

MWAISENI PROPERTIES LTD (1983) Z.R. 40 (H.C.)

HIGH COURT
KAKAD, J.
13TH MAY, 1983
(1983/HP/532)

Flynote

Land law - Land (Conversion of Title's) Act - Presidential consent - Mandatory requirement for - Effects of non-compliance.

Landlord and Tenant - Lease - Contract for - Legal position of.

Landlord and Tenant - Lease - Failure to Execute - Failure to come to court with clean hands - Effect of.

Civil Procedure - Remedy - Injunction - Equitable and discretionary nature of - Availability.

Headnote

The plaintiff sought an injunction to restrain the defendant from hindrance, molestation and interruption of the plaintiff's peaceful and quiet enjoyment of its occupancy of the demised premises during the term of tenancy or until further notice. The premises were demised under a contract to lease which was neither executed, nor carried the requisite Presidential consent. The action arose out of the defendant's effective re-entry and possession of the premises upon the plaintiff falling into several months rent arrears. It was contended for the defendant that the plaintiff

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could not succeed since they were seeking discretionary and equitable remedy available only where one comes to court with clean hands.

Held:

- (i) Without the Presidential consent under s. 13 of the Land (Conversion of Title's) Act, no legal estate of interest in the premises was conveyed to the plaintiff.
- (ii) A contract for a lease is as good as a lease where the court is willing to grant the discretionary remedy of specific performance.
- (iii) The court will not grant the remedy in favour of a tenant whose tenancy agreement is subject to a condition precedent which has not been performed i.e. obtaining Presidential consent or who is in breach of a term of the agreement, i.e. arrears of rent; for he who comes to equity must do so with clean hands.
- (iv) Injunction is an equitable remedy and the court may not exercise its discretion to grant it where the plaintiff is in breach of the contract.

Cases cited:

- (1) William Jacks and Co. v O'Connor (1967) Z.R. 110.
- (2) Thomson v Park [1944] All E.R. 477.

Legislation referred to:

Land (Conversion of Title's) Act. No. 20 of 1975 s.13 (1) (2).
Landlord and Tenant (Business Premises) Act, Cap. 440 ss.1 (1) (b) 5.

For the plaintiff: A. Hamir, Solly Patel, Hamir and Lawrence.

For the defendant: Musonda, Legal Services Corporation.

Judgment

KAKAD, J.:

The plaintiff (Hina Furnishing Lusaka Limited) applies for an injunction against the defendant

(Mwaiseni Properties Limited) restraining the defendant from hindrance molestation and or interruption of the plaintiff's peaceful and quiet enjoyment of the plaintiff's occupance of the demised premises known as First Floor, Indeco House, Sapele Road, Lusaka, (hereinafter referred to as the "Premises") during the term of tenancy or until further order.

From the affidavit in support and in opposition of the application the following facts are common cause:

- (i) That in August, 1982, by an agreement made between the plaintiff on the one part and the defendant on the other part, the defendant agreed to lease, on the agreed terms, the premises to the plaintiff for a period of three years at monthly rental of K7,500.00;
- (ii) That the terms of the agreement were reduced to a lease in writing but the said lease remained unexecuted by either party;
- (iii) That on 1-9-83 the plaintiff in pursuance of the said agreement and with the consent of the defendant entered into occupation of the premises;

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- (iv) That the defendant in permitting the plaintiff's occupation of the premises had handed over to the plaintiff a duplicate key to the premises;
- (v) That the plaintiff, since 1st September, 1982, had paid K7,500.00 only one month's rent, towards the rent,
- (vi) That the plaintiff at the end of February, 1983 according to the Statement of Account supplied by the defendant was in arrears to the amount of K30,000.00. (see Statement of Account dated 28-2-83 exhibited to the affidavit in support of the application);
- (vii) That the defendant on 28-2-83 served notice on the plaintiff

(i) demanding payment of arrears of rent within 7 days and (ii) notify that it would repossess the premises on failure to settle the arrears within 7 days:

- (viii) That the plaintiff not disputing the arrears of rent for the months of December, 1982, January, 1983 and February, 1983 wrote to the defendant on 8-3-83. Between 8-3-83 and 14th March, 1983, letters concerning the arrears of rent were exchanged between the parties. (see: letters exhibited to the affidavit in support of the application);
- (ix) That between 14th March, 1983 and 23rd March, 1983, I cannot tell the exact date, it appears that the defendant re-entered the premises by unlocking the locks and fixing its own locks. Thereafter, the plaintiff it appears re-entered by opening the locks fitted by the defendant and fitted its own locks. Thereafter the defendant again unlocked the locks fitted by the plaintiff and fitted its own locks and ultimately succeeded to maintain re-entry and possession of the premises.

