[2023] JMCA Civ 49

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR GREEN JA

PARISH COURT CIVIL APPEAL COA2021PCCV00016

BETWEEN	**ROHAN SUDINE**	**APPELLANT**
AND	**SHAY NEWMAN**	**1ST RESPONDENT**
AND	**DWAYNE CHAMBERS**	**2ND RESPONDENT**

Kent Gammon instructed by Kent Gammon & Associates for the appellant

Christopher Dunkley instructed by Phillipson Partners for the 1st respondent

The 2nd respondent not appearing or represented

22 September 2022 and 3 November 2023

Landlord and Tenant - fixed term lease - whether there was substantial interference with possession and enjoyment of leased premises - arrears in rent - Rent Restriction Act

F WILLIAMS JA

[1] I have read the draft judgment of my sister Dunbar Green JA and agree with her reasoning and conclusion.

EDWARDS JA

[2] I too have read the draft judgment of my sister Dunbar Green JA and agree with her reasoning and conclusion.

DUNBAR GREEN JA

Introduction

[3] On 20 May 2016, Rohan Sudine ('the appellant') lodged a plaint (and the attendant particulars of claim) in the Corporate Area Parish Court (Civil) ('the Parish Court'), against the 1st respondent, Shay Newman ('Newman') and the 2nd respondent, Dwayne Chambers, ('Chambers'), claiming that they owed him 13 months' rent for the period, 1 May 2015 to 31 May 2016, and a balance of $33,000.00 for April 2015, totalling $683,000.00. This was at a monthly rental of $50,000.00 payable in advance on the first day of each month. The particulars of claim were amended, at trial, to reflect arrears from March 2015 to October 2016, totalling $950,000.00.

[4] Newman's stated defence was threefold. Firstly, he indicated that there were receipts to show that he had paid, in April 2015, one year's rent in advance, in an amount of $240,000.00, for 1 May 2015 to 30 April 2016, (even though the lease agreement, he relied on, stipulated that the rent was $50,000.00). Secondly, during the year covered by the rent, the appellant broke the locks, re-entered the premises, and rented it to "a Mr Bingham and/or operators of a paint shop". Thirdly, he undertook repairs of the rented premises without "putting it towards the rent", and that for a period in 2016, the appellant was in his employ at one of his establishments.

[5] The case against Chambers proceeded by default.

[6] After hearing evidence in the case, Her Honour Miss Opal Smith ('the learned judge') granted judgment, on 10 November 2018, for Newman in the appellant's plaint for arrears in rent and awarded costs to Newman. The learned judge non-suited the appellant, in his claim against Chambers, on the basis that there was no evidence that a rental agreement existed between him and the appellant.

[7] At paras. 38 and 39 of her written judgment, the learned judge explained her decision as follows:

> "38. It is the duty of the plaintiff to satisfy this court on a balance of probabilities that the 1st defendant owes rent for the period stated. The state of the evidence presented by the plaintiff does not rise to the level to satisfy me that the 1st defendant owes him rent for the period claimed. I find judgment [sic] for the 1st defendant.
>
> 39. In relation to the second defendant [sic], no evidence was presented by the plaintiff that he entered into a rental agreement with the 2nd defendant. He therefore ought not to have been brought before this court. The plaintiff is nonsuited in relation to the 2nd defendant."

[8] Dissatisfied with the learned judge's decision, the appellant filed an amended notice of appeal on 29 July 2021.

Background

[9] The appellant was the landlord and Newman was his tenant, in respect of sections of commercial property situated at 41 Dunrobin Avenue, in the parish of Saint Andrew ('the building'/'the rented premises'). Chambers was the business partner of Newman.

[10] The landlord and tenant relationship between the appellant and Newman commenced in 2013 with an oral agreement. Up to April 2015, there had been multiple oral agreements between them, with Newman occupying different sections of the building. The available sections comprised a front warehouse, a front office, and a back section (sometimes referred to as 'the back warehouse'). The agreement changed depending on the section or sections of the building that were occupied. Rent fluctuated between $15,000.00 and $79,000.00, per month, depending on which section or sections of the building were rented at any one time.

