IN THE COURT OF APPEAL OF BELIZE, A.D. 2004

CIVIL APPEAL NO. 4 OF 2004

HILDA ROBATEAU **APPELLANT**

v.

DUDLEY ESTELL **RESPONDENT**

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BEFORE:

The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. Hubert Elrington for the Appellant.
Mr. Dons Waithe for the Respondent.

—

17 June and 15 October 2004.

MORRISON JA

1. At the conclusion of the hearing on 17 June 2004, this appeal was dismissed, with costs to the respondent. These are the Court's reasons for doing so.

2. This is an appeal from a judgment of Barrow J (Ag) given on 2 April 2004, in which he dismissed the appellant's claim in Summary Action No. 3 of 2003, gave judgment for the respondent on his counterclaim in the sum of $2000.00 and awarded costs to the respondent in the amount of $1500.00. The learned judge gave a full written judgment.

The pleadings

3. The appellant's claim in the court below was for damages for breach of the terms and conditions of a lease, entered into between the respondent (the defendant in the Court below) as lessor and the appellant (the plaintiff in the Court below) as lessee, in February of 2002. In what was described as her statement of claim the appellant gave particulars of her claim in which she pleaded that the respondent let his business premises in Ladyville Village, Mile 10, Northern Highway, Belize District ("La India Bonita") to her, for use as a restaurant and bar. The appellant was let into possession, so the particulars ran, when to the respondent's knowledge, the premises were "not fit for its purpose". So therefore, it was alleged, the parties agreed that the appellant would repair and renovate the premises using her money, and that the respondent would repay the money spent by the appellant in the repairs and renovation, by monthly deduction from the rent until the sums advanced on the

repairs were by this method repaid in full. The parties, it was pleaded, did not agree on a "fixed monthly rent", though it was agreed that the appellant would pay a reasonable sum not exceeding $500.00 as a monthly rent which "would become due and payable, as soon as the repairs and renovation were completed, and the plaintiff opened her Restaurant and Bar".

4. The remaining particulars to the statement of claim were as follows:

> "The Plaintiff started to trade in April of 2002. On the 13th June, 2002 Defendant sent Plaintiff an invoice, claiming, the following:
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> | | | |
> |---|---|---|
> | April Rent | - | $1,000.00 |
> | Rent Deposit | - | $1,000.00 |
> | Club Licence | - | $500.00 |
> | April Electricity Bill | - | $284.00 |
> | Water bill | - | $92.00 |
> | May Rent | - | $1,000.00 |
> | May Electricity Bill | - | $390.32 |
>
> Plaintiff refused to pay the rent of $1,000.00 and the rent deposit of $1,000.00, insisting that under the lease she had bounded (sic) herself to pay a reasonable rent, not to exceed $500.00 rent, and $500.00 rent deposit – The Defendant refused the offer.
>
> The Defendant then caused the water and electricity to Plaintiff's premises to be cut off, and began to demand, with threats that Plaintiff leave the premises. Plaintiff applied to the water authority and the electricity authority, to have her supplied reconnected, but Defendant refused to allow water and electricity to be reconnected to the Plaintiff's property, claiming that he was the property owner, and that he had the right to determine whether water and electricity could be supplied to buildings on his property.

As a result of Defendant's, willful (sic) act, Plaintiff was forced to shut her business down and to look for new business premises.

Plaintiff now claim:

Damages for breach of the terms and conditions of her lease

Damages for trespass

Damages for loss of profits.

Reimbursement of the sum of $4,500.00 spent on obtaining new business premises and re-establishing her business in these new business premises.

The sum of $20,000.00 expended by Plaintiff on repairing and renovating, the Defendant's remises (sic), with the knowledge and consent of the Defendant.

Such further or other reliefs or remedies as the Honourable Court deems just."

5. The respondent filed a notice of counterclaim, accompanied by the counterclaim itself, the material parts of which read as follows:

"2. The Defendant let the premises to the Plaintiff as a monthly tenant from the month of April, 2002 under an agreement that the Plaintiff would pay a reasonable rent to be determined by the Defendant.

