

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION**

1997/CLE/gen/00629

Between

LAWRENCE MCKINNEY

Plaintiff

AND

BAHAMAS DEVELOPMENT BANK

First Defendant

AND

ROOSEVELT BUTLER

Second Defendant

AND

KIM ROLLE

Third Defendant

Before: Deputy Registrar (Acting) Carol Misiewicz

Appearances: Glenda Roker for the Plaintiff

Barry Sawyer (holding brief for Christopher Francis) for the Second
and Third Defendants

Hearing Date: 24 January, 2018

RULING

1. This is an Assessment of Damages consequent upon the Judgment given by her Ladyship Madam Justice Claire Hepburn on 2 May 2014.
2. In this action, begun by writ in 1997, the Plaintiff had claimed damages against the Bahamas Development Bank (the First Defendant) for loss of his mortgaged property, a restaurant called Outback Restaurant located on Thompson Boulevard, which the Bank had sold to the Second and Third Defendants, purportedly pursuant to a power of sale contained in a mortgage.
3. There was also a claim by the Plaintiff against the Second and Third Defendants, who were his tenants in the premises prior to the Bank exercising the power of sale.
4. It does not appear that a perfected Order embodying the terms of the Judgment was ever drawn up by counsel for the Plaintiff, however, the relevant portion of the Judgment for the purpose of the Assessment proceedings is at paragraphs 68 to 72. Her Ladyship awarded \$85,000.00 in damages to the Plaintiff on his claim against the Bank for the improper exercise of the power of sale; the Plaintiff said during the Assessment Hearing that this amount has been satisfied. The action therefore continues only as against the Second and Third Defendants, whom I shall henceforth refer to as "the Defendants". According to the Judgment of Hepburn J, the Defendants are liable to the Plaintiff for the following reasons:

"68. Butterfield and Rolle accepts (*sic*) that they rented the mortgaged property from the Plaintiff for \$2,500.00 per month; that they ceased paying rent on July 17, 1995; that the sale was completed in May 1996, 10 months later; that they occupied the property for 10 months without paying rent to the Plaintiff. The sum of \$25,000 is therefore due and owing by the Defendants to the Plaintiff and Judgment is entered against Butterfield and Rolle in that amount."

"69. The Plaintiff alleges that during the time the Plaintiffs occupied the property his chattel property which were included in the rental agreement between Butterfield and Rolle within the premises was destroyed. Until the execution of the conveyance from the Bank to them, the Plaintiff was still the owner of the chattels in February 1996 the chattels belonged to him. Butterfield said they got rid of the chattels because they were vermin infested and of no worth. It would follow then that damages ought to be given for the destruction of his personal property, to which he still owned regardless of the state or condition of it."

5. According to paragraph 13 of the Amended Statement of Claim filed 8 September 2003 the value of the equipment alleged by the Plaintiff to have been in the restaurant was

\$100,000.00. The Learned Judge heard evidence from the Plaintiff as to the items in the mortgage property, and found thus:

"70. The Plaintiff's evidence as to the items that were in the mortgaged property during Butterfield and Rolle's occupation as tenants of the Plaintiff are as follows:

- i) Table and chairs
- ii) Booths
- iii) Freezers, refrigerators, walk-in freezers
- iv) Screens
- v) Carpets
- vi) Air conditioners
- vii) Deep fat fryers
- viii) Stoves, desks
- ix) Couches
- x) Automatic fire
- xi) Electric salad bars."