[11] On or about 1 April 2015, they signed a fixed-term lease for 10 years ('the lease') by which Newman was to occupy two sections of the building, namely, the front office and the front warehouse, and pay rent at a rate of $50,000.00 per month on the first day of each month, commencing April/May 2015.

[12] Contrary to the provisions of the lease, the appellant contends that the leased premises comprised the back warehouse and the front office at an agreed rent of $50,000.00. He also contends that there was a separate oral agreement, which had been entered into previously (and remained in existence after the signing of the lease), for Newman to occupy the front warehouse at a monthly rental of $20,000.00. The total monthly rent payable was, therefore, $70,000.00. Further, at the commencement of the lease, Newman promised to make good on arrears owed by him. However, he never paid rent in accordance with the lease and had last paid rent in February 2015.

[13] Newman contends that there was no verbal agreement co-existing with the lease. He claimed that the lease replaced all oral agreements and represented the agreement between them. He also claimed that the lease covered three sections of the building at a total monthly rental of $50,000.00.

[14] Further, at or around the time the lease was signed, he paid six months' rent in advance, in the sum of $120,000.00, for the period 1 May 2015 to 31 October 2015. He was also credited a further sum of $120,000.00, which he had paid to the Jamaica Public Service ('JPS'), on the appellant's behalf, in lieu of rent. That credit was for rent payable from 1 November 2015 to 30 April 2016.

[15] As will be seen later, it became a bone of contention whether these sums satisfied rent obligations under the lease.

[16] About July 2015, the appellant locked the gate to the rented premises (the record of proceedings refers to "gates" at points, but this distinction is immaterial). His reason for doing so was that Newman could not be contacted, nor had he paid rent since February 2015. According to Newman, consequent on being locked out, he left the premises and when he returned about three weeks later other persons were in occupation of the sections of the building which he had leased.

[17] It is not necessary to outline the evidence in greater detail than has been woven into the arguments and discussion below.

Grounds of appeal

[18] The appellant sought to challenge the learned judge's finding that he did not satisfy the court that Newman owed rent. This was on the grounds summarised as follows:

> (i) Newman admitted to operating a car wash and office at the rented premises over the period March 2015 to October 2016; his evidence being that, although he left the rented premises in July 2015, Chambers his manager, remained in occupation. This made the 1st respondent liable to pay rent as no notice to quit was served on the appellant;
>
> (ii) the 1st respondent's evidence was that he did not return to the premises after July 2015 yet he paid electricity bills up to April 2016 (reliance being placed on a statement from the JPS included in the record of proceedings);
>
> (iii) the learned judge's finding that the 1st respondent paid rent up until 30 April 2016 was inconsistent with the 1st respondent's evidence regarding the sections of the premises he rented and the rent amount;
>
> (iv) the receipts tendered into evidence confirmed that the 1st respondent rented three sections of the premises ("front, back and warehouse") for $20,000.00, $30,000.00, and $20,000.00 respectively;
>
> (v) the learned judge erred by finding that the areas covered by the lease were the front office and front warehouse, especially in light of the 1st respondent's testimony that he rented three sections;
>
> (vi) the learned judge erred when she found that rent was paid up to 30 April 2016 (which included the payment of JPS arrears) despite JPS' records, which show that the cheque was returned on 16 April 2015 (reliance being placed on said statement from the JPS);

(vii) the learned judge erred when she found that the 1st respondent had not returned to the premises or repossessed same after being "put out in 2015", although the 1st respondent gave evidence that "he went back to the premises two to three weeks after";

(viii) the premises not being "yielded up prior to September 2016, the 1st respondent was obligated to pay rent under Section 25 of the Rent Restriction Act up to then"; and

(ix) the learned judge failed to make any finding against the 2nd respondent in light of evidence from the 1st respondent that the 2nd respondent occupied the premises up to October 2016.

