

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law & Equity Division**

**2018/CLE/gen/01200**

**BETWEEN**

**MARVIN SMITH**

**First Claimant**

**AND**

**RASJINIQUE SMITH**

**Second Claimant**

**AND**

**BEVERLY ANN MOSS**

**Defendant**

**Before: Her Ladyship The Honourable Madam Senior Justice Deborah Fraser**

**Appearances: Mr. Byron Woodside for the Claimants  
Mr. Akire' Nicolls and Palincia Hunter for the Defendant**

**Hearing Dates: 17July 2023; 18 July 2023**

**Civil Procedure – Breach of Contract – Repudiation – Damages – Whether the Defendant's action constitutes a fundamental breach of the agreement and whether the Claimant's actions amounted to a repudiatory breach of the agreement.**

## **JUDGMENT**

### **FRASER, SNR J:**

[1.] This is an action arising out of a Lease Agreement under Rent to Own Contract executed on 23 April 2015 between Marvin Smith (“**First Claimant**”) and Rasjinique Smith (“**Second Claimant**”) (referred to as the “**Claimants**”) and Beverly Ann Moss (“**the Defendant**”) for the purchase of Town Unit #1, “Country Club Estates”, New Providence for \$230,000.00. The Claimants allege that the Defendant breached the agreement when she took out an Eviction Summons against them in the Magistrate Court.

[2.] On or about 23 April 2015 the Claimants took possession of Unit 1 and remained in occupation until sometime in or about October 2018.

[3.] The Claimants filed a generally endorsed Writ of Summons followed by a Statement of Claim in which they sought the following relief:

1. That the sum of \$64,795.00 representing the down payment and monthly instalment payments as of 1 June 2018 and further interest costs up to the Judgment;
2. Interest and Costs
3. Any other relief which the Court deems just.

[4.] The Defendant filed a Defence and Counterclaim. The Defendant denied breaching the lease. In her Counterclaim, she seeks relief as follows:

1. Damages in the amount of \$27,090.16;
2. Interest and Costs;
3. Such relief as the Court deems fit and just.

### **BACKGROUND FACTS**

[5.] The following background facts have been agreed between the parties in an Agreed Statement of Facts and Issues filed on 27 March 2023.

[6.] The Defendant is the owner of Townhouse Unit 1 which forms a part of a complex known as “Country Club Estates” situated at Harmony Street off Spikenard Road in the Southern district of the Island of New Providence, Bahamas. The Defendant had obtained a First Demand Legal Mortgage over Unit 1 property with First Caribbean International Bank (Bahamas) Limited on or about 26 August 2004.

[7.] The Claimants and the Defendant entered into a “Lease Agreement Under Rent to Own Contract’ dated 23 April 2015 (“**the Agreement**”) which outlined the terms of the relationship between the parties concerning the Claimant’s occupation and intended purchase of Unit 1. The Agreement was expressed to expire on 23 April 2020.

[8.] The Claimants took possession of Unit 1 on or about 23 April 2015 and remained in occupation until sometime in or about October 2018 (that is, approximately 42 months later).

[9.] It was an express term of the Agreement that:

“a. The Defendant granted the Plaintiffs with the exclusive right to an option to Purchase Unit 1 (“the Option”) and the Plaintiffs were required to pay the sum of \$15,000.00 as a non-refundable deposit to exercise the Option (“the Deposit”).

b. The Claimants were required to pay to the Defendant, a monthly rent of \$1,275.00 (“the Rent”) and all utilities and services required on the premises of the Unit 1, inclusive of Condominium Association fees (“the Agreed Fees”).

c. Subject to the conditions in the Agreement regarding late payment, the Deposit and the Rent was to be deducted from the total purchase price of Unit 1.

d. Provided the Claimant breached any of the terms of the Agreement including the payment of Rent at the prescribed time, and after service on the Claimants of a notice of default, the Defendant had a right, inter alia, to re-enter and take possession of Unit 1.

e. In the event of default and subject to the terms as aforesaid, the Defendant was entitled to hold the Claimants liable for any differences between the Rent that would have been payable under the Agreement during the balance of the unexpired term of the Agreement.

f. The Claimants were required to pay late fees for any late monthly rental payments.

g. The Defendant was required to produce to the Claimants the set of keys to Unit 1 (“the Defendant’s Keys”) and the remote control to operate the automatic gate to access Unit 1 (“the Remote”).

h. The Claimants would pay to the Defendant the sum of \$90.00 for the failure to produce the Defendant’s Key and the Remote on the termination of the Agreement.”