6. The Learned Judge found that the Defendants did not dispute the Plaintiff's evidence about what items were in the premises, and also noted that the Plaintiff did not produce evidence of the value of the chattels other than his estimate (*Judgment para.71*).
7. Notice of Assessment of Damages was filed on 21 October, 2014. For no doubt varying reasons, somehow the assessment did not come on for hearing until earlier this year.
8. I heard evidence in this matter on 24 January 2018. The Plaintiff gave sworn testimony. I found him to be most unhelpful and difficult. Most of the time he either did not answer, or gave vague or incomprehensible answers, whether to questions from the Court, opposing counsel or even his own counsel, to even the simplest and most straightforward questions. For example, when his counsel asked him what was the date of the quote for equipment that he received from Nassau Hotel and Restaurant Supplies, the Plaintiff answered: "Whatever date is on it." (See transcript p.8 line 3.)
9. Then at the start of cross-examination by counsel for Mr. Butterfield, Mr. Sawyer asked the Plaintiff if he could tell the court when were the tables and chairs purchased, and the Plaintiff replied baldly: "No." It was only after some prodding from the court Mr. McKinney eventually explained that the subject items were in the building when he purchased it. He was not sure about his date of purchase, saying it could have been in 1989, 1990 or

1995. According to the Amended Statement of Claim the Plaintiff mortgaged the property to the Bahamas Development Bank in 1991, so it is likely that his purchase of the building was in or around that time. Although the Plaintiff immediately then contradicted himself and said the building was empty when he bought it, and that he had purchased the equipment. His evidence under cross-examination about the items he purchased, such as what, when and where was vague, thus it is likely that his first answer was correct. It is not necessary for these proceedings to determine that issue although it negatively affects the Plaintiff's credibility.

10. Also, this is important evidence regarding the value of the chattels that are the subject of the claim, and no doubt explains why the Plaintiff was unable to offer any more or clearer evidence about what items were on premises and their value. Mr. McKinney produced a bundle of documents containing either quotations or estimates of supplies and equipment, to support his claim for the value of those items. He demonstrated no familiarity or knowledge of the contents of the quotations or even reasonable knowledge of what the contents of the restaurant were at the time he granted the lease to the Defendants. This is consistent with Mr. Butterfield's evidence that the restaurant had been vacant at the time he took the lease. I accept Butterfield's evidence that in fact it was about one full year before he was able to go in and occupy because of the outstanding electricity bill which had to be cleared so that he could have power supplied to the premises.
11. The Plaintiff had no appraisals done for the items, did not know their value in 1995, and could not say what the commercial life of the items was, although he admitted that they would have depreciated in value from the time he acquired them. He denied that the items (for example the stove, deep fryer or freezer) were in a state of disrepair when the Defendants entered possession under the lease.
12. The Plaintiff relied upon a Bundle of Documents giving values for items in 2017, when clearly, whatever items were in the premises when the Defendants leased it were not new, and in some cases, were not even functional. As Hepburn J found and was likewise the case at the hearing before me, the Plaintiff had no evidence of the value of the chattels other than his own personal estimation. That estimation of them being worth on the order of \$100,000 is fanciful.

13. It is convenient to note here that Hepburn J found as a fact that there was no evidence to support the claim that repairs were made to the mortgaged premises by the Plaintiff. The Plaintiff tried to assert during the course of the Assessment Hearing that he carried out repairs during the Defendants' tenancy, which the Defendants disputed, and which evidence I also reject.

14. Mr. Butterfield made every effort to be both forthright and fair during examination in chief and cross examination, even to the point of testifying to facts against his own interest. He has even maintained possession of the items that were in the building (aside from the carpet which had a stench and had to be removed) in order to be able to return them to the Plaintiff if ever called upon, at obvious personal cost and inconvenience. Therefore when it comes to whose evidence to believe as to the contents and value of items left in the restaurant by the Plaintiff, I prefer the evidence of Mr. Butterfield, on behalf of the Defendants.