Summary of submissions

<u>For the appellant</u>

[19] Mr Gammon's principal submission, on behalf of the appellant, was that Chambers utilised or occupied the building from March 2015 to October 2016 and, therefore, Newman was liable for rent during that period. Counsel sought support from page 17 of the notes of evidence ('the notes'), where Newman testified that: (i) Chambers was his partner in the car wash and he left him "there (supposedly at the rented premises) running the business" upon his leaving the rented premises; (ii) he (Newman) could not recall for how long Chambers continued to occupy the premises after he left; and (iii) he (Newman) returned to the premises two to three weeks later.

[20] Counsel advanced five additional arguments. Firstly, Newman did not pay rent for November 2015 to April 2016 as the cheque to JPS, in lieu of rent, was dishonoured. He pointed out that the learned judge did not consider Newman's evidence, at page 16 lines 25-29 of the notes, which, he claims, supports the conclusion that rent for that period was still owed at the time of trial. The relevant exchange in the notes was as follows:

> "Counsel: Did you get a receipt from JPS in $120,000.00?

> 1st respondent: Every time I get a bill I get a receipt.
>
> Counsel: Payment for JPS arrears was never credited to Mr Sudine [sic] account.
>
> 1st respondent: I wouldn't know this. Whenever I pay a bill I pay a bill [sic]."

[21] Secondly, it was argued that the learned judge erred in finding that the lease covered the front office and the front warehouse as Newman's evidence was that he had rented three sections of the building. Thirdly, Newman having not brought a claim on any "unlawful act", it meant that the tenancy was undisturbed or unbroken and Newman remained in possession, notwithstanding the appellant's ill-advised action in locking the gate. Fourthly, there was never any "delivering up of possession" during the contested period because Newman served no notice to quit, and there was no surrender. In the absence of a proper notice or surrender, the appellant was entitled to treat the tenancy as subsisting at all material times. Fifthly, the appellant served a notice to quit on Newman.

[22] In support of the grounds of appeal, counsel referred us to **Massander Reid v Bentley Rose and Cynthia Rose** [2011] JMCA Civ 48, and **Tewani Limited v Tikal Limited (T/A Super Plus Food Stores)** [2016] JMCC Comm 8.

For Newman

[23] Mr Dunkley, appearing on behalf of Newman, sought, firstly, to correct para. 7 of Newman's written submissions, filed on 16 September 2022, wherein it is indicated that Newman had paid rent in advance from March 2015 to April 2016 in the amount of $490,000.00. Mr Dunkley indicated that the correct amount was $240,000.00.

[24] It was submitted that the appellant's action of padlocking the gate, changing the locks on the premises and placing Newman's items outside the rented premises, in 2015, amounted to a termination of the lease and was an unlawful eviction. Counsel pointed out that Newman was not able to enter the premises and had to seek the assistance of a police officer to collect his items. Further, if the court accepts that the appellant's action

amounted to a re-entry of the rented premises, by the appellant, in June 2015, there was no obligation for Newman to pay rent going forward.

[25] In the alternative, it was submitted that there was no proof that the appellant served a notice to quit on Newman, and in any event, the lease being in respect of commercial premises for a fixed- term of 10 years, meant that 12 months' notice prior to the expiration of the lease was required. In the absence of an appropriate notice, or any notice, to quit, the appellant would have breached the lease. The case of **Tewani Limited v Tikal Limited et a**l was relied on for support.

[26] Counsel further argued that the receipts for the $240,000.00 were at variance with the appellant's evidence as to which section or sections of the rented premises they relate. Therefore, the learned judge was entitled to find that the sum was for the entire rented premises at 41 Dunrobin Avenue, and covered the period 1 March to 30 April 2016. He submitted that the receipts amounted to an admission, by the appellant, that rent was paid for that period.

[27] Counsel further submitted that if the appellant treated Chambers as Newman's agent, once the lease was terminated, any occupation by Chambers could not be under the auspices of the lease.

[28] As already indicated, Chambers did not participate in the trial, and it does not appear that he was served with notice of this this appeal.

Issues

[29] The following issues arise from the grounds of appeal:

i. whether the learned judge erred when she found that the appellant had re-entered the rented premises;

ii. whether a notice to quit was served on Newman and, if so, what was its effect;

iii. whether Newman repossessed the rented premises, and if so what was the effect;

iv. whether Newman was required to give notice to quit and deliver up possession of the rented premises;

v. whether the learned judge erred by finding that Newman did not owe the appellant rent; and

vi. whether the learned judge erred in non-suiting the appellant against Chambers.

