Under Water Centre (Pty) v Beau Vallon Properties

(2009) SLR 205

Kieran SHAH for the appellant
William HERMINIE for the respondent

Judgment delivered on 2 March 2009 by:

PERERA C J: The appellant is the lessee of premises at the Coral Strand Hotel, Beau Vallon, owned by the respondent company, the lessor. In an application dated 9 April 2008 to the Rent Board, the respondent averred that the appellant was given three months' notice of intention to terminate the Tenancy Agreement, and invited them to "tender new proposals" with regard to the premises. It was also averred that the Coral Strand Hotel will close down in May 2008 for renovation and hence the appellant should vacate the premises urgently. "Renovation" which is a ground under section 11 (1), is not a ground for eviction. Once renovation was completed the former lessee had to be offered repossession before letting it to another person. Hence there was no ground for ejectment pleaded in that application.

After notice of that application was sent to the appellant with notice of a Mention date on 25 April 2008, the respondent filed an amended application dated 10 April 2008 wherein paragraph 2 of the original application was amended to read as -

> In the month of November 2007, the appellant gave three months' notice to the respondent of its intention to terminate the agreement as it requires the premises *for renovation and thereafter for occupation/business by the applicant.*

In an amended application, the respondent combined section 11(1) with a ground for ejectment under paragraph 11(1)(c). Such pleading was misconceived, as after renovation the premises had to be offered back to the former lessor. Hence ground (1)(c) ought to have been pleaded separately.

The appellant in answer to the application dated 9 April 2008 averred that as it had paid rent regularly since 1976, the purported notice to terminate the agreement did not affect its legal rights in general and protection as a statutory tenant in particular. It was further averred that it any event, even if it vacated to permit renovation works, it was entitled to be restored to possession after such work was completed.

However, upon being served with the application dated 10 April 208, the appellant filed an amended answer reiterating the earlier averments, and adding that -

> The applicant is not acting reasonably and does not require the premises for its occupation/business as alleged at all. The applicant in an attempt to

> sabotage the respondent's business has disconnected the electricity supply to the premises the respondent leases, and despite many requests for the applicant to reinstate the electricity supply, the applicant has not done so.

Admittedly, Coral Strand Hotel came under new management on 7 September 2007. Denis Verkhorubov, the Financial Director of the said hotel testified before the Rent Board that the management undertook an overall renovation of the hotel premises, and hence it was necessary that the premises occupied by the appellant as a Diving Centre had also to be renovated. On 30 November 2007, a notice of "invitation to tender" was published in the *Seychelles Nation* newspaper, inter alia for a "centre for diving activities". That notice had the usual clause that "the management reserves the right not to accept the highest or any bids". Mr Verkhorubov stated that the appellant did not respond to that notice and claimed that he was a statutory tenant. He also stated that subsequently the management changed its mind and decided to use it as an office.

Mr Sergi Ergorov, the Project Manager also testified before the Rent Board that water and electricity had to be disconnected in the course of the general renovation work, and hence it affected the appellant. He also stated that the premises being occupied by the appellant is needed to be used as an office for a construction of another hotel in the same locality by Guta Group, which is a subsidiary of the Beau Vallon Properties Ltd.

The appellant had testified that the premises occupied by him was in a reasonably good condition, and that all that was required was repairs to the ceiling, and painting of the walls, which could be done while he was in occupation. He further stated that he has been doing business in underwater activities and won many national awards. He has also contributed to tourism development through "Subios" and given the hotel significant business. In the year 2007, it was about 47,000 Euros.

The Rent Board upon considering the evidence in the case, delivered its decision on 21 October 2008 ordering the appellant to vacate the premises within three months. The Board based its decision on the fact that the said hotel had changed ownership and that the new owner wanted a "change of use" of the premises occupied by the appellant. The Board has not considered the proviso to section 10 which states that no order shall be made on any ground specified in paragraph (9), (i), (j) and (k) if the Board is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the lessor or lessee, greater hardship would be caused by granting the order than by refusing to grant it. There was evidence on record that the respondent company first sought to terminate the agreement, and at the same time provide an opportunity to the appellant to tender for the business which he was engaged in for the past 30 years. As the appellant did not respond, the ground for ejectment was changed to the ground in section 13 (l) (k), that the premises are reasonably required by the lessor for business, trade or professional purposes or for public service. According to the evidence, the premises were needed by the lessor to use as an office when a hotel project in the vicinity commences. Paragraph (k) applied only if the requirement arose for the lessor. The Contract of Tenancy was between

Beau Vallon Properties Ltd and the appellant, in respect of premises which are part and parcel of Coral Strand Hotel. Hence although the "Guta Group" may be a subsidiary of Beau Vallon Properties Ltd, the appellant who has no connection with the other hotel project, was in the position of a third party. In these circumstances, the requirement of an office was for the benefit of another hotel project, which is a separate legal entity.

