COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2021/CLE/gen/FP/00039

BETWEEN:

DR. CHARLENE REID
(d.b.a EASY DENTAL CARE)

Plaintiff

AND

TEACHERS AND SALARIED WORKERS COOPERATIVE CREDIT UNION LIMITED

Defendant

RULING

Before: The Hon. Mr. Justice Loren Klein
Appearances: Mr. Samuel L. Rahming for the Plaintiff
Mrs. Carla Scott-Clare for the Defendant

Hearing Dates: 16, 30 April 2021

Civil practice and procedure—Claim for interlocutory injunction pending trial—Termination of Tenancy Agreement—Defendant serving notice of eviction—Allegation of arrears of rent—Claim by Plaintiff in Writ of Summons for accounting of rent payments and alleging Landlord's breaches of covenants—Holding over tenancy—American Cyanamid principles—Balance of Convenience (Justice)—Damage to goodwill of business—Conveyancing and Law of Property Act, s. 16—Right of re-entry or forfeiture under any proviso or stipulation in a lease.

INTRODUCTION AND BACKGROUND

[1] The purpose of this short judgment is to set out the reasons for my decision granting an interlocutory injunction restraining the defendant from evicting the plaintiff from premises which she has leased since 2013, pending hearing of the plaintiff's writ seeking various reliefs against the defendant. I announced that decision to the parties on 8 June 2021 and promised to provide reasons in writing.

[2] The premises are Units No. 13 and 14 of a commercial complex owned and operated by the defendant, the Teachers and Salaried Workers Cooperative Credit Union Limited, known as the Teacher's Credit Union Plaza, in Freeport, Grand Bahama. They have been used by the plaintiff, Dr. Charlene Reid, as a dental office, which operates under the business name of Easy Dental Care. In this judgment I shall occasionally refer to the plaintiff as "the tenant" and the defendant as "the landlord".

Procedural Background

[3] The plaintiff applied by *ex parte* summons filed 24 March 2021 seeking the following relief:

> *"An order pursuant to Section 21 of the Supreme Court Act 1996, Order 29 of the Rules of the Supreme Court or otherwise pursuant to the inherent jurisdiction of the Court*

> *restraining the Teachers and Salaried Workers Co-operative Union Limited, the Defendant herein, whether by itself its agents servants and employees or any of them from evicting Dr. Charlene Reid (d.b.a. Easy Dental Care) from the premises known as Units 13 & 14 Teacher's Credit Union Plaza, situate at West Atlantic Drive, Freeport Grand Bahama, on (sic) or in any way interfering with or disrupting the Plaintiff's use enjoyment and occupation of the said premises pending the final determination of the Plaintiff's Writ of Summons by the Court."*

[4] The application was supported by an affidavit of the plaintiff filed 24 March 2021, as well as a certificate of urgency.

[5] The plaintiff also filed a Writ of Summons that same day alleging various breaches of covenant by the landlord and claiming, *inter alia*, a proper accounting of the rental payments for the period, an injunction restraining the landlord from evicting the plaintiff pending determination of the plaintiff's action, and damages.

[6] This matter was filed in the court's registry in Freeport, but came before me as the urgent list judge in New Providence on the 30 March 2021, after the lone sitting civil judge in Grand Bahama recused herself. As it turned out, the landlord had served a "Notice of Eviction" by letter dated 2 February 2021 requiring the tenant to vacate the premises on or before the close of business on the 6 April 2021. By the time the matter came before the court, there were only two clear days before the eviction notice was to take effect, as the 6 April fell immediately after the long Easter holiday weekend. It was in those exceptional circumstances that I heard the application for an interim injunction *ex parte* and granted an order to maintain the status quo pending the hearing of the application on an *inter partes* basis, which would be at the first convenient date for the parties. A return date was set for 16 April 2021, and I gave directions for the filing of evidence and documents by the parties.

