12 pages.

ROYAL COURT
19th June, 1990 84

(Samedi Division)

Before: The Bailiff, and
Jurats Vint and Gruchy

BETWEEN:	GEOFFREY ARTHUR ALKER	FIRST PLAINTIFF
AND	NORTHERN INN LIMITED	SECOND PLAINTIFF
AND	C. LE MASURIER LIMITED	FIRST DEFENDANT
AND	FRED PHILIP WEBBER CLARKE	SECOND DEFENDANT

Applications by the First and Second Defendants, for an Order, inter alia, that the interim injunction in the Plaintiff's Order of Justice, restraining the Defendants from pursuing eviction proceedings in the Petty Debts Court be lifted, and that so much of the prayer of the Order of Justice as seeks a withdrawal of the Defendants' Notice to quit, be struck out.

Advocate M.M.G. Voisin for the Plaintiffs,
Advocate R.J. Michel for the Defendants.

JUDGMENT

BAILIFF: The background to this case is that the first plaintiff's company - either itself or through the first plaintiff, it is really irrelevant to our arguments - became the tenant of either the first defendant or the second defendant, but I think the first defendant, C. Le Masurier Limited, for whom the second defendant, Mr. Clarke, did most if not all of the negotiating. The parties have agreed for the purposes of argument in today's case that the first and second plaintiff may be taken to be one and the same person and likewise the first and second defendant. Therefore, if I refer in the course of my judgment to the first or second defendant, or to the first or second plaintiff, I shall of course merely mean one side or the other.

In 1964 there was an undated letter written by C. Le Masurier Limited (and the copy we have says that the secretary signed it, although there is no sign of the secretary's name on the letter) to Mr. Alker setting out certain terms under which he or his company took over the Auberge du Nord. That agreement did not specify the terms of the lease, but merely said that the rent would be payable at the rate of £400 per anumm, payable quarterly in advance on the usual quarter days with effect from the 25th March, 1964, with an increase to £600 per annum payable from the 29th September, 1964, subject to review.

We are not called upon to interpret that arrangement, but it is clear to us that at that time what the defendants appeared to be granting to the plaintiffs was a common law lease which if it had to be terminated, according to the terms of the letter, would require under Loi (1919) sur la Location des Biens Fonds, one year's notice.

In the course of the following years the parties remained, as far as we can tell from reading the affidavits, on good business terms. However from 1983 onwards there were some diffculties due in part to floods which affected the property.

As a result of negotiations between the parties it was not possible to decide finally who should pay for the repairs which were necessary

to be effected to the property because the flooding was outside the terms that had been agreed in 1964 which were, amongst other things, that the tenant would be responsible for all repairs. It became clear that the parties could not agree and therefore in due course by letter addressed to Advocate Voisin himself, acting on behalf of the plaintiffs, by Advocate Day of Crills, acting on behalf of C. Le Masurier Limited, and dated 17th February, 1988, notice was given that an official Viscount's notice in accordance with the Law of 1919 was to be served on the plaintiffs, requiring him (it actually mentioned Mr. Alker personally) to leave the Auberge du Nord at Christmas, 1989.

However, Mr. Day concludes his letter with the following paragraph: "My client company hopes it will be possible to agree a date upon which your client would voluntarily leave the Auberge. Accordingly and until further notice, supplies of goods will continue on a cash on delivery basis." It seems to us that that letter leaves open the possibility of further negotiations before finally taking the step of eviction of the plaintiffs.

However that did not appear to be the case because the notice was formally sent in December, 1988; the Viscount was instructed on the 14th December, and service was effected on the 15th December, 1988, accordingly. The notice expired on the 29th December, 1989.

If the plaintiffs in this action had wished to challenge the validity of that notice, they would have had to bring a notice against the landlords in accordance with Article 2 of the Loi (1946) concernant l'expulsion des locataires réfractaires. I pause for a moment to say that there was a submission by Mr. Voisin that because, before the expiry of the year, an Order of Justice was brought by the plaintiffs to which I will refer in a moment, the 1946 Law could not have applied because at that stage the plaintiffs were not yet 'locataires réfractaires'; they could not become that until they, so to speak, overstayed the expiry date of their notice. I do not think it is necessary for me to rule on that point, but it is clear that if the plaintiffs in this case had wished to argue that the notice to quit was

invalid, when it was served on them in December, they should have done so within a month of receiving it, which is the requirement of Article 2: "dans le courant d'un mois après avoir reçu ledit avertissement".

