**IN THE SUPREME COURT OF BELIZE, A.D. 2009**

**CLAIM NO. 522 of 2009**

**BETWEEN: ELBERT MURILLO CLAIMANT**

**AND**

**FORT STREET TOURISM VILLAGE DEFENDANT**

Hearings
2009
3rd November
18th November
20th November

Mr. Hubert Elrington for the Claimant
Mrs. Liesje Barrow-Chung for the Defendant

LEGALL J.

**JUDGMENT**

1. The claimant by a lease agreement dated 14th September, 2001 became a tenant of premises situate at Fort Street Tourism Village, at a monthly rental of $800.00 U.S. dollars. The tenanted premises was one of several stores, described as store No. 9B, and the claimant

carried on a business there of selling wooden carvings mainly to tourists visiting Belize. One of the terms of the said lease was that the claimant had to pay a deposit. The lease was originally for a year, renewable at the option of the parties. The claimant testified that in accordance with the said lease he paid the deposit.

2. The said lease in September, 2001 was between the claimant and the then owners of the rented premises. But the said owners in 2004 sold the premises to the present owners – the defendants – who did not change the name given to the premises by the previous owners. When the new owners took over the premises, the claimant continued to pay his monthly rental of $800. U.S. until around 1st November, 2004 when both parties agreed to an increase of rent to $960. U.S. per month.

3. Between the years November, 2004 and 1st January, 2009 there were yearly adjustments of rent, mutually agreed by yearly leases in writing, by the claimant and the defendant. On 1st January, 2009 another lease agreement was made between the claimant and the defendant for the said store No. 9B at a rental of $900. U.S. dollars per month for a period of one year ending on 31st December, 2009. Between January, 2009 and April, 2009 the claimant had problems in paying his rent, and paying it on time.

4. The defendant claimed that on 8th May, 2009, the claimant agreed to pay rent for April and May, 2009, and also a security deposit of $1,200.00 Belize dollars. The defendant tendered a document which

was admitted in evidence by consent, and which the claimant admitted signing. The document states as follows:

> "April 29th, 2009
>
> I, Elbert Murillo owner of Store 9B Terminal I will pay $2,160.00 for April's rent on April 30th, 2009. Also I will pay May's Rent and the Security Deposit on May 08th, 2009.
>
> If payments are not made on the said date further action will be taken.
>
> Elbert Murillo — Arthur Deeks
> Store Owner — Fort Street Tourism Village"

5. The defendant claims that the claimant in accordance with the above document paid all the rent outstanding, but failed to pay the security deposit as he agreed to. It must be noted that the document does not state the amount of the security deposit, but the defendant and claimant agree that the amount is $1,200.00 Belize dollars. Because of the alleged failure to pay the said deposit, the defendant re-entered the rented premises on 10th May, 2009, put a lock on the door, in which housed the merchandize of the claimant; and prevented the claimant from occupying the rented premises. The lease dated 1st January, 2009 contained a re-entry clause as follows:

> "5.3 **Forfeiture for breach of covenant**

> If the rent hereby reserved or any part thereof shall be unpaid for ten (10) days after becoming payable whether formally demanded or not or if any of the covenants on the part of the Tenant herein contained shall not be observed and performed then and in any such case it shall be lawful for the Landlord or any person or persons authorized by him in that behalf at any time thereafter to re-enter the premises and thereupon the tenancy shall absolutely determine but without prejudice to any right of action or remedy of the Landlord in respect of any breach of covenants by the Tenant hereinbefore contained."

6. Up to the date of the trial in this matter, the claimant was not allowed by the defendant to occupy and take possession of the rented premises. The claimant therefore brought a claim dated 8th July, 2009 against the defendant claiming as follows:

> "1. A Declaration that the lease which he holds of the Defendant at the Fort Street Tourist Village is valid and subsisting.
> 2. An Order prohibiting the Defendant whether by itself, its servants, and or agents, from interfering with Claimant's peaceful possession of the said leasehold premises.
> 3. An Injunction prohibiting Defendant whether by itself, its servant and or agent, from entering upon

the said leasehold premises, remaining upon the said leasehold premises, or in any other way interfering with Claimant's physical possession of the said premises.

4. Costs.
5. Such further or other reliefs as the Honourable Court deems just."

The claimant did not make a claim for damages for breach of contract.

