i) That the defendant Devon House Development Ltd. was acting in its personal capacity when it purported to grant a lease to the claimant. Additionally, even if the defendant was an agent of the Crown it would fall into the category of "the executive" as was enunciated in ***M v Home Office*** [1993] 3 All ER 537 which stated that where an injunctive relief is sought, an officer of the executive arm of the Government is in

the same position as any other person and therefore an injunction may be granted against him.

(ii) That the claimant has satisfied the first requirement of the guidelines as was stated in the House of Lords' decision in ***American Cyanamid v Ethicon*** [1975] 1 All ER 504 that their claim is not frivolous or vexatious and there are in fact serious issues to be tried.

(iii) That damages would however be an adequate remedy were the claimant to succeed and that the defendant would be in a position to pay them."

Grounds of Appeal

[10] In its amended notice of appeal filed on 28 May 2009 the appellant seeks an order setting aside the learned judge's order on the following grounds:

"(i) The learned judge erred as a matter of fact and/or law in refusing the injunction on the basis that the Appellant's ability to pay damages would be tenuous based on its financial position.

(ii) The learned judge erred as a matter of fact and/or law in refusing the injunction on the basis that the Appellant's ability to pay damages would be tenuous based on its financial position without exploring whether the Appellant could provide security through its directors as indicated at paragraph 28 of the affidavit of Peter Brady sworn to on 18 March 2009.

iii) The learned judge erred as a matter of fact and/or law in finding that damages would be an adequate remedy for the Appellant notwithstanding that the Appellant's claim relates to an interest in land being the unexpired portion of three years of a lease with a term of five years.

(iv) The learned judge erred as a matter of fact and/or law in finding damages were an adequate remedy in circumstances where the Appellant is operating a

business as a going concern without regard for the disruption of that business and the termination of its at least forty (40) employees.

(v) the learned judge erred as a matter of fact and law in finding that the Respondent was in a position to pay damages.

(vi) The learned judge erred as a matter of fact and/or law in so far as the factors are evenly balanced such as to favour a preservation of the status quo."

The Counter-Notice of Appeal

[11] In its counter notice filed on 27 May 2009, the respondent, in addition to the reasons given by the learned judge, seeks to affirm the learned judge's decision on the following grounds:

"(1) The learned judge erred in finding that the Respondent was acting in its private capacity and that, even if acting as an agent of the Crown, it would be an agent for the Crown, qua the Executive, and not, qua Monarch (and that, therefore, the Crown Proceedings Act does not apply to prohibit injunctive relief) in circumstances where:

(a) the lease states the capacity of the Respondent in entering into the lease is as the duly appointed agent of the Government of Jamaica; and

(b) the land subject of the lease is vested in the Commissioner of Lands in trust for Her Majesty in right of the Government of Jamaica (i.e. the Crown, qua Monarch).

(2) The learned judge erred in finding that there were serious issues to be tried."

[12] As Mrs Gibson-Henlin submits, from the appellant's perspective, the narrow issue on appeal is whether or not the judge correctly exercised her discretion in refusing the injunction on the ground that an award of damages would be an adequate remedy and that the respondent would be in a position to pay damages. On the other hand the bone of Mrs Minott-Phillips' contention is that the lessor was the Crown and not the respondent. Accordingly, the Crown should have been joined as a party. And in any event, she contends, by virtue of section 16 of the Crown Proceedings Act the court may not grant an injunction against the Crown. If the respondent is right, there will be no need to consider the issues raised by the appellant. Consequently, I will first deal with the respondent's counter appeal.

[13] **Was the respondent acting in its private capacity?**

We have seen that the leased premises are located on land comprised in certificate of title registered at Volume 216 Folio 76. This property is known as Devon House and has been declared to be a national monument. By virtue of section 16 of the Land Acquisition Act, Devon House vests in the Commissioner of Lands "in trust for Her Majesty in right of the Government of Jamaica" from 2 October 2006, that is, the date the Commissioner entered into possession. A notice to this effect was published in the Gazette dated 31 October 2006 – see endorsement on title at page 112 ibid. In light of the foregoing, there can be no doubt

that the leased property is owned by the government. The land is Crown land. It should be observed that the words "in trust" when used in relation to public law merely "indicate the existence of a duty owed to the Crown, by the officer of state as servant of the Crown", to deal with the property for the benefit of the person to whom it is expressed to be held in trust – see ***Town Investments Ltd v Department of Environment*** [1977] 1All ER 83**.** The respondent is not the legal or beneficial owner.