They chose not to do so for reasons which are not entirely clear to us but it seems, from what Mr. Voisin said and from the pleadings, that in January 1989, after the month had expired, Mr. Voisin was informed by Advocate Day that in fact the notice would not be proceeded with because it had been issued as a precautionary measure. I have mentioned Mr. Day's earlier letter of 1988 and his statement in January 1989 seems quite consistent with the last paragraph of that letter. Therefore the conclusion the Court reaches is that at that time the plaintiffs in this action might well have believed that the notice was in fact merely precautionary.

Whether that is so or not the effect of their failing to take action is this: the law is quite clear; if the case were to continue in the Petty Debts Court, the Magistrate would have to apply the remaining provisions of the law which are set out in Articles 3 and 3A of the 1946 Law. He would be obliged to do so because as L'Auberge du Nord contains, we are told, more than two vergées, he would not be able to grant a delay to the immediate expulsion of the plaintiffs from the premises. That would be the effect of a strict application of the law. It was obviously a great worry to the plaintiffs because in December, 1989, before the expiry of the notice, they obtained from me an Order of Justice including an interim injunction preventing the defendants, C. Le Masurier Limited and Mr. Clarke "from taking and/or pursuing any further steps including the institution of eviction proceedings in the Petty Debts Court, to evict the Plaintiffs from the premises". The reason for the wording there is that of course apart from sending the notice the matter had not yet been heard by the Petty Debts Court and therefore to that limited extent Mr. Voisin is right when he says that the Order of Justice was not in respect of exact parallel proceedings in the Petty Debts Court which position was the subject of a judgment in Forster -v- Harbours and Airport Committee (24th January, 1990) Jersey Unreported, C. of A. It is

fair to point out that I did not then have that judgment of the Court of Appeal available to me because it had not been given when I signed the Order of Justice. That does not mean to say that had I had it I would necessarily have refused to sign the Order, for reasons which will become apparent in a moment.

There was some delay in dealing with the Order of Justice itself because it was not tabled for the proper Friday and as a result of that and because of the decision of this Court in Racz -v- Perrier and Labesse (1979) JJ 157 the action for an injunction was deemed to have been discontinued and therefore the injunctions lapsed and it therefore opened the way for the defendants to proceed in the Petty Debts Court. But before they could do so and before the matter could reach the Petty Debts Court the plaintiffs re-served the Order of Justice upon the defendants.

The Order of Justice asked the Court to do a number of things.

Apart from the interim injunction it asked the Court to order: "that the First Defendant withdraw the notice to quit so that the Second Plaintiff might remain in occupation as Tenant of the premises for such period and at such rental as the Court might deem just; or in the alternative (b) that the First and/or Second Defendants pay to the First and/or the Second plaintiffs the sum of £390,000 or such sum as the Court might deem just, in respect of the works of repair and refurbishment of the premises undertaken by the Plaintiffs, and the goodwill of the business of the Second Plaintiff; (c) that the Defendants pay to the Plaintiffs general damages; and (d) that the Defendants pay the costs of and incidental to this action".

In the course of looking at Mr. Alker's affidavit and reading the correspondence and the pleadings, it is clear that the plaintiffs claim that over a period of time they have expended substantial amounts of money on renovation and improvement at the premises. In the affidavit Mr. Alker deposes that the works cost in excess of £172,000 and he was obliged to borrow monies from third parties to finance them and they remain outstanding.

In part of the pleadings it is suggested that there was a meeting in 1986 between an intermediary, a mutual friend of the parties, in which it was agreed by the second defendant (who, as I have already said, is the alter ego of the first defendant) that provided the plaintiff and his company observed the terms of the lease and did not (putting it in general terms) get into trouble under the Licensing Law, they could have an indefinite continuation of their tenancy. Exactly what that means and the effect of it, is not for me to say at this stage except that that conversation is denied to the extent that all that was promised by Mr. Clarke was that if the defendants fulfilled their obligations under the lease and did not fall foul of the licensing law, their present arrangements, as agreed in 1964, could continue. That is to say, they could have an ordinary common law lease which under the terms of the 1919 Law could be terminated by giving one year's notice. That is a matter of dispute and it is a matter which at some time will have to be resolved by this Court.