[7] The defendant opposed the application for the injunction and filed the affidavit of Tonia Percentie, the defendant's office manager, on 14 April 2021 ("the first Percentie affidavit"), to which the plaintiff replied with her second affidavit filed the 16 April 2021. Ms. Percentie filed a further affidavit on 29 April 2021 ("the second Percentie affidavit") in response to the second affidavit of Dr. Reid. I commenced hearing the matter on 16 April 2021, but it could not be completed on that date. It was adjourned to 30 April 2021 for completion, as a two-week trial involving international counsel and multiple participants intervened in the court's calendar.

Background facts

[8] Only a short recounting of the background facts is necessary for the disposal of this application. The plaintiff is a long-time tenant of the landlord, having rented the premises since 2013. It is used as a dental office and, according to the plaintiff's evidence, currently employs 19 persons, comprising several dentists, dental hygienists and administrative staff.

[9] From 2017 onwards, a number of disputes developed between the parties. According to the plaintiff, these were over the failure of the landlord to observe and perform several covenants regarding maintenance of the landlord's fixtures, the premises, the common areas, and collection of the garbage. There were also disputes as to the rental arrears, which the tenant

sought to have clarified. The tenant claims that between 1 March 2019 and 20 August 2019, she wrote more than a dozen letters to the landlord trying to have these matters resolved.

[10] By letter dated 30 August 2019, the landlord alleged that there were arrears owing in the amount of $9,710.38, later adjusted to $7,961.25 by letter dated 26 November 2019, after both parties involved counsel. That letter also indicated that upon payment of the arrears, the landlord would give consideration to a further lease agreement. It appears that the premises were rented pursuant to an annual lease agreement executed by the parties during the period 2013 to 2018, and thereafter the tenant remained on a holdover basis as a month-to-month tenant.

[11] On 21 January 2020, the plaintiff's attorney wrote to the defendant's attorneys disputing the arrears, and provided a spreadsheet of the payments from January 2015 to 9 December 2019, which it was said showed that the payments were up to date. It appears that this impasse continued until March 2020, when the plaintiff travelled to Nassau and met with Mr. Bryon Miller, the General Manager of the defendant, to discuss these issues. Based on her account, the manager requested further information and copies of her correspondence with the landlord, which she agreed to provide, but which was not provided until September of 2020 due to issues with the Covid-19 pandemic.

[12] The next significant occurrence was the 2 February 2021, when the landlord issued a notice of eviction, giving the tenant 60 days to vacate the demised premises and claiming arrears of $13,169.56 as at 31 January 2021. Following receipt of this letter, the plaintiff says she and her attorney made several attempts to arrange a second meeting with Mr. Miller, who promised a meeting during the second week of February 2021, a meeting which she says never materialized.

[13] On 24 March 2021, the same date the writ was filed, the defendant wrote advising that the arrears were $7,670.40. However, on 30 March 2021, and following the grant of the interim injunction, the plaintiff remitted a cheque for $4,301.13, which the plaintiff says brought the arrears to just under $4,000.00. The defendant disputes this, and contends in the second Percentie affidavit that only $1,725.13 of this amount was applied to the arrears, and the remainder went to pay the March 2021 rent.

[14] The defendant's view of the matter is mainly set out in the first Percentie affidavit. Its chief complaint is that the plaintiff has been habitually in arrears and "…*is in breach of the aforementioned lease by failing to pay…ALL monthly rental charges due in accordance with the Lease Agreement*" (formatting as in original). To this end, the affidavit exhibited invoices stretching back from 2013 purporting to show that, from that date and throughout the period of the tenancy, the plaintiff was in arrears.

[15] The defendant contends further that the plaintiff continues to be a "nuisance" to the defendant by ignoring the terms of the lease and "*doing whatever she wants*" without consideration of the defendant. In this regard, the defendant points to one example where the plaintiff is said to have carried out unauthorized works to the premises. This was a reference to the replacement of the air-conditioning units, which the plaintiff acknowledged were replaced without prior approval. But she says this was only done after the landlord refused to respond to numerous requests over a two-month period to repair/replace the units, during which the office had to be closed due to patient and employee discomfort and loss of supplies. In fact, one of the matters

in dispute between the parties is who is ultimately responsible for these costs, as the plaintiff contends it has expended some $7,849.76 on air-condition repairs and replacement.