[10.] That under the terms of the Agreement:

(i.) The Claimant paid the deposit of \$15,000.00 to the Defendant on or about 23 April 2015.

(ii.) The Defendant delivered to the Claimants the Defendant’s keys and remote.

(iii.) The Claimant paid the Rent to the Defendant, albeit late, but only paid 38 out of 42 payments.

(iv.) The Claimants paid to the Defendant late fees for the late payment of the Rent, on numerous occasions.

[11.] On 7 August 2018 the Defendant filed Summons #7088-18 in the Magistrates Court seeking an order that the Claimant be evicted from Unit 1 and to recover the equivalent of one (1) month's rental payment which was overdue at the material time. The Magistrate's Court Action was heard on 21 August 2018 before Magistrate Carolyn Vogt-Evans and the Defendant received an Order for the recovery of the overdue rent. The hearing of the application for the order that the Claimants be evicted was suspended pending the determination whether the court had jurisdiction to hear the Magistrate's Court Action.

### **ISSUES:**

[12.] The parties have identified eight issues. In my opinion, two broad issues arise for determination namely:

1. Whether the Defendant's action constitutes a fundamental breach of the agreement and whether the Claimant's actions amounted to a repudiatory breach of the agreement?
2. Whether the Claimants are entitled to recover their deposit, and what damages, if any, are each party entitled to recover?

### **EVIDENCE**

#### *Claimant's Evidence*

##### *Ms. Rashinique Smith*

[13.] On August 23, 2021, the witness statement of Rashinique Smith ("Smith WS") was presented as her evidence in chief at trial.

##### *Defendant Evidence*

[14.] On July 30, 2021, the Defendant, Beverly Ann Moss, filed her witness statement ("**Moss WS**"), which served as her evidence in chief at trial.

### **Finding of Facts**

[15.] Having reviewed and considered the testimony of the witnesses, I shall provide my summary of their viva voce evidence and provide my findings of fact based on the evidence before me.

##### *Marvin Smith*

[16.] The First Claimant did not give evidence in these proceedings.

##### *Rasjinique Smith*

[17.] During cross-examination, Mrs. Smith acknowledged that she paid the \$15,000 deposit but conceded that the Agreement did not expressly designate it as a down payment. She further confirmed that the lease term was extended from three to five years at her request. When

questioned about Late Charge Clause, which stipulated that payments made more than five days late would not be credited toward the purchase price, Mrs. Smith initially acknowledged the provision but later asserted that she did not fully grasp its implications. She attributed her understanding of the Agreement to conversations between her husband and the Defendant, maintaining that she and her husband believed that payment of the \$60 late fee would preserve their right to apply the full payment toward the purchase price. However, she could not confirm whether the Defendant explicitly conveyed this assurance, raising uncertainty as to whether this was a misinterpretation rather than an express term agreed upon by both parties.

[18.] In response to questions regarding her history of late payments, Mrs. Smith's testimony lacked consistency. Initially, she sought to minimize the extent of late payments, but upon further questioning, she acknowledged that multiple payments had indeed been made beyond the prescribed due date. She accepted receiving an eviction notice on June 6, 2018, but denied any prior awareness of the termination notice dated September 6, 2017, despite its inclusion in the agreed documents before the court. Additionally, while Mrs. Smith maintained that she only became aware of the mortgage on Unit 1 during the Magistrate Court hearing on August 21, 2018, Counsel presented correspondence in the form of emails, letters, and WhatsApp messages indicating that she had been informed of the mortgage at an earlier stage.