Mr. Michel, on behalf of the defendants, has brought a summons before this Court upon which we have to adjudicate. The summons asked the Court: "a) either to raise or quash the interim injunction" (to which I have already referred) and "b) strike out the prayer of paragraph 2A" (again, to which I have referred) that is to say, requiring the first defendant to withdraw the notice to quit. And secondly: "to stay the present proceedings in so far as they relate to general and/or special damages until such time as the Magistrate of the Petty Debts Court shall have decided upon the first defendants' application for an expulsion order or any appeal therefrom". There is also an application that the defendants' costs should be paid on a full indemnity basis.

The difficulty which faces this Court is this: to allow the defendants to proceed in the Petty Debts Court - because it is clear from the judgment of the learned Court of Appeal in the case which I have just mentioned, that of Forster -v- Harbours and Airports Committee, that the question of expulsion of refractory tenants is within the sole competence of the Petty Debts Court - would be to

deprive the plaintiffs absolutely of certain rights which they claim they now have. In our view a subsequent adjudication of damages, if found to be due by this Court, would be insufficient compensation. Furthermore, although the Court of Appeal in the Forster case upheld the principle which this Court had already stated in the Court of first instance that it was the Petty Debts Court which had the sole competence to deal with the eviction of refractory tenants, it also said that this Court was not precluded from adjudicating on the terms of a tenancy; it said that it would require very clear words in any statute, such as the 1946 Law, to preclude this Court from adjudicating on a lease. So this Court is not shut out from looking at a lease. We think that if, as I say, we allowed the defendants to proceed in the Petty Debts Court then the law if it took its course would conflict without any doubt in our view with the principles of Equity which we have followed in this Court.

Furthermore, it might be that the Petty Debts Court is prevented from considering the point of Equity and the matters raised by the plaintiffs in the course of today's hearing, such as the alleged promise to allow them an indefinite lease and the spending of money and therefore the promissory estoppel matter which arises from the latter point, firstly because an application to submit that the original notice was ultra vires could not be heard by the Petty Debts Court because it was out of time and secondly because there is some doubt in our mind, but I do not think it is necessary to decide this point, as to whether the Petty Debts Court is fully seized of equitable jurisdiction.

As I say these two matters would make it impossible for the plaintiff or his company to advance in the Petty Debts Court the very points which he raises and has raised today through Mr. Voisin and in his affidavit, which was before me, that it would be inequitable for him and his company to be removed summarily from these premises which he has occupied for such a long time.

If one looks at 4 Halsbury 16 para. 1271, which gives one the reasons for imposing injunctions, we find the following in the latter part of the paragraph:

"For practical purposes, it is sufficient to regard injunctions as having been designed (1) to prevent the improper use of legal proceedings, or to remove technical impediments to their proper use; and (2) to prevent the infringement of public or private rights, either temporarily before the right had been ascertained, or permanently after it had been ascertained".

And paragraph 1272:

"The practical importance of the first head has disappeared with the fusion of the administration of law and equity". (Well it has not disappeared as far as Jersey is concerned because I am not at all sure as I have said that equity and law has been fused, to the extent that it has been here in this Court, in the Petty Debts Court). "One of the reasons for the growth of equity being the necessity for correcting the strictness of the law, it was inevitable that equity should have the power of preventing the plaintiff at law from profiting by that strictness, and this it did by forbidding him to proceed on his legal judgment, but equity did not impugn the legal judgment as such. It recognised the judgment, but prevented its unconscientious use".

We think for that reason to allow Mr. Michel to rest on his legal rights - and he is correct when he says and we would not challenge it because we are bound by the Court of Appeal's judgment that the Petty Debts Court is the sole Court to deal with eviction of refractory tenants - and allow the defendant to proceed that would in fact be permitting his clients to profit by the strict observance of the law.