7. On the 13th July, 2009, learned counsel for the defendant Mrs. Barrow-Chung, after having received service of the claim, wrote a letter of the same date, to learned counsel for the claimant, Mr. Hubert Elrington, expressing willingness to settle the claim. Mrs. Barrow-Chung wrote:

> "Our client is willing to settle the captioned claim and it is proposed that our client will permit Mr. Murillo to resume occupancy of the premises known as space #9B located at the Fort Street Tourism Village effective immediately for the duration of his lease on the terms specified therein.
>
> Our client further proposes that in consideration of the loss caused to Mr. Murillo our client is willing to permit Mr. Murillo to occupy the premises rent free for the remainder of the month of July and rent will only become due and payable on the 1st

> August, 2009 and every month thereafter until the lease is at an end.
>
> Additionally, our client accepts that Mr. Murillo is entitled to a refund of rent for the 10th May, 2009 to 31st May, 2009 being the period that he was unable to use the premises for which he had already paid. However, our client will forego its entitlement to the security deposit in consideration of it not paying Mr. Murillo a refund."

8. There was no response to the letter. When the matter came up for trial I invited both counsel to consider settling the matter based on the contents of the letter, which I thought were reasonable; but this was resisted by learned counsel for the claimant.

9. The dispute in this case is whether the claimant paid the deposit of $1,200.00 as he agreed to. The defendant's case is that the deposit was never paid and, therefore, the defendant was entitled to re-enter the premises, by virtue of clause 5:3 of the lease, determine the tenancy and take possession of the rented premises.

10. On the other hand, the claimant's case is that at the beginning of his tenancy in September, 2001, he was required by provisions of the then lease of that year to pay the deposit, which he did. The lease according to the claimant, was for one year; and it provided that at the end of the year, the deposit would be returned to the tenant, unless the

tenant agreed that it must be used for a future deposit or rent, in the event of a renewal of the lease. The claimant states that the initial deposit was never returned to him, and he never agreed that it must be used for future rent. He claimed that he was a tenant of the premises for about eight years, before the defendant retook possession of his premises; and he had told the defendant, after it became the new owner, that he had paid the deposit since 2001; and the defendant continued to enter into yearly leases with him, for the period of about four years and never took any action against him. This is evidence, according to the claimant, that the defendant had impliedly accepted that he had paid the initial deposit since 2001.

11. In relation to the document above dated 29th April, 2009, the claimant testified that before signing the document, the defendant locked the store – the rented premises – and told him that the store would not open until he signed the document. In other words, he did not sign the document of his own free will. The claimant stated that he had a receipt showing that he paid the deposit; and a statement from the defendant's company supporting payment of the deposit. He said the documents were in the store which was locked by the defendant. The claimant was given the opportunity to produce to the court the receipt and statement, and the defendant agreed to give him access to the store to locate the documents.

12. The claimant, though allowed by the defendant access to the store, failed to produce the receipt; but produced a type written statement

with no signature or name indicating from whom the statement came. The statement was not tendered in evidence.

13. Moreover, the claimant, in his evidence, said that several statements he made in his witness statement were in error. His evidence-in-chief contradicted several matters he swore to in his witness statement which was tendered in evidence. On being asked in the witness box whether he saw his signature on exhibit E.M. 2 above, he insisted on reading the document first before answering the question whether his signature appeared thereon. I have also observed the claimant in the witness box. There is some doubt whether the claimant paid that deposit on the original lease of 2001, and whether he was forced to sign exhibit E.M. 2 in which he agreed to pay the deposit.

14. But assuming that he did pay that deposit in 2001, in accordance with the original lease, that deposit would have been paid to the then owners of the tenanted premises under the provisions of the then existing contract or lease between the claimant and those owners. The present owners of the rented premises – the defendant – became the owners in the year 2004. The present defendant is not bound by the terms of the contract or lease made between the claimant and the previous owners of the rented premises. The claimant, if he had paid the deposit of $1,200. to the previous owners, would have to seek a remedy against them for his deposit; but cannot properly request the court to make an order that payment of the deposit, if any, to the previous owners, on a separate contract, is payment to the defendant. On the other hand, if he did not pay the deposit to the previous

owners, that would have entitled them to proceed against the claimant. The defendant would not be entitled to that deposit, because it was the subject of a separate contract with the previous owners.

15. The defendant contends that the claimant over the period of five years had only paid a one month deposit, instead of a required two months deposit, always owing the other deposit, on the ground, as we have seen, that he had paid the other deposit in 2001 when he signed the original lease with the previous owners.

16. The defendants say that they allowed the claimant to continue as a tenant, year after year, though he did not pay the required two deposits, because of goodwill towards him. Was it goodwill that caused the defendant to allow the claimant to continue as a tenant, assuming the deposit was not paid; or was it because of clause 3.1:2 of the lease dated 1st January, 2009 between the claimant and the defendant? Clause 3.1:2 states:

> "The tenant hereby covenants with the landlord as follows:
> 3.1:1 ……
> 3.1.2 Acknowledges that he has paid as a security deposit a sum equal to two months rent."