[14] We have also seen that the respondent is a government company. Its Memorandum of Association shows that its main object is to "maintain and develop the property known as Devon House…". One of its objects is "to let or lease any such premises or parts thereof…". It is reasonably clear that the respondent is part of the government machinery in relation to the operation of the Devon House Complex. Contrary to counsel for the appellant's submission, I am of the view that the respondent is a Crown entity. As such, it seems to me that any proceedings against the respondent should be instituted against the Attorney General pursuant to section 13 (2) of the Crown Proceedings Act which reads:

> "13 (1)...
> (2) Civil proceedings against the Crown shall be instituted against the Attorney -General."

Accordingly, I agree with Mrs. Minott-Phillips that the Attorney General should have been joined since the appellant was going against a government entity.

[15] Further, it seems clear to me that since the respondent was neither the legal owner nor the beneficial owner of any interest in the leased land, it could not have been acting in its personal capacity when it entered the lease agreement with the appellant. It must have been acting as agent or servant of the owner otherwise it would be a stranger meddling with the property of another. In such a case the appellant's claim would be for breach of warranty of authority. In the case of ***Collen v Wright*** (1857) 8E & B 647, "A describing himself as agent of P, agreed in writing to lease to the plaintiff a farm which belonged to P. Both the plaintiff H and A believed that A had the authority of P to make the lease, but this in fact was not the case. The plaintiff having failed in a suit for specific performance against P, later sued to recover damages from A's executors the costs that he had incurred in the suit." The action succeeded - see Cheshire Fifoot and Furmston's Law of Contract 12th Ed. pages 496-7. That the respondent in the instant case was acting as the authorized agent of the Crown cannot, in my opinion, be seriously debated. The Instrument of Lease states that the lease is:

> "**BETWEEN** Devon House Development Company Limited…(hereinafter referred to as 'the Landlord' which expression shall, where the

> context so admits, include the person for the time being entitled to the reversion immediately expectant on the determination of the term hereby created) of the **ONE PART** AND the party whose name, address and description are set out in Item (a) of Schedule 2…"

(Of course the appellant's name etc. appears in Item 1 of Schedule 2).

Preamble (B) of the instrument states unequivocally that:

> "The Landlord is the duly appointed agent of the Government of Jamaica to act on its behalf in relation to the letting, management and all aspects of the operation of the Devon House Complex."

Thus the appellant knew from the outset that the respondent was the agent of the government and that it signed the lease agreement as such. The principal was disclosed in the lease agreement itself. Mrs Minott-Phillips' submission that in the circumstances the principal should have been sued, is, in my opinion, correct.

[16] The general rule is that where the agent has authority and is known to be an agent, the contract is the contract of the principal, not that of the agent, and prima facie at common law the only person who can sue and can be sued is the principal. It would seem that this general rule may be excluded by the express intention of the parties. There is no evidence of any such express intention in this case. As said before, the Instrument of Lease clearly stated that the respondent was the agent of the government. The fact that the respondent did not specifically sign

"for and on behalf of" is no indication that it was acting in its private capacity. A pleader should in my view, if in doubt, go against all three - the Attorney General, the Commissioner of Lands and the respondent.

Injunctive Relief against the Crown or its Agent

[17] Having found that the respondent was acting as agent of the Crown and not in its personal capacity, I must go on to consider whether the learned judge was right in holding that as an agent of the Crown, the respondent "would fall into the category of the executive" and as such an injunction could be granted if the principles set out in ***American Cyanamid Co. v Ethicon*** [1975] 1 All ER 504 were satisfied.

[18] The learned judge stated that the determination of the issue as to whether an injunction ought properly to be granted against the respondent, assuming that it was acting as agent of the government, depended on whether the respondent was covered by section 16 (1) (a) and (2) of the Crown Proceedings Act. These provisions are:

> "16.- (1) In any civil proceedings by or against the Crown the Court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that –
>
> (a) where in any proceedings against the Crown any such relief is sought as might

> in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
>
> (b) in any proceedings against the Crown for the recovery of land or other property the Court shall not make an order for the recovery of land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.
>
> (2) The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."