In consequence of the above events the plaintiff on 30-3-83 issued a writ against the defendant seeking inter *alia* a declaration, damages and injunction as claimed in the writ. On the same day the plaintiff applied for an injunction, which is now for consideration before this Court.

Mr Hamir, the learned counsel for the plaintiff arguing the application for injunction submitted that the defendant had interfered with the tenancy of the plaintiff and in the plaintiff's business by preventing the customers from entering the premises by closing down the premises which was in lawful occupation of the plaintiff. He claimed that the damages caused and continued to be caused as a result would not be adequately compensated by liquidated damages. Mr Hamir contended that the plaintiff was by terms of the agreement entitled to quiet and peaceful enjoyment of the premises and therefore to an injunction order. He claimed that the defendant's reliance on lease in justification of re-entry and repossession of the premises was irrelevant because the lease has not been executed. He contended that the plaintiff's tenancy is a protected tenancy under Landlord and Tenant (Business Premises) Act, Cap. 440. He claimed that the plaintiff had been in occupation of the premises for a period of over six months and therefore the defendant had no legal right to evict the

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plaintiff, unless in compliance with the provisions of the Act, Cap. 440. According to him the statutory rights of forfeiture did not arise in this case because the arrears of rent due from the plaintiff was only for three months. He claimed that rights of forfeiture and re-entry would only arise when rent due was in arrears of six months or over and where there were no goods to distrain. He claimed that a right of re-entry could only arise when the said right was specifically agreed between the parties and on the terms agreed. According to him the right of re-entry could not be executed if waived by landlord. He submitted that the defendant in this case had waived the right of forfeiture and re-entry by negotiating to settle the arrears due from the plaintiff. He contended that the defendant, assuming the terms of the unexecuted lease were applicable, could not have re-entered without giving 21 days' notice as provided in the unexecuted lease. He submitted that 7 days' time to settle the arrears of rent; due from the plaintiff was totally unreasonable and unjust. Referring to Sections 5 and 11 (i) (b) of the Landlord and Tenant (Business Premises) Act, Cap. 440, the learned Counsel claimed that in the absence of an executed lease, the defendant had no right to forfeit and re-enter. He urged this Court to apply the principles of balance of convenience.

Mr Musonda, the learned counsel for the respondent submitted that the remedy claimed by the plaintiff was an equitable one and was in the discretion of the Court. He claimed that he who goes to equity must go with clean hands. He contended that in this case the plaintiff must establish that he is entitled to the right he is seeking. He claimed that the defendant entitled to enjoy the terms of the agreement as much as the plaintiff wishes to claim. According to him the plaintiff cannot come to the Court and claim injunction when he has failed to clear the arrears of rent. He submitted that the Landlord and Tenant (Business Premises) Act, Cap. 440, did not apply in this case because that Act applies to leases which are executed. He claimed that right of re-entry is an implied covenant in every tenancy agreement. According to him to grant an injunction would operate unfairly to the defendant.

The learned counsel for the plaintiff contends that the plaintiff, at the time evicted, was and is as today protected tenant under the provisions of the Landlord and Tenant (Business Premises) Act, Cap. 440, and that the defendant could not have terminated the plaintiff's tenancy or occupation by eviction unless as provided under s.5 of the Act, Cap. 440.

"Tenancy" under s. 2 of the Landlord and Tenant (Business Premises) Act, Cap. 440, (hereinafter referred to as the Act, Cap. 440) is defined as under

"'tenancy' means a tenancy of business premises (whether written or verbal) for a term of years certain not exceeding twenty-one years, created by a lease or under-lease, by an agreement for or assignment of a lease of under-leave, by tenancy agreement or by operation of law, and includes a sub-tenancy but does not include

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any relationship between mortgagor and mortgagee as such, and references to the granting of a tenancy and to demised property shall be construed accordingly."

However, since 15th August, 1975, under the provisions of s.13 of the Land (Conversion of Titles) Act, 1975, (hereinafter referred to as Act 20 of 1975, every person is mandatorily restricted from sub-dividing and alienation of land, which includes sub-letting, without prior consent, in writing, of the President.