Perhaps the claimant was allowed to continue as a tenant on the basis of the above clause. This clause was probably inserted in the lease because the claimant had always insisted that he had paid the original deposit.

17. But the lease dated 1st January, 2009 which governs the landlord and tenant relationship between the claimant and the defendant, does not specifically require the claimant to pay a deposit of any amount. There are clauses 3.1:2 above and clause 4.5 which speak of deposit, but I do not think that these clauses could be interpreted as meaning that the claimant agreed or contracted, as a term of his lease, to pay a deposit. But assuming these clauses mean that the claimant contracted or agreed to pay the deposit, the said clause 3.1:2 states that the tenant acknowledges that he paid the deposit, which clause was agreed to by the defendant. Therefore this latter interpretation of the lease would not authorize re-entry on the premises for failure to pay the deposit.

But Mrs. Barrow-Chung submitted in writing, after the conclusion of the evidence, that the above clause 3.1:2 contained a typographical error. This is how the submission is made by learned counsel for the defendant:

> "It is submitted that clause 3.1:2 of the lease agreement contains a typographical error and that the clause should have read: "Acknowledges that he is to pay as a security deposit a sum equal to two months rent."

But there is no evidence before me that clause 3.1:2 contains a typographical error; and therefore there is no legal basis upon which I could so hold.

18. At the time – 10th May, 2009 – when the defendant re-entered and took possession of the rented premises, the claimant was not in arrears of rent. It is true that the claimant admitted that he had not always been paying the rent on time. But the defendant accepted the sometimes late payment of rent and did not re-enter the premises because of that. The re-entry under the above clause of the lease was done because of the alleged non-payment of the deposit.

19. I have no doubt that there was an agreed requirement to pay the deposit; but it was not a requirement specifically stipulated in the lease of 1st January, 2009. It was a requirement stipulated in the original lease of 2001 and which was referred to as security deposit in exhibit E.M. 2. The right of re-entry is given to the defendant in clause 5.3 of the lease dated 1st January, 2009 above. The defendant cannot rely on this clause to justify re-entry for non-payment of the deposit because there is no specific requirement for payment of deposit in the lease of 2009; and even if there was, clause 3.1:2 acknowledges that it was paid. And the defendant cannot rely on exhibit E.M. 2 because that refers to a deposit in relation to the previous agreement with the previous owners of the premises.

20. Moreover, the agreement in exhibit E.M. 2 was not an agreement of tenancy, but an agreement to pay alleged outstanding rent and deposit. Any breach of that agreement by the claimant could not invoke the sanction of re-entry under the lease, because the agreement was separate from the lease and because it dealt with a different subject

matter: the payment of alleged outstanding rent and deposit. There is no evidence that the document was intended to be part of the lease thereby invoking the re-entry provisions.

21. The breach of the agreement exhibit E.M. 2 to pay the outstanding deposit was not a breach of any condition or covenant of the lease of January, 2009. It is accepted that if a clause in a lease can be construed as a condition, and there is a breach of that condition by the tenant, and there is a clause in the lease authorizing the landlord to re-enter the premises on such breach; the landlord is authorized to re-enter the premises and recover possession: see ***Elsie Persuad v. Charles Ogle 1979 27 W.I.R. 160***.

22. In ***Moore v. Ulcoats Mining Co. Ltd. 1908 1 Chd 575, at p587*** the court said:

> "Where the condition is that the landlord must re-enter, he must actually re-enter or he must do that which is in law equivalent to re-entry, namely, commence an action for the purpose of obtaining possession."

23. If the lease of January, 2009 had a condition specifically requiring the claimant to pay a deposit, and there was a breach of that condition, the defendant would have been able to re-enter the premises under the provisions of an appropriate re-entry clause. But this is not the case here; and even if it was the case, there is clause 3.1:2 acknowledging

payment of the deposit. Moreover, exhibit E.M. 2 was not a lease, but a separate agreement to pay outstanding rent; and had no provision for re-entry by the landlord if there was any breach.

24. I therefore find that the defendant unlawfully re-entered the rented premises and unlawfully prevented the claimant from occupying same. I make no finding on damages for breach of contract, as the claimant made no such claim.

**CONCLUSION**

25. Based on my findings above, I make the following orders:

1. A declaration is granted to the claimant that his lease dated 1st January, 2009 is valid and subsisting until the date of termination agreed to in the said lease, namely 31st December, 2009.

2. An injunction is granted to the claimant restraining the defendant, its servants or agents, until the date of termination agreed to in the lease dated 1st January, 2009, from occupying, or residing at the rented premises, namely, store No. 9B situate at Fourth Street Tourism Village, Belize City, or in any way preventing the claimant from quietly enjoying the said store.

3. There is no order as to costs.

Oswell Legall
JUDGE OF THE SUPREME COURT
20th November, 2009