[19] In concluding that, in the circumstances of the instant case, section 16 of the Act did not prohibit the granting of injunctive relief, the learned judge relied on ***M v Home Office*** [1993] 3 All ER 537 which was referred to by the appellant's attorney-at-law. That case was primarily concerned with the question as to whether ministers and civil servants are personally subject to the contempt jurisdiction of the court in respect of acts done in their official capacity. The House, however, was of the view that the question as to whether injunctive relief was available against the Crown or its officers in that case was relevant to the contempt jurisdiction

issue and should therefore be addressed. But the circumstances of the instant case have nothing or little in common with those of ***M v Home Office***. In the latter, M was deported in alleged breach of an undertaking by the Home Secretary's counsel not to remove him from the jurisdiction. Further, a court order that he be returned was also breached. The Secretary of State applied for the court order to be discharged on the basis that as an officer of the Crown, no injunction could be granted against him, by virtue of section 21 of the 1947 Crown Proceedings Act (the provisions of that section are identical to section 16 of its Jamaican counterpart). The order was discharged by the judge who had made it on the basis that he had no jurisdiction to make the order. Thereafter, M brought proceedings against the Secretary of State for contempt in failing to comply with the undertaking and the court order. It was held that the court had jurisdiction to make coercive orders such as injunctions, in judicial review proceedings against Ministers of the Crown acting in their official capacity by virtue of the unqualified language of the Supreme Court Act 1981 of England. That Act made procedural changes to judicial review introduced in 1977 by RSC Order 53.

[20] It is critical to note that ***M v Home Office*** was concerned primarily with issues of public law and judicial review and the power of the court to make coercive orders against the Ministers of the Crown acting in their

official capacity. It was in relation to those circumstances that, Lord Templeman made the statement (on which the appellant relies) that, "the expression 'the Crown' has two meanings namely the monarch and the executive". However, today, in reality and particularly so in this jurisdiction, the distinction between the Crown, that is the government, and officers of the Crown, is of no practical significance. Today all servants or agents of the Crown are appointed to exercise the powers of government. As Lord Simon of Glaisdale said in ***Town Investment Ltd v Department of Environment*** at page 831:

> "…the Crown and 'Her Majesty' are terms of art in constitutional law. They correspond though not exactly, with terms of political science like 'the Executive' or 'the Administration' or 'the Government'… So it comes about that Wade and Phillips Constitutional Law, discussing proceedings by and against the Crown before the passing of the Crown Proceedings Act 1947, stated: 'Crown' includes all the departments of Central Government."

Later in his speech the learned Law Lord went on to say at page 833:

> "The departments of state including the Ministers at their head (whether or not either the department or the Minister is incorporated) are then themselves members of the corporation aggregate of the Crown.
>
> …prima facie in public law a Minister or a Secretary of State is an aspect or member of the Crown. Except in application of the doctrine of precedent analogies are to be regarded warily in legal reasoning. But in view of all the foregoing the analogy of the human body and its members is I think, an apt one in relation to the

> problem facing your Lordships. It is true to say: 'My hand is holding this pen.' But it is equally true to say – it is another way of saying: 'I am holding this pen'. What is nonsensical is to say : 'My hand is holding this pen as my agent or as trustee for me'."

[21] ***Town Investments Ltd v Department of Environment*** concerned a lease granted to the Secretary of State on behalf of the Crown. The issue was whether the Secretary of State or the Crown was the tenant. It was held inter alia that the acceptance under his official designation by a Minister of the Crown in charge of a government department of the grant from a private lessor of a leasehold interest in premises for use as government offices, was an executive act of government and was therefore an act done by the Crown or by the government, that is, the Ministers of the Crown collectively. It followed that the tenant of the premises was the Crown, or the government and not the Secretary of State. By parity of reasoning, the learned judge in the instant case erred in holding that when acting as agent of the Crown, "an officer of the executive arm of government is in the same position as any other person" where injunctive relief is sought and that, accordingly, section 16 of the Crown Proceedings Act does not apply.