Discussion

Issue i: whether the learned judge erred when she found that the appellant had re-entered the rented premises

[30] A tenant has, either impliedly or expressly, a right to quiet enjoy of the rented premises during the period of tenancy. It is a question of fact whether there has been any or substantial interference with this right (see **Kenny v Preen** [1963] 1 QB 499).

[31] The landlord must, as a matter of law, operate within parameters that circumscribe his powers in relation to the tenant's right to quiet enjoyment. Harris JA at para. [25] of **Massander Reid v Bentley Rose and Cynthia Rose** stated the common law position as follows:

> "At common law, a landlord may have a right of re-entry to his property and may exercise such right if the lease contains express provisions for forfeiture on the occurrence of certain events, for example, on the tenant's failure to pay rent. He may also re-enter where the tenant has served a valid notice within the prescribed period for the service of such notice, or there has been an effective surrender…"

[32] There was no evidence that the lease contained any such provision for re-entry.

[33] Harris JA went on to make the important point that the landlord's rights at common law "have, in some instances, been removed by statute, particularly the Rent Restriction Act".

[34] In the instant case, there was no evidence that the rented premises were exempted from the provisions of the Rent Restriction Act ('the Act'), which therefore meant that the 1st respondent, a rent-paying tenant, would have been in occupation of a controlled premises and was, therefore, entitled to protection under the provisions of the Act which impose restrictions on a landlord who wishes to recover possession of controlled premises. Section 27 of the Act states:

> "Except under an order or judgment of a competent court for the recovery of possession of any controlled premises, no person shall forcibly remove the tenant from those premises or do any act, whether in relation to the premises or otherwise, calculated to interfere with the quiet enjoyment of the premises by the tenant or to compel him to deliver up possession of the premises."

[35] The salient factor for consideration, by the learned judge, was the effect of the appellant's conduct on the lease. At para. 29, she made findings as follows:

> "The plaintiff admitted that he locked the gates to the premises. By this act he denied the defendant access to the rented premises. In addition, the defendant says his belongings were put out. The plaintiff did not deny that the defendant's belongings were thrown out but instead said that he did not know who put them out. However, he was the owner/landlord of the premises. No one else had the authority to put out the defendant's belongings. When this act is considered in the light of the locked gate, I do not accept the plaintiff's evidence that he does not know who put out the defendant's belongings. His pattern of conduct demonstrates that he orchestrated the eviction and locked out the defendant. I also bear in mind that he says he unlocked the gate a few hours later. I found this to be of no consequence, the deed was done [sic]. The tenant was evicted. According to Mr. Newman after he saw the locked gate and his belongings put out, he left. When he visited two to three

> weeks later he saw a paint shop being set up there. He therefore, never re-entered into possession. The plaintiff had effectively terminated the tenancy and was not entitled to any more rent."

[36] At para. 37, the learned judge also said:

> "I find that the plaintiff always knew where to find Mr. Newman. I find that the plaintiff unlawfully evicted the defendant from the leased premises. I find that the plaintiff breached the terms of the lease. I find that in so doing no rent was due to the plaintiff after the date the gates were locked and his belongings removed."

[37] On the evidence that the learned judge accepted, she was entitled to find that the acts of locking the gates and removal of Newman's property from the rented premises were either perpetrated by the appellant himself or were with his acquiescence. The interference by the appellant was physical and direct and evinced an intention to forcibly eject Newman (see Parker J in **Browne v Flower** [1911] 1 Ch 219, 220) and Romer LJ in **Davis v Town Properties Investment Corporation Limited** [1903] 1 Ch 797, 805 as to actions that may amount to forcible removal of a tenant). Such forcible removal by or with the appellant's acquiescence, would have justified Newman leaving the rented premises, as the learned judge found.

[38] Given the evidence accepted by the learned judge as proved, I cannot say that she was plainly wrong in concluding that the lease was determined by the unlawful re-entry of the appellant.