[16] The formal reason given by the landlord for serving the eviction notice is said to be "*due to the increasing arrears and the failure of the plaintiff to acknowledge the terms set out in the indenture of lease*". However, it is tolerably clear from the first Percentie affidavit that the landlord is also desirous of bringing the landlord-tenant relationship to an end, as may be discerned from the following passages in the affidavit:

> *"[20] The plaintiff continues to be a nuisance to the Defendant by ignoring the terms set out in the lease and doing whatever she wants, without any consideration to the Defendant. The relationship between the Defendant and the Plaintiff has not been a cordial one and should not continue.*
>
> *"[23] The Plaintiff further alleges in her affidavit that she is dissatisfied with the lack of maintenance on the Defendant's premises. If she is dissatisfied she was free to give up possession of the demised premises and find alternative accommodations."*
>
> *"[24] The defendants' decision not to renew the Indenture of Lease with the Plaintiff is reasonable in all the circumstances and it would be inappropriate to continue in a contractual relationship with the plaintiff."*

[17] Against this brief backdrop, I turn to consider the legal principles and their application to the facts of this case.

THE LAW

The Court's jurisdiction to grant injunctive relief

[18] The jurisdiction of the Supreme Court to grant injunctions is codified in section 21 of the Supreme Court Act, which provides for the Court to grant an interlocutory or final injunction "*in all cases in which it appears just and convenient to do so*." Order 29 of the Rules of the Supreme Court (R.S.C.) 1978 sets out the procedural provisions governing the grant of the relief.

The applicable principles for the grant of an interlocutory injunction

[19] As is made clear by the phrase "just and convenient", the grant of an interlocutory injunction is a matter of discretion. But as is the case with all forms of judicial discretion, it is to be exercised on the basis of judicial principles, the most important of which are those set out in *American Cyanamid Co. Ltd. v Ethicon* [1975] AC 396 by Lord Diplock. They are often explicated by way of a structured four-part test as follows:

(i) whether there is a serious issue to be tried;
(ii) whether damages would be an adequate remedy for any loss sustained by either party pending the outcome of the trial;
(iii) whether the 'balance of convenience' favours the plaintiff or defendant if there is any doubt as to the adequacy of the respective remedies available in damages;
(iv) whether there are any special factors that might affect the court's consideration of the matter.

[20] However, while *American Cyanamid* remains the most authoritative statement of the law on interlocutory injunctions, we are reminded by their Lordships in the Privy Council that these principles are not to be approached as fixed rules or as a "*type of box-ticking approach*" (*National Commercial Bank of Jamaica v. Olint Corpn. Ltd.* [2009] UKPC 16 [per Lord Hoffman at. 16, 17, 21]):

> *"[16]…The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result."*
>
> *[17] In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out the injunction should not have been granted or withheld, as the case may be. The basic principle is the same, namely, the court should take whichever course of action seems likely to cause the least irremediable prejudice to one party or the other." […]*
>
> *[21] Their Lordships consider that this type of box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction."*

COURT'S ANALYSIS OF FACTS AND LAW

Serious issue to be tried

[21] As to the first of the *American Cyanamid* requirements—whether there is a serious issue to be tried—the plaintiff only has to mount a relatively low threshold. As Lord Diplock said in that case [pg. 407G]:

> *"The use of such expressions as "a probability", "a prima facie case" or "a strong prima facie case" is the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The Court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried."*

[22] I also bear in mind Lord Diplock's warning that the court is not to embark on a mini-trial at this stage of the proceedings, especially based on untested affidavit evidence. Speaking to this point, he said (pg. 407H):

> *"It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt with at the trial."*

[23] The relationship between a landlord and a tenant is primarily a contractual one, and their rights are governed by the terms of their agreement. However, it is to be noted that statute has intervened in some cases to impose obligations over and beyond what appears in the parties' agreement. As indicated, the plaintiff filed a writ alleging various breaches of covenants by the landlord, seeking an accounting, a declaration that the eviction notice was unreasonable in all of the circumstances, and damages. She also denies that her rental payments are in arrears.

