COMMONWEALTH OF THE BAHAMAS **2022/APP/sts/000018**

IN THE SUPREME COURT

Civil Appeal Division

BETWEEN:

ELSWORTH MCINTOSH

Appellant

AND

TREVOR MARSHALL

Respondent

Before: The Honourable Justice Carla D. Card-Stubbs

Appearances: Mr. Anthony Newbold for the Appellant
Mr. Gabriel Brown for the Respondent

RULING

CARD-STUBBS J

Introduction

1. This is an appeal from a decision of the learned Magistrate in Case Number 4254/2022 rendered on May 4, 2022.
2. The Respondent bought a claim in the Magistrate's Court in the amount of Two Thousand Four Hundred and Fifty Dollars ($2450.00) against the Appellant for return of money paid pursuant to an arrangement entered into between the parties for the rental of an apartment unit located on Faith Avenue in the Western District of New Providence.
3. The Respondent in addition to the aforementioned sum claimed Two Hundred Dollars ($200.00) in legal costs.
4. On May 4, 2022, the learned Magistrate rendered her decision in the matter. That lower Court ordered the following:

   > "Judgement for the Plaintiff in the amount of Two Thousand Four Hundred and Fifty Dollars plus Two Hundred Dollars Cost. Appeals Notices."

5. By way of Notice of Appeal filed 5 May 2022, the Appellant filed an appeal of the learned Magistrate's decision on the following grounds:
   1. That under all the circumstances of this case the decision is unsatisfactory.
   2. That a Magistrate viewing the circumstances reasonably could not properly have decided to grant judgement to the Respondent; and
   3. That the Magistrate failed to properly take into account the Appellant's case.
6. In the affidavit accompanying the Notice of Appeal, the Appellant averred:

   > "4. At no time was your Affiant or the Plaintiff invited to give evidence (sworn or affirm).
   >
   > 5.Instead, the Learned Magistrate questioned your Affiant and the Plaintiff about the claims outlined on the Summons from the bar.
   >
   > 6. Thereafter, she issued Judgement against your Affiant."

7. Those averments were not denied by the Respondent.

8. Counsel for the Appellant suggested that the matter be remitted to the Magistrate for rehearing.
9. Counsel for the Respondent did not concur.
10. The process and reason for the learned Magistrate's decision may be gleaned from that court's record which reads:

> "Plaintiff appeared; the defendant appeared and admits to the claim paid the defendant two thousand four hundred and fifty dollars which represents first and last and security deposit in within twenty four hours of payment, the plaintiff change his mind about moving in and cancelled the agreement within the cooling off period because additional terms of the contract were onerous and burdensome."

11. This Court determined to conduct an appeal by way of a rehearing and to allow the parties to adduce evidence.

The Jurisdiction To Hold an Appeal by Rehearing

12. Section 54 of the Magistrate's Court Act provides for a right of appeal to this court from the finding of a magistrate. It provides:

> 54. (1) An appeal shall lie from the decision of a magistrate given in the exercise of his summary jurisdiction, whether matrimonial or civil, in the following cases only, that is to say —
>
> 1. (a) in civil proceedings, when the sum claimed exceeds one dollar exclusive of costs;
> 2. (b) in civil proceedings, when the order for imprisonment was not made only for the enforcing of a judgment or order for the payment of money or as the alternative for failure to comply with an order for the doing or abstaining from doing any act or thing required to be done or left undone, or for the finding of sureties or for the entering into recognisances for the giving of security.
>
> (2) Appeals under this section shall lie —
> (a) where the case has been heard by the Chief Magistrate of a stipendiary and circuit magistrate, to the Supreme Court;
> b) in all other cases to the Chief Magistrate, a stipendiary and circuit magistrate or a circuit justice on circuit.

13. In most instances, an appeal will encompass a review of the decision of the lower court based on the grounds of appeal advanced by the Appellant. However, in certain cases, a superior court may hold an appeal by rehearing. This is where a court determines that it

would be in the interest of justice to do so. Such rehearings on an appeal from a lower court ought to be rare. An appellate body has within its jurisdiction the power to remit the matter for retrial to a lower court instead of itself embarking upon a fact-finding mission. In my opinion, an appeal by rehearing should not be undertaken lightly by a superior court as to do so with any regularity could result in an unworkable and inefficient system if a superior court were to regularly have litigants rehearse facts already traversed before a lower court. Nevertheless, I consider a justifiable instance where a superior court may embark on such a rehearing to be where the litigants agree that they were not "heard". In the instance before me, I determined to rehear the parties on the basis that the procedure adopted by the lower court may be deemed to be a procedural irregularity. The complaint, in essence, is that the matter was determined without the formal evidence of the parties being taken.

