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

CLAIM NO. 91 OF 2007

	(ISLAND MARKETERS LTD.	**CLAIMANT**
	(d.b.a. BELIZE YACHT CLUB	
	(	
BETWEEN	**(AND**	
	(	
	(PROTECH BELIZE LTD.	**DEFENDANT**

Before: Hon Justice Sir John Muria

9 October 2009

Mr. M. Chebat for the Claimant
Mr. O. Twist for the Defendant

J U D G M E N T

CONTRACT – claim for breach of contract – use of premises for dive business – rental and commission arrangements – whether arrears of rent owing – counter-claim for commission and other breaches of contract – whether commission owing – whether counter-claim for breaches of contract made out

MURIA J.: By its claim form dated 22nd February 2007 the claimant claims against the defendant the following relief:

1. Possession of the "Dive Center" building located at the premises of the claimant

2. Removal of Defendant's shipping container from the claimant's land
3. The sum of $19,678.80 being money due and owing from the defendant to the claimant for arrears of rent.

In addition the claimant also seeks costs, interests and other relief that the court deems fit to grant.

The defendant denies the claimant's claim and sets up a counter-claim for $107,135.17 being for commission due from the claimant for the period 8th May 2004 to 1st August 2006, and damages for various breaches of contract. Apart from the alleged failure to pay commissions, these other alleged breaches of contract include failure to refer clients to the defendant, failure to maintain the Dive Centre, failure to promote Protech, committing trespass on the defendant's properties, and causing harm to Protech and its customers.

Brief Background

The brief background circumstances to the case are that on 8th September 2002 the claimant and defendant entered into an agreement whereby the claimant rented its Dive Centre building ("the Dive Centre") at the Belize

Yacht Club premises to the defendant at the rent of $500.00 per month. The rent was reviewable every 24 months.

Business between the parties went on well until the issue of rent increase arose. In April 2004, the claimant proposed an increase in the rental from $500.00 to $3,000.00 per month. There was no objection, as such, to the proposed increase, except that in May 2004, the defendant wrote to the claimant stating that he was "*quite prepared to be flexible*" and proposed that it would pay $2,000.00 per month for May to August 2004, and thereafter starting in September 2004, the sum of $3,000.00 per month. Difficulties arose as to the further payments of the rent and so by a letter dated March 9, 2006 the claimant gave two weeks' notice to the defendant to vacate the claimant's dive centre building.

Issues

As set out in the skeleton arguments of Counsel for both parties, there are three main issues for the court to determine. These are:

1. Whether the defendant owes the claimant the sum of $19, 678.80 as arrears in rent.

2. Whether the claimant breached the Concession Agreement thereby entitling the defendant to damages.
3. Whether the defendant is entitled to arrears of commission in the sum of $107, 135.17.

Evidence was given by and on behalf of both parties both orally and in their witness statements.

Terms of the Agreement

As with any case of this nature where the dispute arises out of a written agreement between the parties, the starting point is the terms of that agreement. In this case, that agreement is the ***Concession Agreement*** entered into by the parties on 8th September 2002.

Relevant to the issues before the court, are the following provisions which deal with rental, and termination of the agreement.

> "CONCESION FEE (RENT):
> The monthly rental is BZ$500, payable in advance. In consideration of the clauses and covenants in this contract, Protech agrees to deposit with the Yacht Club on the date of signing of this contract the equivalent of three months monthly rental, to be held as rent payments

for the first chargeable month, for the last month, and for a security deposit. The security deposit will be refunded by the Yacht Club or its successor in title at any agreed termination.

In subsequent months, on the same date of the month as the contract and for the duration of the contract, Protech will pay the monthly rental for the month then commencing. Except that the first month from the date of signing of this agreement shall be rent free; any outstanding decoration by the Yacht Club and initial modification and setting up by Protech shall take place during this time. So the first payment of rent subsequent to the initial payment above shall be two months later.

In the event of evacuation of the Dive Center due to an impending storm, or closure due to damage sustained in a storm, no rent shall be payable until the Center is again occupied."

And with the termination of the agreement, it is provided as follows:

"NOTICE, BREACH AND TERMINATION

In the event of the Center becoming permanently unusable due to storm damage this contract may by mutual agreement be considered terminated from that date.

In the event of minor breach of this contract, the aggrieved party shall have the options of specific performance, or compensation for the actual loss incurred.

Material breach shall at the option of the aggrieved party constitute grounds for immediate termination of the contract. Such material grounds shall include, not exclusively, persistent failure to render agreed statements or payments to agreed standards, persistent failure to provide services to agreed standards, persistent failure to maintain building and structures to acceptable standards, and deliberate illegal actions directly affecting the other party.