[24] The defendant's position is that it is well within its rights to terminate the agreement and serve an eviction notice. It claims that the tenant is currently in the position of a holdover tenant with the consent of the landlord, and therefore it is only contractually required to give her 30 days' notice pursuant to the terms of the agreement. In this regard, it indicates that the last executed lease between the parties expired 30 November 2018. The landlord says that it signed the lease generated for the period 1 December 2018 to 31 November 2019, but the tenant did not sign the counterpart. Thus, the plaintiff would have been in the position of a holdover tenant since 1 December 2018.

[25] It is useful to set out the material parts of the notice of eviction.

> *"You are aware that there is no lease currently enforced over the rental units as the previous lease expired on November 30, 2018. Subsequently, you failed to execute the new lease with terms and conditions dated Dec. 1, 2018. Further, you refuse to pay rental arrears, late fees and penalty interest amounts resulting in arrears of $13,169.56 as at January 31, 2021.*
>
> *We expect that you will vacate the premises by the end of the business day April 6, 2021. It is also expected that you will ensure that the units are left in their original state as when they were first rented by you. And expenses that is incurred to convert the units back to the original state will be at your expense. All outstanding rents and fees must also be settled on or before the said date."*

[26] Clause 2.3 (a) of the Lease Agreement provides in material part as follows:

> *"If Tenant shall remain in possession of all or any part of the Demised Premises after the expiration or termination of the Term of this lease, with the consent of the Landlord, then Tenant shall be deemed a Tenant of the Demised Premises from month-to-month, cancelable upon* ***thirty (30) working days'*** *notice, at the same rental and except with respect to the month-to-month terms specified above, subject to all of the terms and provisions hereof;…". [Underlining supplied.]*

[27] Thus, notwithstanding the defendant's contention that there is no lease agreement currently in force, cl. 2.3(a) makes it clear that where the tenant is holding over with consent the tenancy is converted from a yearly tenancy to a monthly tenancy, but all the other terms of the lease continue to be in full force and effect. Therefore, the tenancy continues to be governed by the terms of the lease, although the duration has changed.

[28] The first point for the Court's determination, therefore, is whether there are any serious issues to be tried as between the plaintiff and defendant. For the reasons stated below, I am satisfied that there are one or more serious issues to be tried arising out of the plaintiff's writ. These include, but are not limited to: (i) whether or not there has been a breach of the terms of the lease, either by the plaintiff failing to pay rent or by any of the parties breaching any of the other covenants or conditions; (ii) consequently, whether the landlord is entitled to evict and forfeit for the alleged breaches; and (iii) whether the landlord's notice is sufficient at common law and statute to effect eviction (the plaintiff contends that it is "inadequate and improper").

Alleged breach of requirement to pay rent

[29] In this regard, it is to be noted that the plaintiff firstly denies that she is in arrears and seeks an accounting "*of the rental payments paid by the Plaintiff to the Defendant during the term of*

the tenancy." There is clearly a dispute about the payment of rent, and lack of clarity as to the state of accounts between the parties. As explained in the background facts, the amount of arrears claimed by the defendant has fluctuated, and therefore the state of the accounts between the parties is a matter that requires testing on evidence. This clearly raises triable issues.

Breaches of other covenants and conditions

[30] The plaintiff alleges in her writ that the defendant has failed to perform its covenants regarding the defendant's fixtures, maintenance and upkeep of the demised premises and common areas, and collection of garbage. Again, these raise triable issues as to whether there have been breaches by the defendant and whether the plaintiff is entitled to any damages as a result.