14. The parties in this matter refer to an informal question and answer process and the Appellant is aggrieved "at this treatment". It is important for a tribunal of law, before coming to a determination, to allow the parties to give evidence on oath (or on affirmation) in support of their position. This does not mean that the Magistrate could not have correctly assessed the situation and made a reasonable determination, sound in law, by adopting the procedure that she did. However, for the reason that "justice must not only be done but must be seen to be done", this Court embarked on a rehearing and both the Appellant and Respondent were allowed to give evidence and to file witness statements.
15. I should also point out that a rehearing on appeal does not exclude a review of the decision under appeal. A rehearing often serves the purpose of the appellate court making an evaluation as to whether or not the decision under appeal was correct or not.

Issues

16. Having heard the evidence in this matter, the lower court would have had to determine
    1. Whether there was a valid enforceable agreement between the parties; and
    2. Whether the Respondent is entitled to recoup the sums advanced to the Appellant for the apartment unit.

Parties' Evidence and Submissions

The Appellant's Evidence

17. The Appellant's evidence is that he advertised the apartment for rent "in one of the dailies which generated numerous phone calls". The Respondent was one such caller on March 27, 2022 and the Respondent and his father viewed the apartment that day. On the following day, the Respondent returned with monies in hand and was given a contract which he signed. Later that day "the Respondent complained that his father thought "the contract had too many rules… (and) therefore wanted his money back." The Appellant's evidence is that he told the Respondent that they had a signed contract and that he, the Appellant, was retaining the funds as liquidated damages.
18. The contract exhibited to the Appellant's witness statement is stated to be an agreement made "28 day of March A.D. 2022". The number representing the year "1999" is struck through and replaced with "2022". The exhibited contract does not have a commencement date but it shows a payment date of "28 day of every month." The agreement is said to be for a period of one year. The exhibit shows a signature clause but no signature of either party. The document appears to be a mishmash of several precedents of leases. When read together, the numbers of the clauses do not run consecutively. On one page of the exhibit is shown is a termination clause for a notice period of 3 months. It also the word "ONE" entered in before "years" denoting a period of one year.
19. On cross-examination, the Appellant admitted that the Respondent had not taken possession of the unit but denied that he had told him that it was under renovations. The Appellant's evidence is that "I told him that the unit would be hopefully ready by weekend". The Appellant stated that the Respondent paid a deposit to hold the apartment and was to get the key at the end of the month. The Appellant's evidence is that he gave the Appellant "a copy of the draft lease agreement" which the Appellant signed. He acknowledged that the Respondent took a picture of the agreement and that there were blank spaces in it but that "Mr. Marshall did not express concern about the blank spaces."
20. The Appellant's evidence is that the Respondent took a picture of the blank agreement but that he, the Appellant, filled it out before the Respondent signed it.

21. The Appellant's evidence is that he kept the money as damages for inconvenience since he had taken the apartment off the market. His evidence is that "I normally get 250, sometimes 350 calls per day."

The Appellant's submissions

22. The Appellant submitted that he and the Respondent entered into a valid agreement and that, as a result, the parties are bound by its terms.
23. The Appellant argued that the question for the court's determination concerns the provision for termination of the agreement after the parties have signed it. The Appellant submitted that "while the parties made references to termination, we find no definite statement either for or against termination after one day." Relying on the cases *of Shirlaw v Southern Foundaries (1926) Ltd (1939, C.A)* and *Pettitt v Pettitt (1970) H.L*, Counsel submitted that the Court "should imply the term regarding termination".
24. The Appellant submitted that the notice given by the Respondent was short, that the reasons for determination were unsatisfactory and that the termination of agreement caused loss to the Appellant as he lost other prospective tenants as a result of the transaction between the parties.
25. The Appellant also submitted that the Respondent was "in constructive possession of the property which caused the Appellant to not entertain additional phone calls in connedtion thereto and thus lose prospective tenants."

The Respondent's Evidence

26. The Respondent's evidence is that on March 27, 2022 he and his father met with the Appellant. They inspected the apartment and were pleased. On the following day, the Appellant met with the Respondent and told him that he was interested in leasing the unit. The Respondent's evidence is that he received "an incomplete draft lease agreement" which bore the year "1999". The evidence of the Respondent is that the draft did not provide a commencement date or "the period of the tenancy, nor did it provide the amount of money to be paid monthly for rent or which day rent would be payable each month. There was also no provision as to the requirement of notice to be required prior to the termination of the draft Agreement."