Therefore, should the injunction remain? We look at the authorities, and they have been set out very fully in this Court by Mr. Commissioner Hamon, in the case of Wood -v- Establishment Committee (15th May, 1989) Jersey Unreported. In that judgment the learned Commissioner refers to the principles of English law which have been applied in this Court on several occasions now and are set out, of course, in the well-known case of the American Cyanamid Co

-v- Ethicon, Ltd (1975) 1 All ER 504; (1975) A.C. 396. At p.10 of the Wood judgment, the Court says this:

> "They may be summarised as follows: (that is to say the principles):
> (1) the plaintiff must establish that he has a good arguable claim to the right he seeks to protect.
> (2) the Court must not attempt to decide this claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried.
> (3) if the plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on the balance of convenience.
> These principles are less rigorous than those which were previously applied, and which required higher proof from the plaintiff. They thus increase the court's jurisdiction to grant relief. But whether this relaxation greatly affects the result is more doubtful; the balance of convenience may often be tipped in favour of the party who seems to have the better case; see, e.g. American Cyanamid Co. supra,..." (and a number of other cases).

The learned Court in Janet Wood also went on as follows:

> "Bean on Injunctions puts it this way -
> "The decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd (1975) AC 396 clarified, or (in the opinion of some practitioners) revolutionised, the approach of the courts to interlocutory applications inter partes for prohibitory injunctions. The guidelenes laid down by Lord Diplock are regarded as the leading source of law on the subject, although, as the Court of Appeal point out in Carne v. Global Natural Resources plc (1984) 1 All ER 225 they are based on the proposition that there will be a trial on the merits at a later stage when the rights of the parties will be determined: and in reality this only happens in a very small percentage of cases.

The guidelines may be conveniently discussed under the following headings:

(a) a serious question to be tried:

(b) inadequacy of damages:

(c) the balance of convenience:

(d) special cases"."

It seems to us at this stage that the question of damages is very important. If Mr. Alker and his company were evicted, he would not only lose his house, but he would lose the chance of recovering, if his claims are well founded, from the defendants,the money which,he has claimed,he has expended on their property. They would as he has said, and claimed, be exercising a case of unjust enrichment.

It seems to us that at this stage damages in such a case if Mr. Alker and his company are right, would be inadequate. There is of course authority for suggesting that the Court will find that in certain cases damages where property of this nature is affected, are inadequate.

We have come to the conclusion, therefore, that looking at the four requirements referred to by the learned Court in the Wood case, there is clearly a serious question to be tried; it is obviously serious that the defendants had promised certain matters to the plaintiff which clearly affected his decision to spend money on the premises. And the chance, as he has said through Mr. Voisin, eventually of recovering the money through trade. As to what period of time that is a matter to be decided in due course. Secondly, we have already stressed that in our view damages will be inadequate and the balance is clearly in favour of the plaintiffs in this case. Thirdly, the general position of the balance of convenience again is in favour of the plaintiffs and we do not consider that there is a particular special case which enables us to say that any special facts outweigh those three matters and bring down the scales in favour of the defendants.

Therefore we have come to the conclusion that the application to strike out and prevent the matters being dealt with by this Court fails

and the summons is therefore dismissed. We think it right under the circumstances because the plaintiffs have succeeded in their defence that they should have their costs.

Authorities

Racz -v- Perrier and Labesse (1979) JJ 151.

Forster -v- Harbours and Airports Committee (24th January, 1990) Jersey Unreported C. of A.

Le Nosh -v- Stirling (30th April, 1990) Jersey Unreported.

Loi (1946) concernant l'expulsion des locataires réfractaires, Articles 1, 2, 3, 3A.

Loi (1919) sur la location de biens-fonds, Article 1.

Pirouet -v- Pirouet (1985-86) JLR 151.

York Street Pharmacy -v- Rault (1974) JJ 65.

Royal Court Rules, 1982, Rule 6/13.

4 Halsbury 16 para. 1271, 1272.

R.S.C. (88 Ed'n) O.29/1/2 p.472.

American Cyanamid Co -v- Ethicon, Ltd (1975) 1 All ER 504; (1975) A.C. 396.

Evans Marshall and Company -v- Bertola (1973) 1 All ER 992.

4 Halsbury 24 para. 1028.

Channel Islands & Int'l Law Trust Company, Limited and Others -v- Pike & Others (30th January, 1990) Jersey Unreported.

Jarden Morgan International, Limited -v- Holderness (1st June, 1989) Jersey Unreported.

Wood -v- Establishment Committee (15th May, 1989) Jersey Unreported.

Royal Bank of Scotland -v- Citrusdale Investments, Ltd (1971) 3 All ER 558.

Loi (1853) établissant une Cour pour le recouvrement de menues dettes.