[19.] Throughout her cross-examination, Mrs. Smith's responses were, at times, hesitant and lacked clarity, particularly when addressing key contractual terms and her obligations under the Agreement. She frequently deferred to her husband's understanding rather than her own independent knowledge of the contractual provisions. Her reliance on verbal assurances rather than the explicit terms of the Agreement gave rise to uncertainty as to whether her misinterpretation of the contract stemmed from a misunderstanding or an assumption based on informal discussions. While there were discrepancies in her evidence, it is unclear whether these arose from an intentional effort to mislead the court or from a genuine lack of comprehension of the Agreement's terms.

*Beverly Moss*

[20.] During cross examination Ms. Moss acknowledged that she verbally extended the payment deadline to the two times at the request of the Claimants. She was unwavering in her position that the \$15,000 deposit was nonrefundable, as explicitly stated in the Option to Purchase Clause. She explained that the deposit served a commitment mechanisms to prevent the Claimants from backing out at will and that without this deposit, the Agreement would have lacked security for her as the property owner.

[21.] When counsel questioned about the late payments, Ms. Moss consistently maintained that although she exercised discretion in allowing a grace period, this did not alter the Default Clause of the contract, which remained enforceable at all times. She recalled a meeting with the Claimants, during which they demanded that all theirs payments be credited toward the purchase price while simultaneously refusing to make any further payments. Her responses suggested that

she perceived this as an attempt to unilaterally modify or terminate the contract. She stated that upon reviewing their payment records, she identified discrepancies and later sent the Claimants a text message informing them that their figures were incorrect. Ms. Moss asserted that the Claimant's never proposed a resolution but instead abruptly walked away from the discussions. When pressed about the \$15,000 deposit, she admitted that some of the funds were used for remodeling before the Claimants moved in, and as a result, it was not fully held in escrow.

[22.] On the issue of eviction, Ms. Moss acknowledged that she did not serve a default notice before filing for eviction. However, she justified this by pointing to the Claimants' explicit refusal to make further payments as stated in their August 7 letter. She testified that she filed the eviction summons on the same day she received their letter, as it was her belief that the Claimants had abandoned the Agreement. When challenged on the validity of the rent-to-own agreement and whether she had disclosed the existing mortgage on the property, she denied any wrongdoing. During re-examination, she reaffirmed her position that the Claimants were fully aware of the consequences of late payments, reiterating that once a payment was more than five days late, it could no longer be applied toward the purchase price.

## **LAW**

[23.] A repudiated breach is defined in **Chitty on Contract, 28<sup>th</sup> Edition, Volume 2, at paragraph 37-208**:

**“Where one party so acts or expresses himself as to show that he does not mean to accept the obligations of the contract any further, then this may depending on the circumstances, amount to a repudiatory breach of contract.”**

[24.] In **Heyman and Another v Darwins Ltd [1942] 1 All ER 337** Lord Wright discussed the concept of repudiation, particularly in the context of anticipatory breach of contract, he states:

**“Perhaps the commonest application of the word “repudiation” is to what is often called the anticipatory breach of contract, where the party by words or conduct evinces an intention no longer to be bound, and the other party accepts the repudiation and rescinds the contract.”**

[25.] The general rule is clear that damages in contract must flow naturally from the breach, or be reasonably foreseeable by both parties at the time of contracting (**Chitty on Contracts 28<sup>th</sup> Ed. Volume para 130-059**).

[26.] The general rule on damages for breach of contract is that the innocent party should be compensated to the extent that they are placed in the same financial position as if the contract had been performed (**Robinson v Harman**). This principle has been reaffirmed in several cases, including **Johnson v Agnew and British Westinghouse Electric Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673**, which emphasize that damages should reflect actual pecuniary loss resulting from the breach.



repeatedly urged the Claimants to make timely payments because she did not want the ‘bank contacting her’ or ‘evoking fear of possession.’