27. The Respondent's evidence is that he signed the draft and was assured by the Appellant that "this was just a draft and that he would draft a final version of the document with all the relevant information included and present it to me prior to my taking possession of the Unit and that I would also receive my own copy at that time."
28. The Respondent's evidence is that he was told that the unit "was not ready yet but should be by weekend." He raised queries on 2 of the clauses in the draft. As it concerned fixtures in paragraph 9(a), he was told that if he mounted his television on the wall that his television would become the property of the landlord. He enquired about paragraph 9(c) which provided "Any other additional persons living on premises without Landlord's permission will be charged an additional one hundred dollars ($100) per month. The Respondent's evidence is that he was told that if his son visited and stayed with him then the charge would apply.
29. The Respondent's evidence is that he discussed those conditions with his father later that day and returned on March 29, 2022 to let the Appellant know that he "no longer wanted to proceed with leasing the unit."
30. The document as exhibited by the Respondent does not show the clauses complained of. However, those clauses are shown in the document exhibited by the Appellant.

The Respondent's Submissions

31. Relying on the cases of *Street v Mountford* [1985] AC 809 and *Harvey v. Pratt* [1965] 1 WLR 1025, and *Marshall v Berridge* [1881] 19 Ch. D 233, Counsel for the Respondent submitted that in order for a lease agreement to be valid, the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments.
32. The Respondent submitted that exclusive possession was not enjoyed by the Respondent and therefore a valid tenancy was not created. The Respondent never entered into possession nor did he obtain the key to the unit.
33. The Respondent further submitted that the agreement did not contain a commencement date and that there was no period stated for the length of the lease.

Legal Discussion and Analysis

34. The parties appear to be agreed on the applicable law in this area. Indeed, the law regarding the essential elements of a lease is fairly settled.
35. The following principles are outlined in Hill and Redman's Law of Landlord and Tenant 2023-2024, Release Number 2024B1, Chapter 2 at paragraphs 450 – 460:

> An agreement for a lease is created when, subject to the statutory requirements as to the form of the contract, the parties are of one mind as to the essential terms of the agreement and as to any particular terms which are part of the particular bargain. An agreement for a lease is an ordinary contract, and in accordance with the general principles of contract law it will not be binding on the parties until one is able to identify an offer by the lessor to let, and an unconditional assent by the lessee to take, the property to be demised or on certain terms. The essential terms of an agreement for a lease are:
>
> (a) the identification of the lessor and lessee;
> (b) the premises to be leased;
> (c) the commencement and duration of the term; and
> (d) the rent or other consideration to be paid.
>
> Where the essential terms for a binding agreement for lease have been reached it matters not that when the terms of the lease are being settled other matters come into consideration which would form the subject of more or less detailed provision in the final lease. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.

36. The case of *Street v Mountfourd* [1985] 2 ALL ER 289 concerned parties who had entered into an agreement to occupy a room at a defined rate per week which was subject to the terms under an agreement.
37. The question which the House of Lords had to determine was whether the agreement between the parties created a tenancy or a license. *Lord Templeman* (at [1985] 2 ALL ER 289, 294) in considering the distinction between the two, outlined the necessary elements of a tenancy as:

> There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or

a service occupier. To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments. The grant may be express, or may be inferred where the owner accepts weekly or other periodic payments from the occupier.

38. In *Harvey v Pratt* [1965] 2 All ER 786 *Lord Denning* considered the essential elements of a valid tenancy. There he stated ([1965] 2 All ER 786 – 788):

> "The first point is this. The document does not specify any date from which the lease is to commence. It has been settled law for all my time that, in order to have a valid agreement for a lease, it is essential that it should appear, either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what *day* the term is to *commence*. As Lush LJ, said in *Marshall v Berridge* ([1881–85] All ER Rep 908 at p 912; (1881), 19 ChD 233 at p 245):
>
> > "There must be a certain beginning and a certain ending, otherwise it is not a perfect lease, and a contract must, in order to satisfy the Statute of Frauds, contain this reference."
>
> Counsel for the defendant has argued before us that there was an implied term that the lease should commence *within a reasonable time*. He says that this point was not considered in the earlier cases. He argues that on a *sale* of land there is an implied term that completion should be within a reasonable time; so why, he argues, should not there be the same with a *lease?* Why cannot there be an implied term that it should commence within a reasonable time?
>
> I think that the answer to that argument, however persuasive, is that the law is now settled on the point. Counsel suggested that the case of *Blore v Sutton*, can be explained by the absence of a sufficient memorandum within the Statute of Frauds. That may be so; but by the time we got to *Marshall v Berridge* in 1881 the law was settled. It was treated as established law by this court in 1921, in *Edwards v Jones*. It is settled beyond question that, in order for there to be a valid agreement for a lease, the essentials are that there shall be determined not only the parties, the property, the length of the term and the rent, but also the date of its commencement. This document does not contain it. It is not sufficient to say that it can be supplied by an implied term as to reasonable time."

