

Civil Side: CA17/2015

Appeal from Rent Board Decision 41/2015

[2016] SCSC 445

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William Herminie

Appellant

versus

Seychelles Pension Fund

Respondent

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Heard: 11<sup>th</sup> May 2016 (Written submissions 1<sup>st</sup> and 15<sup>th</sup> June 2016)

Counsel: Anthony Derjacques for appellant

Joel Camille for respondent

Delivered: 23<sup>rd</sup> June 2016

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## JUDGMENT

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**M. TWOMEY, CJ**

- [1] The Appellant is a tenant of the Respondent and signed a lease Agreement to that effect on 8<sup>th</sup> November 2012 in which he agreed to pay a monthly rent of SR16, 646.10 in advance and no later than the first of the month.
- [2] The Respondent applied for an order for ejection and payment of arrears of rent against the Appellant in September 2014. At the time of the application the Appellant was in

arrears of rent in the sum of SR 123,923.60. By the time the matter was heard the arrears amounted to SR341, 958.02.

- [3] During the course of the proceedings the Appellant settled all arrears of rent but the Respondent proceeded with the application for ejectment on the basis that there had been constant breaches of the lease agreement over its lifetime in that the Appellant had consistently failed to make the monthly payments as agreed.
- [4] In a decision granting the ejectment of the Appellant, the Rent Board found that the rent payments had indeed been very erratic and not in accordance with the terms of the lease agreement signed by the parties.
- [5] The Appellant has filed an appeal against this decision on the grounds summarised as follows:
1. That the Tribunal was obligated in law to consider whether or not the eviction order would cause greater hardship to the Appellant regardless of the breach
  2. That the Tribunal erred in law in failing to consider that all arrears of rents due were paid prior to the date of hearing of the application
  3. That the Appellant is an Attorney and the premises are his chambers
  4. That the Appellant was contrite and guaranteed monthly and timely payment
  5. That the Appellant had a number of dependants, including family, children and employees with his chambers.
- [6] In support of these grounds of appeal the Appellant has submitted that a reading of the decision of the Board disclosed that the Appellant's defence of hardship was not considered and further the reasonableness of the order sought was not addressed by the

Board. Mr. Derjacques for the Appellant has relied on sections 10 (2) Control of the Rent and Tenancy Agreement Act (Cap 47) (the Act) which requires the Rent Board in certain circumstances to enquire whether greater hardship would be caused in granting an order for ejection rather than refusing it.

- [7] He has also submitted relying on *Hoareau v Mousbé* (1982) SLR241 that the Rent Board has a wide discretion and must take into account all relevant considerations.
- [8] Replying to the Appellants' submissions, Mr. Camille for the Respondent has submitted that section 10(2) of the Act does not apply in the present case given the fact that the Appellant had been in substantial arrears of rent. He invited the Court to consider especially the evidence of Suzelle Cafrine, the compliance officer who testified that rent had been paid sometimes once a year to cover a few months' rent or had not been paid for months at a time which was in clear breach of the Lease Agreement.
- [9] He also submitted that no evidence was brought by the Appellant to support the fact that he would suffer greater hardship than the Respondent if the ejection was ordered and that in any case such a consideration was not proper in respect of an application for ejection on grounds of non-payment of rent. He relied for these submissions on the case of *Marrs v Adam*(No. 3) (1973) SLR 343 and *Seysteel v Tropicolour*(1989) SLR 278.
- [10] Lastly he submitted, the fact that at the time of hearing the rent had been paid by the Appellant has no bearing on the case since the Act only protects those tenants who fulfil their obligations by paying their rent timeously. He relied on the authority of *Dugasse v SHDC* (2006) SLR149.
- [11] Three issues have been identified in this appeal: whether section 10(2) of the Act, namely the balance of hardship has any application in cases of non-payment of rent, whether the consideration of reasonableness of an ejection order is available in circumstances where rent has not been paid and whether the payment of arrears of rent at the time of making an order precludes the Rent Board from making an order for ejection of tenant.
- [12] In terms of the issues raised, it is important to reproduce in relevant part the provisions of section 10 of the Act:

(2) No order for the recovery of possession of any dwelling house to which this Act applies, or for the ejection of a lessee therefrom, shall be made by the Board unless

(a) any rent lawfully due from the lessee has not been paid, or any other obligation of the tenancy (whether under the contract of tenancy or under this Act) so far as the same is consistent with the provisions of this Act, has been broken or not performed;

...