Under the provision of s.13 (2) of Act 20 of 1975, the President in granting his consent may impose such terms and conditions as he may think fit. Such terms and conditions shall be binding on all persons and shall not be questioned in any court or tribunal.

In this case neither party has exhibited the written consent by the President consenting the leasing of the premises as agreed between the parties. The defendant has exhibited an unexecuted lease. It appears to me that the lease remains unexecuted because the written consent as required under s.13 (1) of Act 20 of 1975 has so far not been granted. Under the provisions of s. 13 (1) of Act 20 of 1975, the defendant was strictly restricted from sub-letting the premises to the plaintiff without prior written consent of the President. I therefore consider that in the absence of the written

consent of the President, there was no legal estate or interest on the premises conveyed to the plaintiff. In the result the plaintiff, in my judgment, does not seem to be a protected tenant under the provisions of the Act, Cap. 440.

The terms of the lease i.e. parties, property, length of term, rent and commencement date of terms, appears to have been agreed upon between the defendant and the plaintiff. Thereupon the plaintiff was allowed to occupy the premises. Equally the plaintiff on his part paid rent for some months (see *William Jacks and Company (Zambia) Limited (1967) Z.R. 110*). It therefore appears that in all probability there was an agreement for lease, though I would not make any conclusive findings to that effect.

In *Woodfall, Landlord and Tenant* Vol. 1 (27th Edition) at page 132, contract for lease or an agreement-for lease is defined as under:

"A contract for a lease is an agreement enforceable by law whereby one party agrees to grant and another to take lease. The expression 'contract for lease' and 'Agreement for lease' are usually inter-changeable, but 'Contract for lease' is preferred as being more definite, agreement frequently meaning one of many stipulations in a contract. A contract for a lease, is to be distinguished because lease is actually a conveyance of an estate in land, whereas contract for a lease is merely an agreement that such a conveyance shall be entered into at a future date."

In para. 381 of the mentioned *Woodfall* Vol. 1, at p.162, it is stated:

"If any material point, such as the amount of premium or rent,

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is by the contract left to be determined by third persons, e.g. arbitrators or surveyors, and that has not been done before action, the court will not decree specific performance, having no power to compel such third persons to perform their duty; it therefore treats the contract as too imperfect to be specifically enforced."

In the same Volume at p.177, in para. 420, it is stated:

"Since the Judicature Act, 1873, a tenant who enters into possession under a contract for a lease of which specific performance would be granted is not a tenant from year to year only, but holds under the same term in equity as if the lease had been actually granted. The landlord can therefore exercise all rights, legal as well as equitable, which he would have had if a lease had been granted, and likewise the tenant is protected in the same way as if lease had been drawn up and executed. If under the terms of the lease agreed upon, year's rent would have been payable in advance on demand, a distress for that rent may lawfully be levied upon a tenant holding under the agreement. This principle was laid down in the leading case of *Walsh v Lonsdale*, and the judgment of Jessel; M.R.; in that leading case has frequently been approved, *The principle has no application, however, to a case where specific performance would not be granted, for example where agreement for a lease was subject to a condition precedent which has not been fulfilled and has not been waived by a lessor.*"

In the *Law of Real Property* by Magurly and Wade, (4th Edn.) at p.626, differences between legal and equitable leases have been explained as under:

"The effect of *Walsh v Lonsdale* was often summed up in the words 'a contract for a lease is as good as a lease'. For many purposes this is true, but as generalisation it is misleading, for it ignores the vital differences between legal and equitable interests. The difference between a contract and lease is in reality substantial: a contract falls short of lease in the following respects.

(a) *Dependence upon specific performance.* The effect of *Walsh v Lonsdale* in

equity depends upon the willingness of the court to grant the discretionary remedy of specific performance. If for any reason an agreement for a lease one which the court cannot or will not grant specific performance the position under it is very different from that under legal lease; the parties can have nothing more than a right to sue for damages under the agreement, though yearly or other periodic tenancy may arise in the usual way. For example, *there can normally be no specific performance in favour of a tenant whose tenancy agreement is subject to a condition precedent (e.g. to repair) which he has not performed, or who is already in breach of one of the terms of the agreement, or whose claim is to an underlease which can be granted to him only in breach of a covenant against sub-letting in the head-lease.* He who

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comes to equity must with clean hands, and he who seeks equity must do equity. In such leases the tenant must stand or fall by his rights (if any) at law."