In the absence of material reach, either party may terminate the contract by giving the other party twenty four complete calendar months notice in writing, or such shorter term as may be agreed. Three months notice shall be given of the need to move or remove the container.

Review of rent and commission levels shall take place twenty four months after the date of this agreement and each twenty four months thereafter, unless this is varied by mutual agreement. Changes shall be reasonable in the light of general inflation and business conditions, and failure to agree will constitute termination of the contract three months after the date of such failure.

This contract applies to the present owners of Protech and the Yacht Club and their successors in title, and does not cease with the

proposed change in ownership of the Yacht Club. This must be a condition of such a sale."

The contention by the claimant is that the defendant failed to pay the rent due under the new agreement since March 2006. This 'new agreement' was the one suggesting $3,000.00 rental per month starting September 2004. That is the breach that the claimant is primarily relying upon.

On the other hand the defendant counter-claims for various breaches of the said agreement by the claimant, including non-payment of commission in the sum of $107, 135.17, referring clients to other persons other than the defendant, failing to maintain the Dive Centre, publishing derogatory and damaging remarks about defendant and trespassing onto the defendant's property.

Whether the defendant owes the claimant $19, 678.80 as arrears in rent.

In so far as the first issue is concerned, the evidence presents little problem. The case for the defendant, as far as the court is concerned, is an admission that it owes the claimant the sum of $19, 678.80. In fact, the sum owing is $38, 844.52. In his submission, Counsel for the defendant confirmed this when he stated in his written submission:

> "From the evidence of the defendant which is uncontroverted by otherwise professional evidence, Protech owed Island Marketers $38, 844.52 and not $19, 833.80, however Island Marketers owed Protech $107, 135.17 and when this figure is set off Island Marketers would owe Protech $68, 290.65."

Aside from the counter-claim, the defendant clearly admits owing the claimant the amount of $19, 678.80 stated in the claim. That amount owing is based on the increased rental of $3,000.00 per month as of September 2004.

The evidence shows that payments of $3,000.00 per month were made by the defendant to the claimant for the months of September and October 2004, and February, March, April and May 2005. Thus despite the suggestion by the defendant now that it did not agree to the increase of $3000.00 rental per month, it must be taken to have accepted, not only the increase, but the amount of $3000.00 per month which it did in fact paid for the six months mentioned above. That is acceptance by conduct. See ***CHITTY ON CONTRACTS General Principles*** Thirtieth Edition Vol. 1 paragraph 2-030, page 160.

The evidence of Peter Jones in paragraphs 18 and 19 of his witness statement confirms that the defendant owes the claimant rent arrears. He stated:

> "18. I employed Accountant Owen Codd to do an accounting of the business relationship record between the Claimant and the Defendant and the records revealed that the Defendant owed the Claimant $38,844.52 arrears of rent and the Claimant owed the Defendant commission to the tune of $107,135.17 (refer report dated 4.12.04 marked P.J. XVIII AND XIX for identification).
>
> 19. The record reveal (*sic*) that the Claimant failed to pay the Defendant commission of $107,135.17 and the Defendant failed to pay the Claimant a sum of $38,844.52 as rent."

Mr. Codd also confirmed that the defendant owed the claimant rent arrears. In paragraphs 3 of his witness statement, he states:

> "3. O.C. 1 shows that the Defendant owed the claimant a balance of $38, 844.52 as of 4.1.2007 and O.C.11 Shows that the claimant owed the defendant a total of $107, 135.18 as of 8.1.06."

In his Defence the defendant also admits owing "some arrears of rent for the claimant" but counter-claims for a set-off against the sum of $107, 135.17

which the defendant alleges the claimant has owed to the defendant (see paragraph 6 of the Defence).

When one puts all those scenarios together, it is plain that the defendant owes the claimant $19, 678.80 on rent arrears. I find that the defendant owes the claimant the sum of $19,678.80 for rent arrears.

Whether the claimant owes the defendant $107,135.17 in arrears of commission.

The bold assertion by the defendant is that the claimant failed to pay commissions to it as agreed under the Concession Agreement. The evidence supporting its counter-claim comes from Peter Jones and Owen Codd. The claimant denies owing the defendant arrears in commissions in the sum of $107, 135.17.

Unlike with the claimant's claim, no admission is made by the claimant in respect of owing the defendant the sum of $107, 135.17 or any part of it as arrears of commission. That being the position of the claimant, the defendant must establish its counter-claim on the evidence to the satisfaction of the Court.