[33.] There is no evidence that the Claimants were coerced or unduly influenced into signing the lease. The Second Claimant was asked whether the Defendant explicitly told them that they could not take the Agreement away or consult a lawyer. Her response was vague, but she admitted they were not prohibited from seeking legal advice. I find that the Defendant took a genuine interest in assisting the Claimants with achieving their goal of home ownership, and the relationship between the parties appeared amicable and cordial at the outset.

#### *Option to Purchase Clause*

[34.] The Option to Purchase Clause granted the Claimants exclusive rights to purchase the premises. The Clause states:

**OPTION TO PURCHASE: Landlord grants tenant the exclusive right to an option to purchase the premises herein for a gross sales price of Two Hundred and Thirty Thousand Dollars (\$230,000.00).**

**When exercising the option to purchase, Tenant shall also deposit with Landlord the sum of Fifteen Thousand Dollars (\$15,000.00 BSD) as a deposit to enter into this Lease Agreement with the intent to purchase the townhouse unit “As is” and under the terms described in this Lease Agreement.**

**The deposit is non-refundable under the signing of this Lease Agreement. The deposit will be a deductible from the total sum of sales cost in addition to the monthly Rent – but will be limited to the conditions noted under late payment.**

**Upon exercise of the option Rent to Own by Tenant, a closing shall take place within 60 months. Beginning Thursday, April 23, 2015, and will end on Thursday, April 23, 2020.”**

[35.] When this Clause is considered in light of the factual background, it is clear that the parties intended this to be a purchase Agreement for Unit 1. The critical consideration was that the \$15,000 deposit was non-refundable, and both the deposit and monthly payments would only be deducted from the sale price if the Claimants complied with the Late Payment Clause.

[36.] The Late Payment Clause states:

**LATE CHARGES: If any amount under this lease is more than 3 days late, tenant agrees to pay a late fee of \$60.00. Further to, if payment due is late after 5 days, the rent of \$1,275 WILL NOT be contributed to/against agreement number at the end of the agreement term.**

[37.] Counsel for the Claimant argues that a literal interpretation of the contract suggests that the deposit and monthly payments were meant to be applied toward the purchase price at the end of the agreement and that the Defendant did not allow the Claimants to complete the five year term. However, based on the conduct of the parties that this was a purchase agreement contingent upon adherence to the Late Payment Clause. I accept the Defendant's position that this was the agreed



upon structure of the contract, as confirmed by the evidence of the Payment Schedule and WhatsApp messages.

### *Late Payments*

[38.] The primary source of contention between the parties is the repeated late payments. The Defendant continuously urged the Claimants to make payments on time. According to the Payment Schedule evidence, of the 38 payments made between 2015 and 2018, 17 were made more than five days late and only 10 were paid on time.

[39.] Both parties accuse the other of breaching the contract. The Claimants argue that the Defendant's issuance of an eviction notice constituted a breach and that the summons was served before they had a chance to respond. They further assert that the Defendant's conduct amounted to a wrongful termination of the contract, preventing them from exercising their Option to Purchase before the contract expired.

[40.] The Default Clause in the Agreement provides:

**“DEFAULTS: If Tenant fails to perform or fulfill any obligation under this Lease, Tenant shall be in default of this Lease. Subject to any statute, ordinance or law to the contrary, Tenant shall have seven (7) days from the date of notice of default by Landlord to cure the default. In the event Tenant does not cure a default, Landlord may at Landlord's option:**

- (a) Cure such default and the cost of such action may be added to Tenant's financial obligations under this lease; or**
- (b) Declare Tenant in default of the Lease. In the event of default, Landlord may also, as permitted by law, re-enter the premises and take possession of the premises. Landlord may, at its option, hold tenant liable for any difference between the rent that would have been payable under this Lease during the balance of the unexpired term, if this Lease had continued in force and any rent paid by any successive”**

[41.] The Claimant's letter dated 7 August 2018, is crucial to this case. It states:

**“...It is in this vein that we request all 36 payments to be applied towards the closing cost of the Unit. Until then, future payments will be retained on an account until the matter is rectified. Once this is done payments can be made and we can move forward towards seeking a mortgage, for which we are eligible. Again we are disappointed to see that we have come this far to be at a road block and we respectfully await a response.”**

[42.] I find that, as of this date, the contract was still valid. The issue before the Court is whether this letter constitutes a repudiation of the agreement, that is, whether it demonstrated a clear unwillingness by the Claimants to continue performing their contractual obligations.