[31] In contrast, and notwithstanding that the eviction notice only speaks to non-payment of rent, the defendant alleges in its affidavits that the plaintiff herself has breached other covenants. In fact, the defendant specifically states in the first Percentie affidavit that "…*due to the increasing rent arrears, and the failure of the Plaintiff to acknowledge the terms set out in the Indenture of Lease, the Defendant serve a Notice of Eviction*…". There is also an assertion that the plaintiff has conducted "*unauthorized work on the Defendant's premises without consent*," which is a reference to the installation of new air-condition units by the plaintiff. The Percentie affidavit also makes a general allegation that the "*plaintiff continues to be a nuisance…by ignoring the terms set out in the Lease and doing whatever she wants*". Thus, the issue of whether the plaintiff has committed other breaches is also raised, and the defendant could possibly counterclaim in this regard.

Whether notice is proper and lawful

[32] The tenant claims in her writ that the notice is "wholly inadequate and improper" having regard to all the circumstances, and therefore the lawfulness of the eviction notice is put into question. For example, to terminate for non-payment of rent at common law requires the landlord to make a formal demand of the exact sum due (see for example, the leading common law authority of *Duppa v Mayo* [1669] 1 Saund. 275), unless the landlord is exempted by the terms of the lease from making such a demand. Most modern and well-drawn leases will contain an exemption, but the lease (which I will say at once is not a model of clarity) does not appear to contain the exemption. The landlord's letters of 30 August 2019 and 26 November 2019 are equivocal as to the exact amount of rent said to be due, as the figure has been adjusted on several occasions. Further, they were issued *prior* to any intention to assert a right of re-entry, and in fact the latter letter indicated that the landlord would consider a 'further lease agreement' on payment of the arrears. So there is a question as to whether there has been a proper demand for payment of rent.

[33] For breaches of covenants or conditions other than rent, statute has intervened to make the right of the landlord to seek re-entry or forfeiture subject to his serving a statutory notice for this purpose. This is found at s. 16(1) of the Conveyancing and Law of Property Act (Ch. 138), which provides in material part as follows:

> *"16. (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to*

> *remedy the breach, and, in any case requiring the lessee to make compensation in money for the breach, and the lessee, fails within a reasonable time thereafter, to remedy the breach, if it is capable of remedy and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach. Lessee may apply for relief."*

(See for an application of the rule, *Higgins v Texaco Bahamas Ltd.* [1987] BHS J. No. 86, although in that case the court found that the notice complied with s. 16(1).)

[34] Thus, although cl. 2.3(a) provides for 30 days' notice to terminate in the case of a holdover tenant with the consent of the landlord, where other breaches are being asserted to justify the right to terminate (as appear to be the case here), a section 16(1) notice is required. Therefore, the question also arises as to whether the notice complies with the statutory requirements.

What is the proper method of dispute resolution: arbitration or litigation?

[35] There is another matter which I should mention for completeness, which only came to light on the court's subsequent reading of the documents. It was not mentioned in the written or oral submissions of the parties. As indicated, the lease agreement is far from being well-drawn. One example of this is that it appears to contain mutually exclusive modes of dispute resolution. Clause 6.2 of the lease provides as follows:

> *"Any dispute, controversy or claim arising out of or relating in any way to this lease including without limitation <u>any dispute concerning the construction, validity, interpretation, enforceability or breach thereof shall be exclusively resolved by binding arbitration</u>, and such dispute, controversy shall be referred to a single arbitrator in case the parties can agree upon one otherwise to two arbitrators one to be appointed by each party to the difference and in either case in accordance with the arbitration act of the Commonwealth of the Bahamas or statutory modification or reenactment thereof for the time being in force." [Underlining supplied.]*

[36] Notwithstanding this provision, clause 6.5 goes on to provide as follows:

> *"The validity construction, interpretation and enforcement of this lease and any document or lease contemplated herein and all rights and remedies powers obligations and liabilities hereunder shall be governed by the laws of the Commonwealth of the Bahamas, <u>and any litigation arising out of this agreement shall be governed by the laws of the Commonwealth of the Bahamas and venue shall be reserved to the courts of the Bahamas.</u>" [Underlining supplied.]*

[37] Thus, notwithstanding that clause 6.2 purports to be an exclusive arbitration clause, clause 6.5 purports to give the courts the power to deal with any disputes or litigation arising out of the agreement. So, it may be a preliminary issue for the parties as to whether or not the dispute should be resolved more properly by recourse to arbitration, as opposed to litigation. However, I say no more on this.