<u>Issue ii: whether a notice to quit was served on Newman and if so, what was its effect?</u>

[39] On the question of whether a notice to quit was served on Newman, the learned judge made these findings at para. 28 of her decision:

> "…[Under] section 26 of the Rent Restriction Act the defendant was entitled to be in possession until 2025 and ought only to have been served a notice in April 2024. The plaintiff was the landlord of commercial premises, as such by

> virtue of section 26, the defendant should have been served a notice of 12 months prior to the expiration of the lease. This could not have been done because the lease expired in 2025. I accept the evidence of the 1st defendant that he was not served with a notice to quit. After all, when Newman was put out in 2015, he did not return/repossess. He therefore could not have been served any notice at 41 Dunrobin Avenue. The plaintiff did not say that he was served at Chelsea Avenue, in fact he did not say how or where he served the 1st defendant the notice. I also find it telling that no notice was tendered into evidence to support that he did in fact serve a notice."

[40] I should point out that the lease was not exhibited in the record of proceedings. Our appreciation of its contents is purely on the basis of what the learned judge has said about it.

[41] This court, in the case of **Brady & Chen Limited v Devon House Development Limited** [2010] JMCA Civ 33 accepted as the correct position in law, the passage from Professor Gilbert Kodilinye in his text, Commonwealth Caribbean Property Law at page 18, that:

> "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."

[42] The learned authors of Hill & Redman's Law of Landlord and Tenant (16th ed, 1976) chapter 14 at para. 4447, in addressing the form of a notice to quit, stated that:

> "At common law, subject to the express terms of the tenancy agreement, there is no 'prescribed form' for a notice to quit. The form of notice is immaterial, provided that it indicates, in

> substance and with reasonable clearness and certainty, an intention on the part of the person giving it to determine the existing tenancy at a certain time."

[43] At para. 4450-4460 the learned authors continued:

> "A notice to quit must be unequivocal and be such as the recipient can properly act upon it. Such a notice only can be good as, on a reasonable construction of it, denotes an intention to give up the premises at the lawful time. There must be plain, unambiguous words claiming to determine the existing tenancy at a certain time."

[44] The learned judge's understanding and application of the law are correct. As Newman was the holder of a fixed-term lease with approximately nine years remaining, the appellant needed to prove that Newman was in breach of a condition in the lease and that he (the appellant) gave notice commensurate with what is required for a fixed-term tenancy, specifying the date on which it was given and when it would expire. On the facts, as she found them to be, it cannot be said that the learned judge was incorrect to have found that the appellant had served no notice to quit on Newman.

<u>Issue iii: whether Newman repossessed the rented premises, and if so, what was the effect?</u>

[45] The appellant's contention that the learned judge erred in not finding that Newman's return to the premises amounted to repossession can be dismissed with short shrift. The fact that Newman returned to the premises weeks after being evicted is not evidence that he had repossessed the rented premises, more so, when no reason was given for his return, and there being no conclusive evidence to refute the establishment of a paint shop in an area which was previously rented to him. The appellant said that he "did not recall a Mr Bingham renting a paint shop on property", although he went on to deny that the front office or back warehouse was "rented to a paint man". As arbiter of the facts, the learned judge was entitled to accept or reject evidence as was appropriate. She clearly accepted the evidence of Newman that within weeks of locking the gates, the

appellant had rented a part or parts of the premises previously occupied by him for the setting up of a paint shop or some other purpose.

Issue iv: whether Newman was required to give notice to quit and deliver up possession of the rented premises

[46] Counsel for the appellant referred to **Massender Reid v Bentley Rose and Cynthia Rose**, for the principle that it is an essential requirement that a tenant must give the requisite notice of his intention to quit to the landlord, and in the absence of proper notice, the landlord is entitled to operate as if the tenancy subsists. In our view, that principle has no relevance to the facts of this case. There was no requirement of Newman to give the appellant notice to quit in circumstances where his belongings were put out of the rented premises, and he left those premises as a consequence. The case of **Tewani Limited v Tikal Limited** is similarly distinguishable. That case concerned a tenant who vacated the rented premises and stopped paying rent without serving a notice to quit on the landlord.