I have heard and read Peter Jones' evidence, and I must say that it consists more of assertions rather than facts. As such it does not take the matter very far for the defendant on this aspect of its counter-claim. The closest his evidence goes, in respect of commission, is the fact, that in March, 2006, the defendant instructed its then attorney-at-law, Aldo Salazar, to claim the sum of $5,637.44 against the claimant for commission owing to the defendant.

While Mr. Owen Codd purports to assist the defendant's counter-claim for $107, 135.17 as commission owing to it by the claimant, his evidence offers little proof to support it. His oral evidence in Court, in fact, shows that he did not know whether or not there was any set-off arrangement between the claimant and defendant, nor had he done any reconciliation with the claimant's records to show if any amount was paid, or taken out or set-off. His evidence further shows that he had not requested the claimant to sit with him to reconcile the accounts of the transaction between the claimant and defendant.

The defendant's position is clearly revealed in the following exchanges during the cross-examination of Mr. Codd:

"Q. You were not managing the day to day account of Protech?

A. No.

Q. You simply generate the document supplied to you?

A. Yes.

Q. You were not responsible for writing rental cheques?

A. No I was not. I never wrote one.

Q. You had nothing to do with money passing between BYC and Protech on a daily basis?

A. No. No payment by Protech to BYC from 2002 – 2007."

And again his answers to further questions put to him, he said:

"Q. Any rent paid?

A. No.

Q. When did you start consultation with Protech?

A. October 2004.

Q. Your reports go back to 2002?

A. Yes. I personally reconstructed the account.

Q. In period of 7 years only 3 payments made?

A. Yes, by cash.

Q. Never prepared reconciliation report between BYC and Protech?

A. Never."

The evidence of Xuam Perez effectively counters the suggestion by Mr. Codd or Peter Jones in their evidence that commission is still owing to the defendant by the claimant.

Unlike Xunan Perez who gave evidence for the claimant, and who testified that she met with Peter Jones (the defendant's director) monthly to reconcile the accounts. She then tendered in Court the reconciled account showing deductions for rent from commissions owed to the defendant and the balances owed to the defendant. That reconciled account is marked Tab 9 of the trial Bundle.

There is some reflection in Xunan Perez's evidence (Tab 9 reconciled transaction document) that in March 2006 the amount of $5,172.32 was owing to the defendant from the claimant. However, pursuant to the agreed arrangement between the parties that amount was applied to the overdue rental, as confirmed in the evidence of Xunan Perez's witness statement at paragraph 5:

> "Since Protech was 4 months in arrears with the rental, Mr. Jones and I agreed that income derived from the use of the divers would be applied to the overdue rental invoices. This turned the situation

around temporarily. But by the end f January 2006, the rental sums due tool the account in arrears again. The next three months worked out under the arrangement we made."

With that arrangement in place, by November 2006, the only amount owing, shown by the evidence, was the total rental owing to the claimant in sum of $19,678.80. The evidence does not reflect any commission owing to the defendant then. There is certainly none to the satisfaction of the court.

Consequently, the defendant's counter-claim for commission owing to it in the sum of $107,135.17 has not been made out and must be dismissed.

The defendant's other counter-claim is for damages for breaches of contract for failing to refer clients to the defendant, failing to promote the defendant and causing harm to the defendant and its customers. Unfortunately for the defendant, apart from the assertions contained in Mr. Jones's witness statement, there is nothing before the court to substantiate those assertions. The statements alleging the breaches are not evidence. They are mere assertions.

Counsel for the defendant cited the cases ***Valentine -v- Rampersad (1970) 17 WIR 12; Ram -v- Ram Kisson (1968-69) 13 WIR 332; and Kenny -v- Preen (1963) 1 QB 499***. There was no such harassment and ruthless disregard of the tenant's right by the landlord in the present case, as was the case in ***Valentine -v- Rampersa***d nor were circumstances in ***Ram -v- Ram Kisson and Kenny –v- Preen*** in any way similar to the case at bar. Those cases deal with totally different situations that what we have in the present case.

The counter-claim in respect of the alleged failure to refer clients to the defendant, failure to promote the defendant, and for harming the defendant and its customers are not supported by evidence and so must fail.

The defendant, further counter-claims for damages for breach of contract for failing to maintain the Dive Centre. Mr. Jones's evidence is that the exterior of the Dive Centre has never been adequately painted and that the building has patches of paint missing all over the exterior of the building. The claimant denies the defendant's counter-claim.

The ***Concession Agreement*** provides for the parties' obligations, one of which is for the claimant to maintain the dive centre. It states:

> "The Yacht Club will decorate and restore the dive centre building and its surrounding prior to commencement of this agreement, and will thereafter maintain the structure and exterior in good condition and decorative order. It will similarly maintain the dock to ad surrounding the existing building."