[22] In my opinion, the principles enunciated in ***M v Home Office*** on which the appellant relies are not applicable to the enforcement of a lease agreement entered into by an agent or servant of the Crown on

behalf of the government with a private lessee. ***M v Home Office***, as I have already stated, concerns judicial review proceedings against ministers of the Crown acting in their official capacity and the court's jurisdiction to make coercive orders. I should mention here that section 16(2) does not prohibit the court from granting injunctive relief against an officer of the Crown in judicial review proceedings. This is so because by virtue of section 2 (2), the phrase "civil proceedings" does not include proceedings which in England would be taken on the Crown side of the Queen's Bench Division. And, of course, proceedings for the prerogative orders (which have been replaced by proceedings for judicial review), were brought on the Crown side. In the instant case the matter of judicial review does not arise. I should also state that where an agent or servant of the Crown commits a tort while acting in his official capacity the actual wrong doer or the person who ordered the wrong doing may be sued personally. Such a tortfeasor may not hide behind the immunity of the Crown. This point was made clear by Lord Woolf in ***M v Home Office***. Again, the instant case does not concern the commission of a tort. It seems to me that the importance placed on ***M v Home Office*** by the appellant in support of its contention is misplaced. There can be no doubt that the respondent was acting in a representative capacity and as such was "an aspect or member of the Crown". To grant an injunction

against the respondent would in effect be granting such a relief against the Crown.

[23] The following statement of Lord Woolf supports the contention of the respondent. At page 555 ibid in reference to section 21 of the English Crown Proceedings Act 1947 (section 16 of the Jamaican Act) his Lordship said:

> "…What is clear is that in relation to the proceedings to which provisos (a) and (b) of s. 21 (1) apply no injunction can be granted against the Crown. In addition there is a further restriction on granting an injunction against an officer of the Crown under s.21(2). That subsection is restricted in its application to situations where the effect of the grant of an injunction or an order against an officer of the Crown will be to give any relief against the Crown which could not have been obtained in proceedings against the Crown prior to the Act. Applying those words literally, their effect is reasonably obvious. Where prior to 1947, an injunction could be obtained against an officer of the Crown, because he had personally committed or authorized a tort, an injunction could still be granted on precisely the same basis as previously since, as already explained, to grant an injunction could not affect the Crown because of the assumption that the Crown could do no wrong. The proceedings would, however, have to be brought against the tortfeasor personally in the same manner as they could have been brought prior to the 1947 Act. If, on the other hand, the officer was being sued in a representative capacity, whether as an unauthorized government department, for example, one of the named Directors General or as Attorney General, no injunction could be

> granted because in such a situation the effect would be to give relief against the Crown."

In the instant case the respondent, from the start, was acting in its capacity as an agent representing the Crown and in such position, no injunction can be obtained against it. In my view, the learned judge's decision to refuse the application for injunction should be affirmed on the basis stated in ground 1 of the respondent's counter notice of appeal.

Serious Issues to be tried

[24] The respondent complained in its counter appeal that the learned judge erred in finding that there were serious issues to be tried. The learned judge at paragraph 15 of her judgment expressed the view that the following three issues are some of the serious issues which should be determined at trial:

> "(i) whether or not the lease is valid;
>
> (ii) if it is, whether or not the lease was terminated by way of surrender; and
>
> (iii) whether the monthly sums paid by the claimant to the defendant were in excess of the stipulated monthly rental."

[25] I think it is fair to say that before this court neither of the parties contend that the lease was invalid. As regards (iii) above Mrs. Minott-Phillips referred to a letter dated 12 June 2007 (page 124 of Record) and told the court that there was a concession. Thus, the only real issue for this court is whether, in relation to, (ii) the learned judge was right in

finding that the appellant has satisfied the requirements that its claim was not frivolous or vexatious, that is, that there are in fact serious issues to be tried. I must therefore now turn to examine the material which was available to the learned trial judge with a view to determining whether the appellant has any real prospect of succeeding in his claim for an injunction at the trial - see ***American Cyanamid Co v Ethicon Ltd.***

[26] Critical to the determination of this issue is the letter of 30 December 2008. This letter is addressed to the chairman of the respondent company. It reads (page 50 of the Record):

> "It is with great regret and sadness that we write to inform you that we will not be able to continue with the lease arrangements of the Grog Shoppe beyond 28 February 2009 as we are not able to meet the extremely high costs of operating the business.
>
> The overheads including rent and maintenance are way beyond the ability of the business to support the operations. For a period of years, the business has been financed from personal funds always with the hope that it would have improved with the long awaited recent enhancements to the grounds and the marginal increase in security by DHC. However, this has been to no avail as the client base has not improved.
>
> We ask you to understand our position as we are forced by the circumstances to make this most regrettable decision for a venture in which we had invested great hope and heart and an enormous amount of personal investments which never yielded any returns, but rather extreme losses.