In the case of *Brice v Bronze (No 2)* (1969) SLR 256, the ground relied on for ejectment was ground (i), that the premises are bona fide required for the purpose of being demolished, reconstructed, moved or improved. That Court relied on paragraph 1717 of *Halsbury* (3rd Ed) wherein it is stated inter alia that -

> ….. the intention (to demolish etc…) must be genuine, not colourable; it must be firm and settled intention, not likely to be altered, and there must be ability on the landlord's part to carry it out. The intention to demolish or reconstruct need not, however be the only or primary intention." The critical time when the intention must be shown to exist is the time of hearing, and it need not be shown to have existed previously. The question of existence of the necessary intention is one of act.

In that case, the lessee admitted that the house had to be demolished and sought time to vacate. However in appeal Sauzier J stated that limited admission did not amount to an admission that the landlord, bona fide required it to be demolished. Hence it was the duty of the Board to satisfy itself that the intention of the landlord was genuine, firm and settled.

In an application under paragraph (k), the same interpretation would apply. Before making an order for ejectment under any ground under section 10(2) and 13(1), the Board has to consider whether it is reasonable to make such order. The issue of reasonableness is always an objective one. Megarry on *The Rent Acts* (8th Ed) 238, states -

> The Court must consider not whether the *landlord's desire* for possession is reasonable to make an order of possession, for, because a wish is reasonable, it does not follow that it is reasonable in a Court to gratify it.

In the present case, the Project Manager Sergi Ergorov was only able to give the name of the company that proposes to build another hotel, but did not know to whom the land belonged. The Board was not provided with any proof of such construction. Hence, like in the case of *Brice* (supra), the Board only relied on the evidence of the respondent's witnesses as regards another hotel project, and the need for the premises occupied by the appellant for an office to serve that project. Further as stated earlier, the ground under paragraph (k) cannot apply to a situation where the lessor is seeking the leased premises on the ground of reasonable requirement, when the requirement arises outside the contractual nexus between the lessor and the lessee, as the lessee in those circumstances would be a third party to that ground for ejectment. Paragraph (k) is for the benefit of the lessor to obtain the leased premises for his business, trade or

professional purposes, and not those of any other person or company.

The Board therefore misdirected itself when it held that the premises were reasonably required by the respondent for purposes set out in paragraph (k).

Apart from the misdirection on this aspect of mixed law and fact, the Board also misdirected itself on law when it held that the burden of establishing statutory tenancy and hardship rested with the lessee. Pursuant to section 12 (1), when the lease expires, statutory tenancy begins, and the lessee retains possession of the premises "so long as he retains possession observe and be entitled to the benefit of all the terms, expressed or implied in the original contract of letting so far as the same are consistent with the provisions of (the) Act". Admittedly, the appellant had been a lessee of the respondent for about 30 years and had paid rent regularly and complied with all the conditions of the contract. Hence the Board was wrong in holding that a statutory tenant could be ejected by giving sufficient time to vacate.

As regards the balance of hardship, the Board stated that the fact that the appellant was a lessee for 30 years and was engaged in underwater activities through Subios was not a sufficient ground to the question of hardship being decided in its favour. That was not the sole ground relied on by the appellant for that purpose. The evidence in the case was that the lessor was seeking to evict the lessee to benefit the business of a separate company, though in the same group of companies. The premises occupied by the appellant for so long was sought to be used as an office to administer the site work of the construction of a hotel by the other company. There is no reason why a temporary office could not be constructed within the building site as is the normal practice in such projects. On the other hand, the business activity of the lessee necessarily requires a beach front. As was held in *Cumming v Dawson* [1942] 2 All ER 653, a judge must take into consideration all relevant circumstances "in a broad commonsense way as a man of the world". This, the Board failed to do.

Hence, in view of the innumerable misdirections in law and mixed facts and law, the decision of the Board cannot stand. Section 22 (i) empowers this Count to "affirm, reverse, amend or alter the decision appealed from". Consequently, for the reasons stated, the appeal is allowed, and the order of ejectment made by the Rent Board is set aside.

The appellant will be entitled to costs.

Record: Court of Appeal (Civil No 18 of 2008)