[47] The appellant's contention that Chambers continued in occupation of the rented premises as an agent of Newman was not supported by the evidence. On page 17 of the notes, when Newman was asked whether Chambers had left the premises in October or November 2016, he answered, "Again, I cannot recall how long Mr Chambers was there, after, because Mr Sudine took off the lock and… I stayed away from the premises. Mr Chambers I left there running the business". However, on page 18, he said, "My partner left that day too and everyone else". On page 19, he was asked: "Would you agree with me that a car wash was still operated by your partner up until October or November 2016?" He answered, "No your Honour, he had gone into an arrangement with Mr Chambers before I went to Chelsea separate from me".

[48] Mr Gammon suggested that those statements were inconsistent and impugned Newman's credibility.

[49] There is difficulty with counsel's position for three reasons. First, the evidence was not contradicted by the appellant who said he had locked the gates denying Newman's associates access. There was no evidence as to who those associates were, what role they played and under whose authority they would have remained at the premises after Newman left. Second, Newman was not asked to explain what he meant when he said that Chambers was left "there running the business". In the absence of any clarification, it cannot reasonably be advanced that "left there running the business" was contradictory, given Newman's other statement that Chambers had his own arrangement with the appellant. Third, the issue of credibility was for the learned judge, and she found Newman to be more credible than the appellant based on the difference in the quality of their evidence and observation of their demeanour. She assessed the appellant's evidence as being "random and disorganized". At paras. 30-36 of the written judgment, she pointed out a number of unexplained inconsistencies in his evidence, and at para. 36, she concluded that:

> "No attempt was made to address any of the inconsistencies, all of which were as far as this court is concerned germane to the issues at hand. **They have effectively shredded Supine's [sic] credibility**." (Emphasis added)

[50] It is trite to say that where the agent has authority and is known to be an agent, the contract is that of the principal, not that of the agent. However, Mr Gammon's contention that there was an admission by Newman that he and his partner operated the business at the rented premises between March 2015 and October 2016, was not supported by the evidence. There was no evidence from the appellant that Chambers was one of the persons whom he claimed to have been Newman's associates or left at the building by him.

[51] In the circumstances, there was no requirement for Newman to give notice to quit the rented premises.

Issue v: whether the learned judge erred in finding that Newman did not owe rent

[52] The learned judge did not state a definitive date at which the lease was terminated. It was put to Newman, in cross-examination, that the gates were locked in July 2015; but he said that he was not in a position to confirm the date. The appellant said that the gate was locked in the latter part of 2015, after he had made contact with Newman in June 2015, but gave no specific date. If, as Mr Gammon suggested, the gates were locked in July 2015, then, in the absence of an election by Newman to continue the lease, rent would not accrue moving forward (see **Leighton Chin-Hing v Wisynco Group Limited** [2013] JMCA Civ 19, para. [26] and **Tewani Limited v Tikal Limited**, para. [10]). Newman's only remaining obligation would be for any unpaid arrears in rent up to that month.

[53] At paras. 21–23 of her judgment, the learned judge summed up the relevant evidence as to the terms for payment of rent and opined as follows:

> "21. The lease agreement is dated April 1, 2015 and states that it is for the office and front warehouse at $50,000.00 per month. The plaintiff's case is that the defendant rented the warehouse first then the front office and back section together. This clearly is incorrect as evidenced by the signed agreement.
>
> 22. … Under [cross-examination] it was revealed that Mr. Sudine signed on two pages, 2 and 3. Page 3 speaks to the lease being for a period of 10 years. I reject his assertion that there was no lease for 10 years and further that page 1 was replaced. I therefore accept the lease as reflecting the contract between the parties.
>
> 23. the areas covered by the lease are the office and front warehouse."

[54] The learned judge was entitled to reject aspects of the *viva voce* evidence by both parties and rely instead on the lease to determine the sections of the building which were rented. However, as will become apparent, in making that finding, the learned judge failed to resolve a material discrepancy between the monthly rent due under the lease

($50,000.00) and the sums reflected on each of the two receipts for payment of rent ($120,000.00 for six months' rent). It should be noted that, although Newman stated in his defence, at the commencement of the trial, that the rent payable under the lease was $15,000.00, he, nevertheless, acknowledged by his evidence that the sum was in fact $50,000.00.