> We will be happy to discuss the situation with you at your convenience.
> Yours sincerely
> Brady and Chen"

[27] It is the contention of the appellant that this letter does not amount to a surrender of the lease. On the other hand, the respondent claims that the letter constitutes a surrender which was accepted by the respondent at a meeting of the parties held on or about 8 January 2009. It is necessary to consider the legal requirements to effect the surrender of a lease against the background of the undisputed facts.

[28] The lease agreement does not speak to the surrender of the lease. The Instrument of Lease was not registered under the Registration of Titles Act inspite of clause 5.11 which states that "the parties expressly agree that this lease shall be registered on the Titles affected by same". The non-registration of the lease would, in my view, make the endorsement procedure provided by section 101 of the Registration of Titles Act, for the surrender of the lease, inapplicable. Section 101 provides:

> "101. A lease made under this Act may be surrendered and determined as well by operation of law or under any enactment now or hereafter to be in force relating to bankrupts and their estates, as by the word 'Surrendered' with the date being endorsed upon such lease or on the duplicate thereof (if any) and signed by the lessee or his transferee and by the lessor or his transferee and attested by a witness. The

> Registrar shall enter in the Register Book a memorandum recording the date of such surrender, and shall likewise endorse upon the duplicate (if any) a memorandum recording the fact of such entry having been made. …; and production of such lease, or duplicate (if any) bearing such endorsement and memorandum, shall be sufficient evidence that such lease has been legally surrendered:…".

[29] By virtue of section 94 a lease of registered land made under the Registration of Titles Act shall be (i) for a term not less than one year (ii) executed in the form in the sixth schedule and (iii) registered under the Act. The conditions at (i) and (ii) have been met, but contrary to the stated intention of the parties, the lease was not registered. Thus the provisions for the surrender of the lease under the Act by the endorsement of the word "surrendered" on the title would not be applicable. The Act, of course does not provide the method of surrendering a lease which is not made under the Act. I must therefore move to consider the surrender of a lease which is not registered.

[30] In his work Commonwealth Caribbean Property Law at page 18, Professor Gilbert Kodilinye said:

> "A lease for a fixed period terminates automatically when the period expires, there is no need for any notice to quit by the landlord or the tenant. Another basic characteristic of a fixed term lease is that the landlord cannot terminate the lease before the end of the period unless the tenant has

> been in breach of a condition in the lease, or the lease contains a forfeiture clause and the tenant has committed a breach of covenant which entitled the landlord to forfeit the lease. Nor can the tenant terminate the lease before it has run its course, he may only ask the landlord to accept a surrender of the lease, which offer the landlord may accept or reject as he pleases." (emphasis mine)

I am inclined to accept the above as a correct statement of the law.

[31] In addressing the "nature of surrender" of a lease the learned authors of **Halsbury's Laws of England, Landlord and Tenant Vol.** 27 (1) 2006 para. 630 state:

> "A surrender is a voluntary act of the parties whereby, with the landlord's consent the tenant surrenders his lease to the landlord so that the lease merges with the reversion and is thus brought to an end. It is defined as being the yielding up of the term to the person who has the immediate estate in reversion in order that, by mutual agreement, the term may merge in the reversion. The surrender may be either express, that is by an act of the parties having the expressed intention of effecting a surrender, or by operation of law, that is as an inference from the acts of the parties."

[32] The respondent is contending that there is an express surrender of the lease. It is the submission of Mrs Minott-Phillips for the respondent that for an express surrender to be valid there must be a note in writing signed by the surrenderer or his lawful agent evidencing an intention to surrender. No technical words are required to effect a surrender nor does the word

"surrender" need be used, she contends. Counsel relies on section 3 of the Statute of Frauds 1677, ***Doe d Wyatt v Stagg*** (1839) 5 Bing NC 564, ***Sleigh v Bateman*** 78 ER 738 and ***Farmer of the demise of Earl v Rogers*** 95 ER 666, among others.