As I have said, it appears that there was an agreement for lease between the plaintiff and the defendant upon the agreed terms. One of the terms of the agreement obviously was that the plaintiff had covenanted to pay K7,500.00 as rent per month. The plaintiff it is evident had paid the agreed rent for some months. Equally he has conceded that he has been arrears for the months of December, 1982, January, 1983 and February, 1983 i.e. the month before he was evicted. The law is that there can normally be no specific performance in favour of a tenant whose tenancy is subject to a condition precedent or who is already in breach of one of the terms of the agreement. In this case the plaintiff in failing to pay the rent for the months of December, 1982, January, 1983 and February, 1983, had apparently breached one of the terms of the agreement for lease. Secondly, in my view, the agreement for lease, even though the rental was agreed between the parties, was subject to a condition precedent because under s.13 (3) (b) the rent agreed between the parties had to be consented in writing by the President. It is clear that under s.13 (3) (b) of Act 20 of 1975, the President may allow the agreed rent or may fix a rent which he deems it, proper and that decision could not be questioned in any Court or tribunal. In the premises I have my doubts as to whether there could be specific performance in favour of the plaintiff.

Further, it is also my view that until the written consent by the President was obtained, as provided under s.13 (1) of Act 20 of 1975, notwithstanding the validity of the Agreement for lease between the plaintiff and the defendant, the defendant as the landlord, had no power to grant occupation of the premises to the plaintiff. Consequently the plaintiff, in my view, had and has no right to legally occupy the premises. I have, therefore, my reservations as to the plaintiff's rights, legal or equitable to quiet and peaceful enjoyment of the premises as claimed by the plaintiff.

I do not know, and it is impossible for me to know, how the rights of the parties are likely to be decided when the case is heard. It may be that it will be found that the defendant has broken the agreement; it may be that it will be found that the plaintiff is entitled to quiet and peaceful enjoyment; it may be that it will be found that the defendant was within his rights to re-enter; it may be that the defendant will have to pay damages. I do not know.

In Thompson v Park (1944) 2 A.E.R. at p.480 Due Paroq, L.J., observed:

"Very often, when an application is made for an interim or an interlocutory injunction, the Court has very difficult jurisdiction to exercise. Very often it is impossible to make an order which on the face of it may not do some injustice to one party or the other. It is impossible to go fully into the facts at that stage of the case and with the best will in the world, an order may be made which will afterwards be regretted."

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I fully agree with the above because, what has been stated is very much applicable to the situation in this case.

What I have stated hereinbefore, however, has some bearing on the application before this Court. Injunction, the equitable remedy, is the negative counterpart of specific performance. It is in the discretion of this Court to grant an interlocutory injunction or not. If granted, the object would be to keep things status quo until the question at issue between the parties can be determined. I am mindful that the discretion has to be exercised judicially. In the case of an interlocutory injunction or for that matter any injunction, one of the matters that the Court has to consider is the conduct of the parties. A plaintiff who complains of the defendant's breach of contract will not obtain injunction if he too is in breach. Equally, he who comes into equity must come with clean hands. Thus a contracting party who fails to perform his part cannot obtain an injunction to restrain breach of covenant by the other party.

In this case it is evident that the plaintiff in having failed to pay the agreed rent in time had breached one of the principal covenants of the agreement for lease; and therefore he himself was in breach of the contract when evicted. Equally up to the time of hearing this application, the plaintiff, obviously, has not settled the arrears of rent, which is a substantial amount. In the light of the substantial arrears, I cannot say that the defendant was unjustified in rejecting the plaintiff's proposal to settle the arrears in instalments. In view of the above, I cannot see how I could be justified in finding that the plaintiff, in seeking equity, has come to this Court with clean hands. The maxims "He who comes to equity must come with clean hands," and "He who comes to equity must do equity", in my considered view, cannot be interpreted very flexibly. Furthermore, I have hereinbefore expressed my doubts concerning the plaintiff's rights legal or equitable, to quiet and peaceful enjoyment of the premises. Equally, I have expressed my doubts as to whether the defendant in the absence of the President's consent in writing, had the power to grant occupation of the premises to the plaintiff, and whether the plaintiff's occupation of the premises without the consent in writing by the President was and is legal.

For the foregoing reasons and having given due consideration to what the learned Counsels have submitted, I find that this is not a case where it would be proper for this Court to grant an injunction as claimed by the plaintiff. On the facts obtained the plaintiff's rights, in my judgment, lie in damages rather than injunction. The application for injunction is therefore dismissed with costs to the defendant.

Application dismissed