39. Having reviewed the principles of law, it is clear that the essential terms of a valid and enforceable lease agreement are:

    (i) the parties – landlord/lessor and tenant/lessee
    (ii) the property to be leased,
    (iii) the length of the term/duration of the lease
    (iv) the date of the commencement of the lease and
    (iv) the rent or other consideration.

    If the parties have not agreed these matters, then no binding agreement has been formed because these are what the law considers the essential terms. For the lease to be enforceable then it must be ascertainable as to who the parties to the lease are, what is being leased,

how long the lease is to run, when the lease starts and what consideration/payment is being made in that regard.

40. On the evidence led, in this case I make the following findings of fact.

    1. The Respondent paid the funds to the Appellant in order for the Appellant to hold the apartment which he, the Respondent, wished to lease.

    2. The Respondent was presented with a draft lease from the Appellant. That draft contained blank spaces. The Respondent signed the draft.

    3. The signed document did not contain a commencement date or a period for the lease or a payment period.

    4. The signed document did not contain a termination clause.

    4. The Respondent did not enter exclusive possession and was not given the means to enter the apartment and take possession.

41. The Appellant's evidence is that the lease contained a commencement date of March 28 and that the rent was payable on the 28th of every month. This is refuted by the Respondent. I find that such content was unlikely since the deposit was received on March 28, 2022 with a representation that the apartment "should be" ready by the weekend. There was no agreement between the parties either orally or in writing as to when the Respondent would return to complete the arrangements or to take possession. In any event, it was clear between the parties that the apartment was not likely to be ready before the weekend. I do not believe the Appellant's evidence that the signed document contained a commencement date.

42. I find that the Respondent signed a document with several blanks spaces and that that document did not contain a termination clause.

43. I find that the Respondent signed a document with several blanks spaces and that that document did not contain a duration of term.

44. In the circumstances, I hold that the parties had not entered an enforceable agreement.

45. It seems to me that the Respondent made a good faith deposit expressing an intention to enter a lease. The Appellant agreed to accept the Respondent as a tenant. However, two essential terms of the agreement which had to be agreed by both parties were not arrived at, i.e. the commencement date and the length of the term.

46. There was no agreement on *all* of the essential terms. I find that the parties had not completed the requisite steps to forming a binding agreement and that the handing over of the deposit by the Respondent to the Appellant was merely a step taken in that direction.

47. I find that, as a matter of law, the parties were not "of one mind as to the essential terms of the agreement and as to any particular terms which are part of the particular bargain." Therefore, no contract was entered into and the Appellant is not entitled to hold the funds paid over to him.

48. The Appellant has also claimed to hold the money as liquidated damages since he had taken the property off the market. The agreed evidence between the parties is that the Respondent changed his mind within 24 hours of making the payment and that he had not moved into the premises and that he had no keys or means of occupying the apartment. The evidence of the Appellant is that the advertisement had been placed in "the dailies" to run for several days and that he received between "250 and 300 calls" per day. It seems to me that in such an instance the Appellant should have been able to quickly secure a suitable tenant. I also bear in mind that the apartment, on the evidence of both parties, was not yet ready or available for occupation. There is no legal basis for the Appellant to hold the funds as liquidated damages or otherwise.

49. I turn now to address the grounds of appeal raised by the Appellant.

The Grounds of Appeal

50. Grounds 1 and 2 of the Notice of Appeal are:
    a. Ground 1: That under all the circumstances of this case the decision is unsatisfactory.
    b. Ground 2: That a Magistrate viewing the circumstances reasonably could not properly have decided to grant judgement to the Respondent.

51. Having regard to my findings and having regard to the admissions from the parties as noted by the learned Magistrate, I find that there is no merit in these grounds. The Magistrate considered the nature of the transaction and reasonably made a determination in favour of the Respondent.

52. Ground 3 of the Notice of Appeal is:
    c. That the Magistrate failed to properly take into account the Appellant's case.

53. While there may have been a procedural error in the conduct of the matter by the learned Magistrate, given that this appeal was by rehearing and having regard to my findings, there is no reason to displace the judgment of the lower court. In the circumstances, no serious miscarriage of justice has occurred that would cause this court to overturn the decision of the learned Magistrate in this instance.

Conclusion

54. I conclude that:
    1. There was no valid or enforceable agreement between the parties.
    2. The Respondent is entitled to recoup the sums advanced to the Appellant for the rental unit.

3. There is no merit in the appeal and the appeal ought to be dismissed.

ORDER

55. The order and direction of this Court are as follows:
    1. The appeal is dismissed.
    2. The Appellant shall pay the Costs of this appeal to the Respondent, such costs fixed in the sum of $1000.

Dated this 9th day of August 2024

Carla D. Card-Stubbs
Justice