

IN THE SUPREME COURT OF BELIZE A.D. 2007**Claim No. 473 of 2007****Between****Kimberly Dali
Maureen Dambach** **Claimants****and****Exotic Caye Beach Resort Limited** **Defendant****Coram: Hon Justice Sir John Muria****28 December 2007***Mr. D. Bradley for the Claimants**Mr. R. Williams S.C. for the Defendant***JUDGMENT**

Muria J: By their application dated 18 October 2007 and filed on the same date the applicants seek the following orders:

- 1. That the Respondent be ordered to release and hand over forthwith to the First and Second Applicants certain items of property belonging to the Second Applicant, those items of property being and including equipment, machines, appliances, and furniture which are being unlawfully retained by the Respondent;*

2. In the alternative, that the Respondent be restrained until further order of the Court or until final determination of this matter either by themselves or their agents and or servants from touching, using, moving, removing, selling, transferring, or otherwise disposing of, destroying, or otherwise dealing in any way whatsoever with the items of property referred to in the above paragraph.

In addition, they also seek cost and any other orders the Court deems just to grant. In support of their application, the applicants rely on the affidavit of the first applicant sworn to on 18 October 2007 and filed also on the same date.

The application came before the Court as an urgent matter to restrain the defendant from dealing with the items belonging to the claimants seized by the defendant. Although the Claimants' claim was not filed until 25 October 2007, the Rules allow for such a course of action to be taken.

With the undertaking given by the defendant through its Counsel, that it will not dispose of or otherwise deal with the seized defendants' items, the matter became no longer very urgent, although it needs to be attended to as soon as possible. The application was subsequently heard on 29 November 2007 with the defendant's undertaking continuing until the determination of this application.

The Claimants' Claim

Let me just briefly set out the nature of the Claimants' claim in this matter. By their claim form filed on 25 October 2007, the claimants seek damages for breach of contract and/or mense profits; damages under section 15(2) Landlord and Tenant Act; damages for trespass to property; damages for damage done to property; declaration for the unlawfulness of the seizure and retention of defendants' items together with damages for wrongful detention; aggravated damages exemplary damages; interest and costs. The breach of contract and subsequent claims for damages are said to arise out of the Lease Agreement dated 17 December 2006 entered into by the parties in this case.

Whether injunction should be granted.

The case for the applicants/claimants in this application is that some of the items seized belong to the second claimant and they should be released to her, or alternatively, the respondent should be restrained from disposing or otherwise dealing with the said items until trial of the matter. The items referred to are equipment, machines, appliances and furniture which are said to belong to the second claimant.

Under the Lease Agreement referred to, the First Claimant rented the upper floor of the defendant's premises at San Pedro, Ambergris Caye, Belize for the purpose of operating and running a restaurant/bar business, for five years, commencing on January 1, 2007 at a rental of

\$1,500.00USD per month. The First Claimant defaulted in payment of rents for the months of August and September 2007. The Claimants do not dispute the default.

It is in consequence of the First Claimant's default, that the defendant seized the items concerned in mid September. This the defendant did by locking up the leased premises with items therein, changed the locks and thereby preventing the First Claimant from accessing the leased premises. The defendant's claim to the right over the seized items is made under clause 14 of the Lease Agreement which states:

“(14) upon any default of any term or condition of this lease agreement, the landlord shall have the right to undertake any and all remedies as permitted by law, including but not limited to immediate seizure of the premises and the sale and liquidation of any equipment necessary to fulfill the tenant's obligations under this lease agreement.”

The defendant relied on this clause as entitling it to seize the items belonging to the First Claimant upon any breach of the terms of the Lease Agreement.

The principles governing the exercise of the Court's discretion to grant or refuse an injunction are well settled. See *American Cyanamid Co -v- Ethicon Ltd* [1975] A.C. 396, which has been followed in Belize, for example in *Edwards -v- Walfer and Zuniga* (2000) 3 Bz. L.R. 514; *Ramon Cervantes -v- Caye Caulker Water Taxi Association* (2004) 4

Bz.L.R. 51, and many other cases in this jurisdiction, although not universal in application as pointed out in *Cambridge Nutrition Ltd –v- BBC* [1990] 3 All ER 523. The only universal principle applicable in cases of applications for injunctive relief is that the Court’s discretionary power to grant injunction when it is just and convenient to do so: *Cambridge Nutrition Ltd –v- BBC* (above) per Kerr L J at 534j. In any case, there must be a serious issue to be tried before the Court before an interim injunction can be granted; thereby allowing the case to proceed to the next stage. See David Bean, *Injunctions*, eighth Edition, Thomson Sweet & Maxwell, p. 29 para. 3.12.

Is there a serious issue to be tried here? On the facts, there are in my view serious issues between the parties in this case to be tried over the seized items. There is the issue as to the right of the defendant, which the claimants deny, to seize the items concerned. There is a further issue as to the Second Claimant’s claim of ownerships over the seized items. These issues will have to be determined at the trial.

In addition there are other issues raised, concerning the relationship between the claimants and the defendant under the Lease Agreement, more particularly, whether the First Claimant had surrendered the lease or whether the defendant terminated the lease. Those questions and others, will have to be determined at the trial.

The present application concerns the status and rights over the items seized. That, as I have said, raised serious issues to be determined, thereby necessitating an interim order to be granted.

The alternative order is to order the return of the seized items to claimants. I do not think it would be proper to make such an order in this case for three reasons namely, first, there are issues in dispute between the parties over the items; second, as submitted by Mr. Williams S.C., it is not clear which items belong to the second claimant personally and which items fall part of the assets of the restaurant business of the first claimant, and third, there is the need to preserve the items.

I bear in mind a salient factor in an application for interim injunction, namely the requirement for an undertaking as to damages. Learned Senior Counsel, Mr. Williams, raised the argument that there is an overriding concern in an application for interim injunction that the claimants must show to the Court that they can satisfy an undertaking as to costs.

The usual undertaking in an application for interim injunction is an undertaking as to damages, rather than as to costs. It is a rule of practice that the applicant in an application for interim injunction gives an undertaking in damages if he is successful in his application. However, it remains a matter for the discretion of the Court in all cases of this nature.

In the present case, the applicants give that undertaking as to damages. Despite the suggestion by Counsel for the defendant that the claimants are impecunious to satisfy such an undertaking, I exercise the Court's discretion to accept the fact that the applicants have given an undertaking as the practice requires. The concern that the undertaking might or might

not be satisfied should not deter the Court, in an appropriate case, from granting an interim injunction order upon an undertaking given by the applicant.

Even if I were in doubt that the undertaking might or might not be satisfied, I am content to exercise the court's discretion and take the course which is likely to involve the least risk of injustice to the parties as pointed out by Chadwick J in *Nottingham Building Society v Eurodynamics Systems plc and Others* [1993] Ch D 475. That I can do in this case by granting an interim injunction.

Conclusion and Order

In the circumstances of this case, and for the reasons stated above, the proper course to take would be, not to order the release of the items concerned as prayed in paragraph (1) of the order sought, and instead to order that an interim injunction be granted as sought by the claimants in paragraph 2 and I so order.

Costs of this application be costs in the cause.

Order: 1. *The order sought in paragraph (1) of the application for release of the items to the claimants is refused.*

2. *Grant the alternative order sought for interim injunction as prayed in paragraph 2 of the said application.*
3. *Costs of the application be costs in the cause.*

Sir Justice John Muria