While the evidence from Mr. Jones appears to be the only statement on the condition of the exterior of the Dive Centre, it is in my view insufficient to found a breach of contract as alleged by the defendant in this case. The defendant would have to do more than merely stating that the exterior of the building has never been adequately painted or that the building has patches of paint missing all over it. As the claimant denies the counter-claim, the defendant bears the onus of establishing by evidence the actual condition of the Dive Centre as complained of. The case of ***Griffin v Pillet*** [1925] 1 K.B. 17 relied upon by the defendant shows that the complainant must do more than mere informing the owner of the premises of the defects. There must be actual knowledge of the defects and refusal or failure to remedy the defects despite such knowledge of the defects. In ***Griffin v Pillet***, the defect

in the repair work caused the steps of the house to collapse injuring the plaintiff and for which he was entitled to damages. Nothing of the sort exists in the present case.

Mr. Twist also referred the Court to the case of ***Barett -v- Lounova (1982) Ltd*** [1989] 1 All ER 351. I have the case and apart from the fact that it is based on its different set of factual circumstances, it does not support the defendant's case in its counter-claim in this case.

Put at its highest, all that transpired in the note from Peter Jones to Sergio Torres on 29 April 2004 was that "*the exterior could now do with a repaint*" which could not be said to be much of a notice of a defect given to the claimant.

The bare denial by the claimant may not be an adequate answer to the defendant's claim here, but that weakness in the claimant's answer is no discharge of the onus on the defendant to establish by evidence its counter-claim. If there is sufficient evidence before the court to establish its counter-claim, then, of course, a bare denial by the claimant would have title effect on the defendant's counter-claim.

In the present case, I am not satisfied on the evidence before the Court that the defendant's counter-claim for breach of contract for failing to maintain the Dive Centre has been made out. The counter-claim is therefore also refused.

I deal briefly with the further claim by the defendant in its counter-claim, namely, its claim for damages for trespass. The defendant's contention is that the claimant's agents trespassed on to the defendant's property and locked up its containers, and disrupted its supply of water and electricity. These alleged actions by the claimant's agents were said to constitute a breach of the implied covenant for quiet enjoyment of the property.

The claimant's witness, Mr. Sergio Torres, while admitting in cross-examination that he sent somebody to put a lock on the defendant's container, stated in his oral evidence in Court re-examination that it was done after the termination of agreement, and notice given to the defendant for removal of his containers. Mr. Torres further stated in his sworn oral testimony that it was after more than three (3) months after the notice for the removal and nothing had been done, that the claimant placed a lock on the

container and compressor. Again it was months later that the defendant removed its containers. Mr. Torres's evidence-in-chief also revealed that it was after the claimant's attorney wrote to the defendant that the defendant removed its containers.

There is also evidence-in-chief form Mr. Torres that by mid 2006 the defendant had already moved out of the claimant's premises (Dive Centre) and began operating its dive business services from another location, although its containers were still on the claimant's premises. The defendant's letters of 19th May, 2006 and 11th August 2006, to the claimant have the appearance that they were written by the defendant from a location other than from the dive centre within the claimant's premises, which confirms the claimant's suggestion that the defendant had by mid 2006 operated from a difference location.

The complaint by the defendant of the claimant's actions in discontinuing the supply of electricity, water and the use of restroom, on the evidence, occurred in or about May 2006 after the defendant had moved out of the claimant's dive centre premises. The obligation to continue supplying those

utility services to the defendant by the claimant, in my view, no longer existed at that time.

Then there was the complaint that the claimant obtained the assistance of the Police to in order to commit a trespass onto the defendant's properties at the dive centre. The evidence does not support that allegation. The evidence of Mr. Jones is that in June 2006, he went back to the dive centre but the police told him not to enter the premises which had already vacated. The police were acting on instructions from the claimant's attorneys. The facts reveal that long after the defendant left the claimant's dive centre premises, its containers containing diving equipment were left to remain at claimant's premises, despite request to have them removed, while the parties went about pursuing the issue of the legality of the termination of the agreement.

Considering the whole circumstances of the case and in particular the exchanges of the correspondence between the parties, it seems to the court that the case for the defendant as contained in its defence and counter-claim has far less veracity than it is argued for. Thus the inevitable conclusion can only be that the defendant's defence and counter-claim must fail, and I so hold.

Conclusion

In the light of the findings and conclusions reached by the Court on the evidence in this case, there must be judgment for the claimant. The defendant's counter-claim is dismissed.

Order:

1. Judgment for the claimant in terms of the relief sought.
2. Defendant's counter-claim is dismissed.
3. Costs to the claimant to be taxed if not agreed.

(Sir John Muria)
Justice of Supreme Court