[33] Mrs Gibson-Henlin on the other hand contends that the lease was made under the Registration of Titles Act and that the Statute of Frauds 1677 does not apply. She further submits that the cases relied on by the respondent do not support the respondent's contention. In any event, she submits the following are serious questions to be resolved at trial:

(i) Does the Registration of Titles Act apply not-withstanding the non-registration of the lease?

(ii) Is the Statute of Frauds applicable?

(iii) Was the surrender effective in so far as it was for a future date?

(iv) Did the respondent accept the offer of surrender?

[34] I have already looked at the question as to whether or not the Registration of Titles Act is applicable to an unregistered lease (see paragraphs 28 and 29 supra). I cannot accept the contention of counsel for the appellant that it is reasonably arguable that the lease was made under the Act because it is stated at Item C to be "subject to the easements, covenants and powers contained in the Registration of Titles

Act, except so far as same are hereby modified or negatived, and subject also to the terms, covenants, conditions and stipulation hereinafter contained". It seems to me that, in light of section 94 and indeed the scheme and purpose of the Act, which embraces the Torrens system, it cannot be successfully argued that a lease not registered under the Act is "made under the Act." And if it is not "made under the Act" then section 101 of the Act does not apply to it. Further section 63 of the Act does not seem to support the appellant's contention in this regard. This section states:

> "63. When land has been brought under the operation of this Act, no instrument until registered in manner herein provided shall be effectual to pass any estate or interest in such land, or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature; and should two or more instruments signed by the same proprietor, and purporting to affect the same estate or interest, be at the same time presented to the Registrar for registration, the Registrar shall register and endorse that instrument which shall be presented by the person producing the certificate of title."

[35] It is now settled law that by virtue of section 41 of the Interpretation Act, the English Statute of Frauds 1677 applies to this jurisdiction. By section 3 of the Statute of Frauds no lease shall after 24 June 1677 "be assigned, granted or surrendered unless it be by deed or note in writing signed by the party so assigning, granting of surrendering the same or their agents thereunto lawfully authorized by writing or by act and operation of law". Thus, unlike the situation in England, in this jurisdiction a surrender need not be by deed. I accept the submission of Mrs Minott-Phillips that an express surrender need only be evidenced by a note in writing signed by the surrenderer or his agent. It is important to note that a surrender may also be by "act and operation of law" that is implied from the acts of the parties.

[36] Of the cases cited, I will only refer to one. I do not find the others very helpful. In ***Farmer of the demise of Earl v Rogers*** "AB by deed indented, mortgaged lands to CD for 500 years with a proviso that the term shall cease and be void upon payment of 500L and interest upon a certain day; sometime after the day limited for payment thereof AB paid CD all principal and interest due to him upon the mortgage". AB died and Earl, the lessor of the plaintiff, as his heir at law, brought ejectment proceedings against the defendant who was in possession of the premises. At the trial the defendant produced the mortgage deed which had endorsed upon its back without any seal or stamp: "Received this….

day of March 1738 (being after the day limited by the proviso) of AB so much money for all principal money and interest till this day; and I do release the said AB and discharge the within mortgaged premises from the term of 500 years", signed by CD the mortgagee. As I understand it, it was argued on behalf of the defendant that as the payment was after the day, the legal estate was still in the mortgagee. Further the argument went, the term created by deed could not be surrendered by means of the said endorsement on the mortgage deed. This argument was rejected by the court. The court in giving judgment for the plaintiff held that the words "release" and "discharge the term of 500 years" were much stronger than words which in many cases have amounted to a surrender. The court also held that by virtue of section 3 of the Statute of Frauds a lease for any term of years may be created by writing without deed and that the same may be surrendered by deed or note in writing.

[37] In the light of the foregoing, I will essay an opinion as to whether the appellant has a real prospect of succeeding in its claim for a permanent injunction. Now, in its letter of 30 December 2008, the appellant stated that it "will not be able to continue with the lease agreements of the Grog Shoppe beyond the 28 February 2009 as we are not able to meet the extremely high costs of operating the business". In this statement the appellant has, in my view, clearly evinced an intention to surrender the lease. It does not in my view permit of any other

reasonable interpretation. The parties met on or about 8 January 2009 to discuss the letter of 30 December. The appellant made no mention of this meeting in its first affidavit. It was only after the respondent had in the affidavits of Miss Janette Taylor, (the executive director of the respondent) and Mr Stephen Facey (vice-chairman of the respondent's Board of Directors) stated that the appellant's surrender of the lease was accepted by the respondent at the said meeting, that the appellant in its second affidavit mentioned the meeting and denied that the surrender was accepted by the respondent.