3. The Defendant determined a reasonable monthly rent would be $1000.00 based on the size (approximately, 2000 sq ft) and location of the premises.

4. The Plaintiff vacated the premises at the end of July 2002 without paying any rent. The rent was then and still is $5,000.00 in arrears.

5. The Plaintiff also removed a number of chattels belonging to the Defendant to the value of $460.50 when she vacated the premises.

6. The Defendant is therefore indebted to the Plaintiff in the amount of $7000.00."

In addition to the sum of $7000.00, the respondent claimed interest and costs.

The evidence

6. Against this pleaded background, the matter was tried by Barrow J (Ag) on March 19, 2004. In addition to her own evidence, the appellant called two witnesses, Messrs. David Graham and Selvin Jones. The respondent, for his part, gave evidence in his own behalf and called a single witness, Mr. James Warrior. The learned judge's summary of the relevant evidence, with respect to which there was no challenge on appeal, and which we gratefully adopt, was as follows:

> "4. The Plaintiff's testimony is that she approached the Defendant in February of 2002 and asked him to rent premises to her situate on the roadside in Ladyville Village, known as 'La India Bonita', which had been laid out and used for the restaurant and bar business. The Defendant testified that he was reluctant to do so and warned her that he had been in the business for forty years and that if she had to pay rent and salaries she could not operate at a profit. She told him, he said, of the custom that her restaurant would attract from employees at particular organizations in the locality and assured him that she would make it. He was convinced and rented the premises to her.
>
> 5. She testified that they did not agree upon a rent. She kept pressing him to set the rent and he failed to do

so until finally, she said, he agreed with her that the rent would not exceed $500.00 monthly.

6. He testified that nothing was discussed about rent, she never asked. In cross-examination the Defendant contradicted his earlier testimony that rent was not discussed and testified that he told her variously that he wanted $1200.00, then $1,000.00 then $800.00 for rent. Then, he said, the Plaintiff came down to $500.00 as the figure that she wanted to pay. On this aspect I find on balance the Plaintiff to be the credible witness. I therefore make a finding that the parties agreed at some point that the monthly rent would not exceed $500.00.

7. There was no evidence whatsoever that the Defendant was ever asked to commit to a tenancy of any particular duration and no evidence that the duration of the Plaintiff's occupation was ever mentioned by either party. I therefore find that the tenancy was from month to month determinable, by law, upon either party giving the other one month's notice to quit.

8. The Plaintiff began doing work on the premises in early March, as to which date there was no dispute. The testimony of the Plaintiff and her two witnesses, who testified specifically to repairs and renovations (I will refer hereafter for neutrality to "works"), is that the place was a mess before the Plaintiff did the works. The Plaintiff tendered as an exhibit an "As-Built Evaluation" dated 18th May, 2002 that was prepared on the letterhead of Mr. Selvin Jones, a builder, who did the works for the Plaintiff and who testified. That document was signed by Mr. David Graham beneath his certification. Mr. Graham stated that he does construction, engineering and architectural designing. He also testified on behalf of the Plaintiff. The document that he signed estimated the cost of the works that the Plaintiff did at $15,805.00.

9. David Graham testified that he visited the premises thrice, before works started, while works were in progress and after the works were completed. He was not cross-examined.

10. Selvin Jones testified that he did the works over a period of about a month. He said the place was totally in disrepair before he did the works. He was cross-examined but I did not find that he was affected by the process. He was strongly contradicted by the Defendant who denied that works of anything near the magnitude and cost stated by Mr. Jones were done. The estimate provided by the Defendant's carpenter was for $3,631.90."

The judge's findings

7. Having heard the evidence, the learned judge was not impressed with the evidence given on the appellant's behalf with respect to the cost of the work done by her on the premises. As he observed, what had been produced "was an estimate of the value of the works. She did not produce a single receipt, cash voucher, cancelled cheque or other primary document showing what she paid for the works" (paragraph 11 of the judgment). On this aspect of the matter, the learned judge concluded as follows:

> *"The best evidence of the value of the works was not brought. There was no evidence whatsoever as to the cost of the works. To be sure, the evidence that the Plaintiff produced was capable of proving her claim. But in a case where the issue was to be closely contested it was the Plaintiff's burden to prove her claim; she needed to go farther than producing evidence that was merely capable of proving."*

8. Mr. Warrior, the respondent's witness, on the other hand, had estimated the value of the work done on the premises at $3,631.90 and, though the learned judge found on this issue that "the plaintiff has failed to prove the quantum that she claimed as the costs of the

works" (paragraph 16), he was prepared to rely on this evidence given on behalf of the respondent as an "admission as establishing the minimum figure for the Plaintiff's claim" (paragraph 15).