*Provided that an order shall not be made or given on any ground specified in paragraphs (g), (i), (j) and (k) (as added by section 13(l)) 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 the lessee, greater hardship would be caused by granting the order than by refusing to grant it.*

[13] Paragraphs g, i, j and k concern circumstances where the premises are required by the lessor or his family or a co-owner for their own use, a local authority or statutory undertaking for the purpose of the execution of its statutory duties, or where the premises need to be demolished or require repairs or are reasonably required by the lessor for business, trade or professional purposes or for the public service.

[14] It must also be noted that business premises are covered by the provisions of the Act by virtue of section 13 which states:

*This Act shall apply to any premises used for business, trade or professional purposes or for the public service as it applied to a dwelling house and as though references to a "dwelling house", "house" and "dwelling" includes references to any such premises...*

[15] It is clear from the above provisions firstly that an eviction order may be made where rent has not been paid and secondly that the consideration of the balance of hardship on the lessor and lessee is only necessary in the specific circumstances provided by the Act which does not include circumstances where rent has not been paid by the lessee. This ground of appeal therefore has no merit.

In terms of the second issue, that is, whether the order was reasonable, this Court relies on the authority of *Horizon Trading v. Srinivasan Chetty* (unreported) Civil Appeal 8/1993) in respect of the test for reasonableness to be applied in such cases. An objective rather than a subjective test should be applied. In *Arnold v Britton & Ors* [2015] UKSC 36 in construing a contract, Lord Nueberger identified six factors relevant to the objective standard of reasonableness namely: the natural and ordinary meaning of the clause in the lease; other relevant provisions in the lease; the overall purpose of the clause and the lease; the facts and circumstances known or assumed by the parties at the time the document was executed and commercial common sense.

[16] This Court endorses such an approach to reasonableness in deciding whether an order for eviction should be made. The Respondent in this case is a statutory body and realises profits from the leasing of premises. The Appellant was a lawyer and well versed with provisions of lease agreements especially his own which specified that rent without any deduction should be paid on time.

[17] Further in *Hoareau v Mousbé* (1982) S.L.R. 241 Seaton CJ stated that:

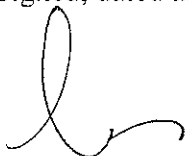
*On the question of reasonableness there is the widest discretion to the making of the order. The Board must take into account the relevant circumstances at the date of hearing, bearing in mind that certain minimum standards are required of a statutory tenant, including that he should not fail to pay such sums as are legally due to his landlord”.*

In his view, in considering whether the Board had exercised its discretion under the first proviso to Section 10(2) the Court:

*“...should not disturb a finding on the issue of reasonableness if it is satisfied that every relevant consideration has been duly weighed, even if it might have to come to a different view thereon... Admittedly once the board had found that the Respondent was in arrears with his payment of rent, the onus shifted on the Respondent (Tenant) to prove it was not reasonable for the board to order his eviction”.*

- [18] In the present case as rightly pointed out by Counsel for the Respondent ample evidence was brought showing the erratic payment of rent and the constant default by the Appellant in paying his rent on time or at all. It was only when the eviction application was made that the Appellant seems to have been spurred to make an effort to pay.
- [19] The third issue is also not sustainable as payment of rent by the time the application is made does not absolve the Appellant from the breach of the lease agreement. In *Dugasse v SHDC* (2006) SLR 149, the Court went even further to say that a tenant who falls in arrears of rent is not protected by the Act as the Act is designed to protect tenants who fulfil their obligation and is not to be construed to penalise the landlord. The Court also pointed out that the fact that all arrears and future rent up to a certain time is made still does not oblige the Board not to make an order of eviction.
- [20] In the present case given the constant non-payment of rent by the Appellant and the quantum of arrears of rent owing at the time the application for ejection was made, together with the failure of the Appellant to explain why he had fallen in such arrears or failed to pay his rent on time, I am of the view that the order of the Rent Board was reasonable in the circumstances and that the order should not be disturbed.
- [21] Section 22 (i) empowers this Court to “affirm, reverse, amend or alter the decision appealed from”. I affirm the decision of the Rent Board and for the reasons stated, the appeal is refused, and the order of ejection made by the Rent Board affirmed.

Signed, dated and delivered at Ile du Port on 23<sup>rd</sup> June 2016



**M. TWOMEY**  
Chief Justice