[55] Copy receipts 010 and 011, both dated "23/4/2015" and each in the sum of $120,000.00 endorsed "for 41 Dunrobin Avenue" for the periods "1/5/15-31/10/15 and 1/11/15-30/4/16", respectively, were admitted as exhibits 3a and 3b. Exhibit 3b is endorsed, "For payment of JPS arrears" whilst exhibit 3a has the additional endorsement, "$30,000.00 cash, $90,000.00 in cheque". Newman's evidence was that these were payments for rent in advance, for two six month periods, each amounting to $120,000.00.

[56] Also tendered and admitted into evidence, as exhibits 2a and 2b respectively, were copy receipt 008 dated February 2015, in the sum of $30,000.00 for the period 1 February 2015 - 28 February 2015, endorsed "back section…" (the other words were illegible) and copy receipt 009 dated 24 February 2015, in the sum of $20,000.00, for "part payment on 41 Dunrobin Avenue (balance $35,000.00) for the period 1/3/15 - 31/3/2015". Although the appellant testified that "all receipts showed which sections", this clearly was not the case.

[57] The dilemma for the learned judge was that three of the four receipts were endorsed "for 41 Dunrobin Avenue", and she had to decide what that meant. It could mean the two sections of the building which the learned judge said were identified in the lease (office and front warehouse); the front warehouse only, which the appellant said was rented to Newman under a verbal agreement, quite separately from the front office and back sections under the lease; or, as Newman maintained, for all three sections. At para. 26, the learned judge resolved the dilemma by concluding, "[i]f the receipts are specific to the areas rented, then 41 Dunrobin Avenue would represent the entirety of the rented sections".

[58] It is my view that she was entitled, in the circumstances, to reject what the parties said and make the finding that the lease represented the entirety of the rented sections. As indicated above, the learned judge preferred the terms in the lease to those put forward by each party. However, by my calculation, the payment of $120,000 for six months (exhibit 3a) does not equate to $50,000.00 monthly. Neither would similar sums paid to JPS in lieu of rent. In each case, it equates to $20,000.00 per month, which is not consistent with $50,000.00 per month under the terms of the lease. If meant as payment for rent under the lease, the sums would cover less than five months' rent at the stipulated rate. On the other hand, if, as the appellant claimed, these sums were in respect of the front warehouse only, under a verbal agreement, they would 'correctly' represent 12 months' rent. Ultimately, as will be shown later, this apparent inconsistency did not affect the decision as to whether any rent was owed.

[59] The learned judge also found at para. 27:

> "27. On a reading of the receipts I am satisfied that the defendant paid rent up to at least April 30, 2016 for the rent [sic] premises. The defendant's [sic] evidence is that the premises fell into arrears in June 2015. This is clearly not true based on the receipts tendered. In addition, the evidence from the plaintiff is that the premises were sold in 2016. This was the basis upon which he says the tenants were told that they had to leave by September 2016. If the premises were sold before September 2016, on what basis is the plaintiff claiming rent up to October 2016? No evidence was lead [sic] as to the date of the sale or the transfer, just that the premises were sold."

It is implicit in these findings that, in addition to the $120,000.00 representing rent paid for 1 May 2015 to 31 October 2015 (evidenced by receipt 3a) with which no issue was taken, the learned judge accepted that receipt 3b was proof of payment of a JPS bill on the appellant's behalf as a set-off against Newman's rent obligations under the lease for the period from 1 November 2015 to 30 April 2016.

[60] The appellant sought to challenge the payment of the latter amount by relying on an unstamped/unfiled notice of intention to tender a hearsay statement purportedly from JPS; but there is no evidence in the record that this notice was ever served on either respondent. Further, it is dated 13 November 2018, three days after the trial (the record indicates that the trial took place on 10 November 2018). There is also no evidence that the statement purportedly from the JPS was put to Newman in cross-examination, received into evidence, or considered by the learned judge in her assessment of the evidence.