9. Having thus rejected the major portion of the appellant's claim, the learned judge went on to find that there was no agreement, as claimed by the appellant, for there to be any deduction from the rent for the cost of the works (paragraphs 19 and 24) and that they did not in fact agree on what was to happen with respect to the sums expended by the appellant on rehabilitating the premises in the event that the tenancy determined earlier than expected. Approaching the matter on the basis of "what the parties agreed, not what they ought to have agreed nor what they would have agreed" (paragraph 23), he found that the parties had not in fact addressed "each other about the impact of that possibility [and] … I do not see any basis on which the court can supply that omission" (paragraph 24).

10. With regard to the appellant's remaining claims for damages for trespass, loss of profits and "reimbursement of the sum of $4500.00 spent on obtaining new business premises and re-establishing her business in these new business premises", the judge observed that she "gave little or no evidence in relation to these matters" (paragraph 25). However, he did accept her contention that it was

the respondent who disrupted the supply of electricity to the premises (and not, as he asserted, that it had been cut off by the electricity supplier for non-payment, a contention which would, as the judge observed, have been provable by production of the outstanding electricity bill). This finding, which the judge based primarily on his observation of the respondent while giving his evidence as "someone who would resort to 'self-help' ", he treated as an unlawful termination of the tenancy, rather than as the trespass claimed by the appellant. Given the nature of the tort of trespass, this was obviously a sensible approach by the judge to the legal consequence of his finding on the facts on this point. In any event, he found that there was no evidence that the appellant suffered any damage from this breach and, in particular, that the claim for loss of profit had not been proved. The claim for reimbursement of relocation costs was similarly rejected.

11. Finally, on the respondent's counterclaim, the judge awarded him $2000.00, being four months rent at the $500.00 per month which he had found to be the agreed rent. The claim for an additional month's rent on the basis that the appellant had held on to the keys to the premises for about a month after moving out, was dismissed by the learned judge on the ground that it had not been pleaded. He dealt similarly with the amount of $460.59 set out in the counterclaim as the value of "a number of chattels belonging to" the

respondent removed by the appellant, holding that it had neither been particularised nor dealt with adequately in the evidence.

12. In the result, the learned judge dismissed the appellant's claim and gave judgment for the respondent on the counterclaim for $2000.00, with costs of $1500.00.

The appeal

13. From this judgment (save for the learned judge's finding that the parties had agreed a monthly rental of $500.00), the appellant appealed, filing in all some eleven grounds of appeal. Of these grounds, Mr. Hubert Elrington, who appeared for the appellant in this court, as he had in the court below, sought and was granted leave to abandon grounds 3(1) (3) (4) (5) (9) and (11) when the matter came on for hearing on 17 June 2004. During the course of the hearing Mr. Elrington had a change of heart with regard to ground 3(11) and was granted leave to reinstate this ground. We deal with the grounds argued in order below.

Ground 3(2)

14. This ground challenged "the finding of the learned trial judge, that in a closely contested case, the Plaintiff was under a legal duty to go further than producing evidence that was merely capable of proving her claim". Mr. Elrington submitted that Barrow J (Ag) was wrong in

law in requiring the appellant "to adduce more evidence in discharge of her burden of proof" and that by so doing "he is in fact requiring her to prove her case on a standard beyond a balance of probabilities and that he cannot do". With the greatest of respect to learned counsel, we do not read Barrow J (Ag)'s remarks as imposing a higher standard than that which he stated expressly that he was obliged to apply, that is, proof on a balance of probabilities. It appears to us that he was merely expressing the wholly unexceptionable view that in a case in which there was a significant divergence between the parties as to the value of the work done on the premises, he would have expected the appellant, who claimed to have spent the substantial sum of $15,805.00 doing this work, to have produced better evidence than the estimate which was in fact put forward at the trial. At the end of the day, bearing in mind the absence of such evidence, where one might have expected to find it in receipts, cash vouchers, cancelled cheques and the like, the learned judge was saying no more, in our judgment, than that he did not find the value of the works established by the evidence on a balance of probabilities. This ground of appeal therefore failed.