Whether damages an adequate remedy

[38] Having found that there are one or more serious issues to be tried, I now turn to the issue of whether damages would be an adequate remedy. On this issue, Brown J. in *Fellowes & Sons v. Fisher* [1976] 1 QB 122 at pg. 137, helpfully summarized the principles laid down by Lord Diplock in *American Cyanamid* as follows:

> *"(1) 'As to that the governing principle is that the Court should first consider whether, if the plaintiff succeeds at the trial, he would be adequately compensated by damage for any loss caused by the refusal to grant an interlocutory injunction.' If damages would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. P. 408*
>
> *(2) 'If on the other hand, damages' would not be an adequate remedy, the Court should then consider whether, if the injunction was granted the defendant would be adequate compensated under the plaintiff's undertaking as to damages. 'If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction'. P. 408*
>
> *(3) 'It is where there is doubt as to the adequacy of the respective remedies in damages…that the question of balance of convenience arises. It would be unwise to attempt event to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case'." p. 408.*

[39] The plaintiff avers in her first affidavit as follows:

> *"20. Damages would not be a suitable or adequate remedy as the Easy Dental Care has been operating from the said premises in the City of Freeport for the past 8 years and owing to the present unavailability of suitable alternative premises in the City of Freeport and the uncertainty as to when suitable alternative premises will become available, the Defendant's forced eviction may result in a temporary or prolonged cessation of Easy Dental Care's operation and will occasion irreparable harm and tarnish the good will and reputation established by Easy Dental Care during its years of continuous operation in the City of Freeport.*
>
> *21. I undertake if required, and to the extent necessary, to provide a cross-undertaking in damages in the event that the Defendant is successful or the Court upon the determination of the Plaintiff's Writ of Summons is of the view that the Defendant has suffered loss that the Plaintiff should compensate it for."*

[40] The defendant does not address the question of the adequacy of damages directly, but states in the first Percentie affidavit that to allow the plaintiff to remain on the premises will—

> *"…be a violation of the Defendant's Constitutional Right and will continue to cause tremendous financial hardship on the Defendant who could have been renting the demised premises to someone who is more reasonable and willing to pay their rent and other financial obligations on time without the Defendant having to incur legal costs."*

Further, in the second Percentie affidavit, there is the general assertion that "*in all the circumstances damages is not an equitable (sic) remedy*," (although it may be presumed that the word "*adequate*" was probably intended).

[41] I accept that the plaintiff is likely to suffer damages of the kind that are not likely compensable if the injunction were refused, as she stands to lose business goodwill and reputation that might be irreparable. For example, in *Evans Marshall & Co. Ltd. v Bertla SA* [1973] 1 All ER 992, Sachs LJ accepted that "*loss of goodwill and trade reputation*" are examples of "*certain areas*

of damage which cannot be taken into monetary account in a common law action" [at pg. 1005].

[42] On the other hand, despite its claim that it will sustain "tremendous financial hardship", it is difficult to see why the defendant could not be compensated in damages for any losses which it alleges may be incurred by continuing with the tenancy agreement in the interim. At the very highest, these may amount to legal costs, considering that the plaintiff disputes that it owes any arrears at all. Also, following the deterioration of the parties' relationship, counsel have been engaged on both sides, and therefore both parties have incurred legal costs.

[43] In any event, the plaintiff has volunteered to pay a year's rent in advance (although the defendant rebuffed this as a strategic offer) and has also offered an undertaking in damages. There has been no cross-undertaking in damages from the defendant. However, to the extent that there remains some doubt as to whether damage to the plaintiff's business goodwill is compensable if the injunction is refused and she is successful at trial, I go on to consider the balance of convenience (or balance of justice, as it is referred to in some of the modern authorities).