15. Using the list contained in paragraph 70 of the Judgment, and based upon Mr. Butterfield's evidence as to what items were there and the condition of the equipment, I find as follows:

- i) **Tables and chairs.** In the quotation from Nassau Hotel & Restaurant (2012) Ltd ("NHR") dated 16 August 2017 there is a line item for 120 padded stacking chairs at a cost of \$79 each. The Plaintiff has not said how many chairs were in the restaurant and so I accept the count given by the Defendants. Also, the quote gives a value for new chairs in 2017, whereas we are concerned with the state of affairs when the Defendants occupied some 20 years prior, in or about 1996, for chairs that were at least 5 or 6 years old at that time. The amount in the NHR quotation is rejected. I accept the evidence from the Defendants that there were 10 tables and about 40 chairs, valued together at \$2,150.00.
- ii) **Booths.** There were some large and some smaller booths, with an estimated total value of \$800.00.
- iii) **Freezers, refrigerators, walk-in freezers.** Only the doors of the walk in freezer had a value, of \$200. The box freezer was valued at \$300. I accept Mr. Butterfield's evidence that there was no refrigerator, and the assess the amount for the walk- in freezer and box freezer at \$500.00.

- iv) **Screens.** Mr. McKinney supplied a quote for a flat screen TV, however, I do not accept that "screens" on this list meant a television set or sets. Mr. Butterfield does not know what screens this might be, so no amount is assessed or allowed for this item.
- v) **Carpets.** Only a notional amount of \$50 can be allowed for this item as it had a stench and was vermin infested and of no worth.
- vi) **Air conditioners.** As Mr. Sawyer had submitted in the course of the hearing this item would be a fixture, and not counted among the chattels. It is still there in the building. In his Bundle the estimates for this item in 2017 values are in the \$12,000 range, however, to allow any amount for this item would be to give Mr. McKinney a windfall. It is disallowed.
- vii) **Deep fat fryers.** Mr. Butterfield said there was a system on premises with a value between \$700 and \$800. I will allow \$750.00.
- viii) **Stoves, desks.** No evidence was given from either side of the existence of any 'desks', so no amount is awarded for this item. The stove was valued at between \$900 and \$1,000. I will allow \$950.00.
- ix) **Couches.** Mr. Butterfield's evidence is that no couches were on the premises. Mr. McKinney did not testify as to the presence of couches, nor did he produce any invoices for a couch. This item is therefore disallowed.
- x) **Automatic fire extinguishers.** Mr. Butterfield admits that these were on the premises, but neither he nor Mr. McKinney gave any evidence as to quantity or value, and I am therefore unable to award any amount in respect of this item.
- xi) **Electric salad bars.** I accept the quantity (one) and value placed on this by Mr. Butterfield at \$600.00.

16. In his bundle Mr. McKinney is claiming for a gas cylinder with gas, a new generator, plumbing fixtures and fittings (from Hanna's Ltd), and for the complete outfitting of a restaurant kitchen, down to dinner napkins, wine glasses and pots and pans. None of these items formed part of the list that was pleaded at paragraph 13 of the Amended Statement of Claim, or are mentioned at paragraph 70 of the Judgment. They are all disallowed.

17. It appears that the Plaintiff grossly inflated his claim – or at least, had a much exaggerated conception of what the property and its contents were worth. In the writ he

claimed that the mortgaged property was worth \$750,000. At trial, after hearing evidence the judge found that the property was worth less than half of that sum, namely \$305,400.00 (*para. 66*).

18. Likewise, having regard to the evidence presented before me, I find and assess the damages due to the Plaintiff for loss of equipment to be \$5,800.00, which is only a tiny fraction of his original claim of \$100,000.00.

19. The trial judge already awarded costs to the Plaintiff as against Butterfield and Rolle, so the issue of entitlement to costs is not open to me as registrar conducting the assessment. However, I am able to deal with the quantum of costs. In light of the amount which has been finally found to be due to the Plaintiff for loss of equipment and to avoid incurring further time and costs in taxation proceedings, I will fix the costs of the Assessment proceedings due the Plaintiff in the sum of \$500.00.

Dated the ^{28th} day of June A.D., 2018

A handwritten signature in black ink, appearing to read 'C.D. Misiewicz', with a long horizontal flourish extending to the right.

Carol D. Misiewicz
Deputy Registrar (Actg.)