*Was there a Repudiation of the contract?*

[43.] I find that the Claimants habitually made late payments and after receiving the eviction notice, the Claimants ceased making payments altogether and continued to occupy the premises until October 2018. The Claimants' letter of 7 August 2018, stating they would withhold all “*future payments*” constitutes repudiation of the agreement. The Default Clause allowed the Defendant to declare the Claimant in default and take possession if they failed to cure their non-compliance within seven days. The Claimants did not attempt to cure their default but instead ceased payments altogether. The Defendant was not legally obligated to issue further warnings before eviction. The Magistrate Court summons was sufficient notice. The Claimants’ action demonstrated an intention not to be bound by the Agreement. The Claimants claim for breach of contract fails, and the Defendant was within her right to treat the agreement as terminated.

**ISSUE NO. 2: Whether the Claimants are entitled to recover their deposit, and what damages, if any, are each party entitled to recover?**

**Damages**

[44.] The Court's primary objective in awarding damages for breach of contract is to compensate the injured party and restore them to the position they would have been in had the contract been performed. In this case, the Claimants argued that the Defendant wrongfully terminated their lease, which included an Option to Purchase, without providing the required notice or opportunity to remedy any default. They contended that the Defendant’s actions constituted a breach, entitling them to damages, including a refund of their \$15,000 deposit and all payments made toward the purchase price, totaling \$64,795. Conversely, the Defendant maintained that the \$15,000 was a non-refundable deposit rather than a down payment and that the contract explicitly allowed for its forfeiture if financing was not secured. The Defendant further sought to recover unpaid rent and additional fees for the Claimants’ continued occupation of the property after defaulting on their payments.

[45.] Having reviewed the evidence and the submissions, the Court find that the construction of the Option to Purchase clause contained conflicting provisions, stating that the deposit was both non-refundable and applied toward the purchase price, while also subject to forfeiture if financing was not obtained. These inconsistencies created uncertainty about its enforceability. While deposits are generally forfeitable in contract law, part payments are not unless explicitly stated. Furthermore, the Defendant had no legal right to sell the property due to her mortgage restrictions, making the contract voidable. Since the Defendant suffered no actual financial loss, retaining the deposit would result in an unfair windfall and function as an unenforceable penalty. Equity therefore intervened to prevent an unjust outcome, and the Court ruled that the Claimants are entitled to the refund of their \$15,000 deposit.

*Whether Defendant is entitled to Damages*

[46.] The Claimants remained in occupation of the property from August to October 2018 without making rental payments. The Court rejects their argument that they were instructed not to

pay rent and found that they are liable for unpaid rent of \$3,825, late fees of \$180, a lock change fee of \$75.16, and a gate remote fee of \$60, totaling \$4,140.16. The Defendant's claim for the remaining value of the lease agreement is denied, as no further financial loss was proven.

[47.] In conclusion, the Court ordered that the Claimants be refunded their \$15,000 deposit, while the Defendant is awarded \$4,140.16 for unpaid rent and associated fees.

## **CONCLUSION**

[48.] I therefore make the following Orders:

1. The Defendant shall refund to the Claimant the deposit of \$15,000.00, paid under the Rent to Own Agreement, minus \$4,140.16, representing outstanding rent, late fees, and other charges,
2. Each party shall bear their own costs.

**Senior Justice Deborah Fraser**

**Dated this 4th day of March 2025**