Balance of Convenience/Justice

[44] Here, I consider which of the parties is likely to suffer the most irremediable prejudice if the injunction is granted or refused. The plaintiff's evidence is that it employs approximately 19 persons, comprising several dentists, hygienists, dental assistants, cleaners and administrative staff with a total monthly salary which is estimated to be in the range of $45,000. Additionally she alleges that she has expended approximately $230,000 in upgrades and improvements to the facility and to equip it for the purposes of a dental office, and would be hard pressed to find alternative accommodation.

[45] The defendant alleges that the relationship between the parties has clearly broken down and that it would wish to be rid of the plaintiff, as it contends that it is incurring legal cost and hardships in obtaining payments. The defendant also disputes the lack of availability of alternative accommodation, and states further that:

> *"…the statement that Hurricane Dorian and the Pandemic has made it difficult for the Plaintiff to find alternative accommodations quickly cannot be true as there are many properties available for rent due to the fact that many persons have gone out of business and repairs to several buildings have been completed. In fact, several new plazas offering rental spaces have opened and are looking for tenants."*

Further, it alleges that if the injunction remains in place, due to the ongoing issues with the plaintiff:

> *"[T]he defendant's property is at risk of being damaged or destroyed by the Plaintiff, her servants or agents…".*

[46] On the state of the material before the court, I would have no hesitation in holding that the balance is clearly in favour of the plaintiff. Whatever inconvenience may be experienced by the landlord in superintending the commercial relationship with the plaintiff must pale in comparison to the tremendous dislocation and interruption of business operations that would

be occasioned by the forced relocation of the dental facilities, not to mention the possible impact on the employees of that facility. It seems to me that the defendant is relatively assured of obtaining its rental payments, but just wishes to be rid of what it considers a problem tenant.

[47] Even though the parties dispute the availability of alternative accommodation, in my view the question of alternative accommodation is hardly determinative of the point. In this regard, the defendant rather cavalierly states that if the tenant was dissatisfied with the performance of the landlord, "…*she was free to give up possession of the demised premises and find alternative accommodations*." However, it seems plain enough that to uproot a well-established business enterprise which employs a significant number of persons, and force it to seek alternative accommodation prior to the determination of the legal claims between the parties, would create tremendous hardships for the plaintiff. As indicated, this might result in the complete destruction of the business.

[48] I also do not find any basis for the assertion that the defendant or her agents would in any way wish to damage the building: in fact, the evidence is to the contrary, as the defendant acknowledges that the plaintiff has made improvements to the building (e.g., by installing air-conditioning units), and she would obviously wish to maintain the premises in a manner suitable for servicing the needs of her clients. I am satisfied in all the circumstances that it is the plaintiff who is likely to suffer the most irremediable prejudice if the injunction is refused.

CONCLUSION & DISPOSITION

[49] Therefore, for the reasons given above, I find that this is a fitting case in which to exercise my discretion to grant the interlocutory injunction sought by the plaintiff pending the determination of the claims.

[50] In coming to this conclusion, and because I have found that the balance of convenience was clearly in favor of the plaintiff, it was not necessary for me to conduct any analysis of the relative strength of each parties' case. It might be that the grant of an interlocutory injunction in a case where a landlord is determined to terminate a lease and repossess premises might only be to postpone the inevitable. However, whatever may be the ultimate outcome, it does not excuse the need for a landlord to comply with the law in seeking to regain possession, and the court should not be slow to come to the aid of a tenant or lessee seeking interim protection until the legal issues between the parties can be finally determined.

[51] Having said that, this is obviously a matter that should be heard with some degree of promptitude, and I would direct a speedy trial of the action. The costs of the application will be those of the plaintiff, to be taxed if not agreed.

22 December 2021

Loren Klein
Justice