[61] This matter could end there; but I will go on to show that even were the statement admitted, the appellant would have had a difficult hurdle in demonstrating its evidential value. Firstly, Mr Gammon wanted to use the statement to establish that the payment of $120,000.00 was not made because "the cheque was dishonoured". It is true that the purported statement bears Newman's name as a customer and a service address of 41 Dunrobin Avenue, and shows a payment of $120,000.00 on 1 April 2015. There is also a debit for a "Returned Cheque" in the same amount on 16 April 2015. However, there is a gap in the evidence as it was never established that the sum paid to the JPS on the appellant's behalf was made by cheque. The receipt (exhibit 3b) was only endorsed, "For repayment of JPS arrears". Indeed, the only reference to a cheque was for the amount of $90,000.00 endorsed on receipt (exhibit 3a), and it had nothing to do with JPS.

[62] Secondly, as a tangential point, Mr Gammon sought to rely on the account being in Newman's name to support his contention that Newman continued to pay utility bills for the premises up to July 2016. Such a conclusion could not be drawn from the statement. More to the point, apart from the purported payment in April 2015, the payment of any other JPS bill, by Newman, was not established. Further, given the circumstances under which Newman left the rented premises and, particularly his evidence, that weeks after, a paint shop was established in the area that he had previously rented (which evidence the learned judge seemingly accepted), a JPS meter being in his name would not, without more, establish that any bills paid in respect of that

meter were done by him. Newman was not asked about any payment to JPS after April 2015, and he gave no such evidence.

[63] Accordingly, notwithstanding the statement forming a part of the record of proceedings submitted by the Parish Court, it has not assisted with this appeal.

[64] I now return to the calculation of rent. It has already been determined, on the evidence, that the lease commenced on 1 April 2015 and came to an end about July 2015. This means that Newman would have been obligated to pay rent under the lease, commencing 1 April 2015 and ending about 1 July 2015 at a monthly rental of $50,000.00. By my calculation, this amounts to $200,000.00. Considering that receipts 3a and 3b covered the periods 1 May to 30 April 2016 in the total sum of $240,000.00, the rent obligation, under the lease, would have been covered with a balance of $40,000.00. Given the learned judge's finding that the lease represented the agreement between the parties (correctly so on the basis of the evidence led), Newman would have met his rent obligation up to the date at which he was evicted. The learned judge, however, would not have been correct when she concluded at para. 27 of her written judgment, that "[o]n a reading of the receipts I am satisfied that the defendant paid rent up to at least April 30, 2016 for the rented premises". This error, however, was not material to her ultimate finding that no rent was owing, since Newman's obligation under the lease terminated in July 2015.

<u>Issue vi: whether the learned judge erred in nonsuiting the appellant in relation to Chambers</u>

[65] The learned judge found that there was no evidence by the appellant to prove that a rental agreement existed between himself and Chambers. The claim was hinged on agency, but Chambers had not been sued in that capacity. Even if that relationship had been established, it would have ceased to exist, for purposes of the lease, when it was terminated by the appellant's unlawful re-entry. The Judicature (Parish court) Act, at section 181, gives a judge of the Parish Court, "the power to nonsuit the plaintiff in every

case in which satisfactory proof shall not be given to him entitling either the plaintiff or defendant to the judgment of the Court".

[66] It is a well-established principle that the appellate court as a court of review, should be slow to interfere with the exercise of discretion and findings of fact of a judge at first instance if it cannot be said that the judge was plainly wrong (see **Massander Reid v Bentley Rose and Cynthia Rose**, para. [44]). It cannot be said that the learned judge was plainly wrong in her assessment of the evidence and the conclusions she arrived at on the evidence as a whole. There is, therefore, no justification for disturbing the learned judge's findings and decision.

Conclusion

[67] For the reasons above, it cannot be said that the learned judge erred in her understanding of the law and its application to the facts, as she found them to be. The appeal should, therefore, be dismissed with costs to Newman.

F WILLIAMS JA

ORDER

i. The appeal is dismissed.

ii. The decision of the court below is affirmed.

iii. Costs of $40,000.00 is awarded to the 1st respondent, Shay Newman.