Ground 3(6)

15. By this ground, the appellant challenged the learned trial judge's finding "that absent an express agreement as to what was to occur

in the event that the lease was terminated early by the Landlord, there was an omission, for which no basis existed in law, to made (sic) that omission good". Mr. Elrington contended in support of this ground that even if there was no agreement between the parties on this issue, as the judge expressly found to be the case, the "well established" principle of quantum meruit could have assisted the appellant. On this point we were referred by counsel to the case of **Craven-Ellis v Canons, Ltd [1936] 2 All ER 1066**. A cursory reading of this case demonstrates that it does not support counsel's contention. As Greer LJ observed (at page 1073), the obligation to pay a reasonable sum on a quantum meruit "is one which is imposed by law in all cases where the acts are purported to be done on the faith of an agreement which is supposed to be but is not a binding contract between the parties". In the instant case, Barrow J (Ag) found as a fact that there was no agreement between the parties, with the result in our judgment that this ground of appeal could not succeed.

Ground 3(7)

16. This ground sought to challenge the learned trial judge's characterization of the respondent having caused the disruption of the appellant's electricity supply as a wrongful termination of the tenancy, rather than as a trespass. Given that trespass is a wrong

involving the entering into possession of land, we were again of the view that the learned judge was plainly correct in his approach on this aspect of the matter and that the ground accordingly failed.

Ground 3(8)

17. This ground challenged the learned judge's finding that the appellant did not prove any actual loss of profit, "when it was clear that the Defendant's act deprived Plaintiff of all opportunity to make the reasonable profit on her investment". There was absolutely no evidential basis at the trial for this claim, which was therefore bound to fail, as it did. This ground of appeal accordingly failed as well.

Ground 3(10)

18. This ground challenged the learned trial judge's finding that "Defendant was despite his intentional disruption of Plaintiff's electricity and water re entry into possession (sic) was entitled to rent after the period that the Plaintiff had been in actual occupation of the premises". The ground arises because of the appellant's evidence that she vacated the premises somewhere around July 20 or 21, 2002 having been in occupation from early April. The learned judge awarded four months' rent to the respondent on the counterclaim, thus giving rise to the complaint that he was allowed rent for a period (that is, some ten days or so) when the appellant

was not actually in possession of the premises. This is the only ground on which we found it necessary to invite Mr. Dons Waithe, who appeared for the respondent, to respond and he submitted that the evidence as to the date on which the appellant went into possession of the premises was not sufficiently precise to warrant interference with the judgment on the counterclaim. In her evidence in chief, for instance, she spoke of having gone into possession, done "extensive renovation", which was completed on 6 April 2002, and of the business having opened on the 8th. It therefore appeared, Mr. Waithe submitted, that she may well have been in possession sometime before the beginning of April, in which event the judge's award of four months' rental was in all likelihood in keeping with the facts. With this submission we agreed and we did not find anything in all the circumstances of the case to justify disturbing the judge's award in this regard.

Ground 3(11)

19. Mr. Elrington, having originally abandoned this ground, was permitted in the end to argue that this court should disturb the judge's ruling that the appellant should pay the respondent costs in the sum of $1500.00. This was purely a matter for the discretion of the learned judge and, it not even having been asserted that he

proceeded on any wrong principle, there was no basis for this Court to interfere.

Conclusion

20. The trial of this matter turned almost entirely on issues of fact. The learned trial judge had the benefit of hearing the witnesses and assessing their evidence and we found no basis to disturb his findings. It is for these reasons that we dismissed the appeal, with costs to the respondent.

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SOSA JA

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CAREY JA

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MORRISON JA