[38] Putting aside the discussions at the meeting of 8 January, there can be no serious argument that the surrender was not accepted and the acceptance not communicated. I make this conclusion based on the following:

(i) In an advertisement appearing in the Sunday Gleaner of 15 February 2009, the respondent invited expressions of interest for the operation of the Grog Shoppe Restaurant at Devon House. It later accepted the proposal of Davoli Ltd. It is significant that one of the expressions of interest was submitted by one of the directors of the appellant company.

(ii) By letter dated 24 February 2009 the appellant company wrote the respondent stating (page 53 of Record):

> "Further to our letter of December 30, 2009, I am writing to ask for an extension of two weeks so as to enable us to arrange our operations."

(iii) The respondent replied by letter dated 27 February, 2009 (page 54 of Record):

> "We are in receipt of your letter dated February 24, 2009 where you requested an additional two weeks extension regarding the closure of your operations.
>
> Due to much need (sic) renovation work that has to be done on the kitchen as soon as possible we regret to inform you that Devon House Development Ltd can only offer you one week extension effective March 1, 2009."

It does not appear that the appellant responded to this letter.

(iv) On 3 March 2009 the respondent wrote the appellant a letter for the attention of Mrs. Lisa Gabay, a director of the appellant. The respondent thanked Mrs. Gabay for her proposal and informed her that she might be called for an interview. She was also reminded that the one

> week extension to occupy the Grog Shoppe would end on March 7, 2009 and asked to settle outstanding rent and water arrears.

The appellant company replied to this letter asking for audited statements. The appellant did not seek to refute the respondent's statement that there was an extension that would soon end. Mrs Minott-Phillips summed up the situation aptly and forcefully in this way – "without a termination an extension does not arise". I should add that it is only after the respondent's attorneys-at-law had written the appellant warning that no further extension would be granted and that the respondent would be 're-entering and retaking possession' that the appellant wrote disputing the surrender of the lease. In my opinion, the subsequent conduct and acts of the parties make it abundantly clear that the respondent had accepted the appellant's surrender of the lease.

[39] In her written submissions, Mrs Gibson-Henlin argues that the letter of 30 December was not effectual in surrendering the lease because a surrender must take effect at once and cannot take effect at a further date. In this case, she observes, the surrender was intended to take effect almost two months later. In support of this submission she cites para. 630 of **Halsbury Laws of England** (supra) which states that "Authority has suggested that a surrender must take effect at once…". The cases

referred to in the footnote seem to be of dubious authority for that proposition. In any event in ***Take Harvest Ltd. v Lui and Anor*** [1993] 2 All ER 459 their Lordships' Board held that an agreement to surrender a lease at a future date would have been effective to surrender but for the fact that it did not satisfy the relevant statutory provision that such agreement should be in writing.

Conclusion

[40] For the reasons given I hold that:

(1) the respondent was not acting in its private capacity but was acting on behalf of the Crown.

(2) the respondent, as an agent of the Crown, is part of the government machinery or a "member of the Crown". To grant an injunction against the respondent would in effect be granting an injunction against the Crown. By virtue of section 16 of the Crown Proceedings Act, the court may not grant an injunction against the Crown;

(3) In any event, in my view, there is no serious issue to be tried and thus the appellant has no real prospect of succeeding in its claim for an injunction.

(4) Accordingly, I would allow the respondent's cross appeal with costs and affirm the judge's decision.

(5) In view of the above findings, there is no need to consider the issues raised by the appellant in its grounds of appeal.

HARRIS, J.A.

I have read the draft judgment of my brother and I agree with his reasoning and conclusion.

DUKHARAN, J.A.

I agree.

SMITH, J.A.

ORDER

The appeal is dismissed. The respondent's cross-appeal is allowed. The decision of the court below is affirmed. Costs to the respondent to be agreed or taxed.