

In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2018: No. 013

BETWEEN:

DALE LEE

Appellant

-and-

BRENDA AUGUSTUS SPENCER

Respondent

Before:

Hon. Assistant Justice Pettingill

Appearances:

**Mrs Simone Smith-Bean, Smith Bean & Co., for the
Appellant**

**Mr. Christopher Swan, Christopher E. Swan & Co., for
the Respondent**

Date of Hearing:

15 July 2019

Date of Judgment:

22 July 2019

RULING

1. The Appellant appeals from a decision of the Magistrates' Court handed down on March 16 2018, where he was ordered to give up possession of the Respondent's property which he was leasing for commercial purposes as a "roadside kitchen".
2. The Respondent had served notice on the 21 February 2018 in writing to terminate the tenancy relying on the reason that the "breach or event" warranting

the termination was that the “*Landlord desired the premises*”. It is apparent that at the hearing before the Learned Magistrate that the application under the Landlord and Tenant Act 1974 for possession related to a dispute over “rent” even though proceedings had not yet been issued but allegedly on Counsel’s submission amounted to a claim for over \$16,000. I note here that this was not a matter put in evidence but the Respondent, appearing unrepresented, did in fact admit to withholding rent “*in order to bring the parties to the table*” and to force a “*negotiation*”. The Learned Magistrate understandably, perhaps viewed this as an unacceptable reason to withhold rent and ordered possession as of April 30, 2018. The Appellant then filed an appeal in the Supreme Court and sought an order for a stay of execution of the Magistrates Order which was granted on May 22 2018.

3. The Appellant through his counsel, Ms. Smith-Bean argued on two limbs:
 - (i) That the Appellant did not have the opportunity to be fully heard and that there was a “commercial lease” in place that the Magistrate should have had the opportunity to review and consequently, the evidence before her was not sufficient to warrant possession; and
 - (ii) That the notice period given by the Landlord was insufficient in that there was a lease in place in accordance with s.11(a) of the Landlord & Tenant Act 1974 which amounted to a year to year tenancy and consequently required six (6) months’ notice.
4. With regard to the first limb of the argument, it is unfortunate that the evidence of an existing lease was not laid before the Magistrate at the time or even, on the face of the record, argued by the Appellant. This is likely as a result of him being unrepresented and as a layman not appreciating the nuances and technicalities of the law. I find that in the face of the evidence before the Learned Magistrate she would have been quite right to make a possession order for failure to pay rent as this is a covenant enshrined in s.6 of The Act and it is a fundamental and trite

principle of law that rent must be paid even if the tenant has valid legal issues to receive compensation by way of damages for any breach by the Landlord.

5. The difficulty that arises in this matter as I see it relates more to the second limb of the Appellant's argument dealing with sufficient notice and the lease. Mr. Swan for the Respondents, urged the Court that the Appeal had to be conducted on the basis of the Appeal Record and the findings of the Magistrate and that the Court should not give consideration to other matters, such as the clauses of the lease. Mr. Swan took the position, eloquently argued, that the matter was straightforward and there had been an admission of the withholding of rent which warranted an Order for possession on the basis of fundamental breach of covenant, whether implied or contractual.
6. The Court is of the view that the matters contained in the Record of Appeal, in addition to the Notice of Appeal Record, cannot logically or equitably be ignored. The fact of the matter is that the original notice to terminate the tenancy never mentioned the issue of rent. I take the view that given the fact that payment of rent is such a fundamental principle that a notice of termination should surely indicate that this is a breach on which the Landlord relies and it was not sufficient to umbrella this significant allegation with the phrase "*Landlord desires premises*".
7. Despite the issue being raised at the hearing and the admission of the Appellant, I find that the alleged breach of the tenancy in the written notice was not particularly sufficient to constitute valid notice to the Tenant of his illegal breach.
8. The Lease in question was attached to the Affidavit of the Appellant, Dale Lee, in support of the ex- parte summons for a stay of the Order of the Magistrate and I have accordingly taken the opportunity to review it as it was raised by both counsel during the Appeal. Ms. Smith Bean submitted that the lease was a year to year lease in accordance with s.11(1)(a) of The Act requiring six (6) months' notice. Mr. Swan argued that the payments were intended to be made monthly

- and consequently the lease fell into the category of s.11(1)(c) and could be terminated with one (1) months' notice.
9. Page 3 of the Lease indicates that it was the "intention" of the parties on the basis of the "*rental structure*" that the lease would "*be considered a five year lease agreement with an option to review within six (6) months....*" Consequently the Court is of the view that the lease did in fact fall into the s.11(1)(a) category of the Act, requiring six (6) months' notice as opposed to one (1) month.
 10. In the circumstances I allow the Appeal and find that the Learned Magistrate did not have the opportunity to consider matters that should properly have been before her particularly the terms of the lease, the notice period and the particular reasons for termination of the tenancy.
 11. It is apparent that the Appellant has remained in occupation but unclear as to whether rent has been properly paid in accordance with the provisions of the Lease. The Respondent will consequently need to re-address any alleged breach in the Magistrates Court with proper notice.
 12. Costs of the Appeal to be agreed or taxed accordingly.

Dated 22 July 2019

MARK PETTINGILL
ASSISTANT JUSTICE