

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

2021/CLE/gen/00848

BETWEEN

SAMUEL KEMP

Plaintiff

AND

MINISTRY OF AGRICULTURE

First Defendant

AND

THE DEPARTMENT OF LANDS AND SURVEYS

Second Defendant

AND

ATTORNEY GENERAL OF THE BAHAMAS

Third Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Owen Wells for the Plaintiff

**Kenria Smith, Quintin Percentie and Kingsley Smith for the
Defendants**

3 August 2021

RULING

WINDER, J

This is the Plaintiff's (Samuel's) application for injunctive relief with respect to his operation of a stall at the western side of Arawak Cay in an area commonly referred to as the Fish Fry.

[1.] The application was brought by Summons filed on 23 July 2021 seeking:

(a) to restrain the Defendants:

- (i) from interfering with his quiet enjoyment of the leasehold premises at Lot Number 14 on a Plan numbered 3518 situate on the western side of Arawak Cay;
- (ii) from entering the property and preventing Samuel, his agents and servants, from having free access to and from the property;
- (iii) from preventing members of the public from resorting to the property; from interfering with Samuel's reasonable occupation of the property; and,

(b) to return the personal possessions, including furnishings, appliances and other fittings out of the premises.

[2.] The Application was supported by the affidavit of Samuel also filed on 23 July 2021.

[3.] Samuel is the son of Frederick Kemp (Frederick) who had been granted a lease with respect to Lot Number 14. The plan numbered 3518 delineates several plots in an area known as the Fish Fry, where small restaurants and bars operate. A stall or restaurant and bar is erected on Lot Number 14 and operated under the business name "*Joeys Restaurant and Lounge*".

[4.] The lease to Frederick was entered into on 1 May 2002 for an initial term of ten years and provided an option for renewal, for a further ten year period, at the request of the tenant. The initial term ended on 30 April 2012 but no new lease was entered into. Frederick remained in possession of the premises, holding over, following the termination

of the initial term.

[5.] Frederick died in March 2020 intestate, survived by 6 children, including Samuel.

[6.] On 14 May 2020 the Defendants wrote to Dario Williams (Dario), the operator of the stall, to cease and desist carrying out repairs to the building on Lot 14. The reason for this, they said, was because the property was in dispute by 2 sub-lessors and that Frederick Kemp had died. Dario was again written to on 3 June 2020, as the construction is said to have continued. The 3 June 2020 letter complained that Dario did not obtain permission to build, as required under the lease. Dario was told to vacate the premises within 7 days of receipt of the letter.

[7.] Samuel responded to the 3 June 2020 letter, requiring Dario to vacate the premises, in a letter dated 5 June 2020. He complained that he was being harassed by the operators of Arawak Cay almost immediately after burying both his parents. He denied that there were any disputes in relation to the property and that his family had occupied the property as *Kemp & Sons* for the past 30 years. He contended in the letter that the disputes had been resolved by Sr. Justice Watkins and Sr. Magistrate Rolle-Davis.

[8.] Samuel says that he is in a business relationship with Dario to operate and manage the restaurant and bar. They are both identified on the business license certificate which will expire in December 2021 and which was produced in evidence. The Defendants suggests that Samuel has sub-let the premises to Dario, contrary to Clause 2(10) of the lease. They say that when they inspected the premises previously it was noted that the prior license for 2020 had been issued to Dario's name alone. The Defendants also produced a different license for 2021 in Dario's name alone. Samuel has not explained the existence of the two licenses.

[9.] On 30 April 2021 an eviction order, made by Deputy Chief Magistrate Andrew Forbes (as he then was), was served on Dario requiring him to "*remove himself from the premises situated at Stall Number 14 Arawak Cay*". The eviction order was made in the

absence of Dario. Samuel was not a party to the proceedings before the Magistrates Court. It is said that Dario was ill and unable to attend at the hearing before the Deputy Chief Magistrate on 30 April 2021.

[10.] On 2 May 2021 fresh proceedings were brought against Samuel in the Magistrates Court for possession of the premises at Lot Number 14 Arawak Cay. He has entered a defense in those proceedings and the matter is proceeding to an adjudication before the Magistrate.

[11.] Notwithstanding the pending court matter, Samuel says that on 15 July 2021 Gregory Minnis, a representative of the First Defendant along with the Police presented an eviction order and forcibly closed down *Joeys*, requiring patrons to leave. A lock was placed on the premises which remains in place to date. Samuel says that he employs 18 persons who are now out of work. Samuel also says that he was contacted by Minnis who told him that he had until 24 July 2021 to remove all chattels from the building or they would be disposed of.

[12.] Samuel says that he paid rent of \$200 on 15 June 2021 which was accepted.

[13.] Samuel seeks an interlocutory injunction. The statutory jurisdiction of the Court to grant interlocutory injunctive relief, is found in section 21(1) of the Supreme Court Act 1996. Order 29 rule 1(1) of the Rules of the Supreme Court of the Commonwealth of The Bahamas provides:

1. (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

[14.] Samuel relies on the criteria for the grant of an interlocutory injunction as set down in the decision in *American Cyanimid v. Etchicon* [1975] A.C. 386. That criterion provides, inter alia, for the following:

- a) A serious issue to be tried;
- b) good prospects of success; and

c) A favorable balance of convenience.

[15.] The Defendants submit that Samuel has no prospects of success in the matter. They contend that:

- (a) The said lease of Crown Land was granted to the late Frederick Kemp on 1 May, 2002 for a term of 10 years. The lease expired on 1 May, 2012 and at the expiration of the lease, a new lease was not entered into by the parties. Mr. Kemp, however, remained in occupation of the premises, thus making him a tenant at will, until his death in March, 2020. As such, such tenancy may be determined at will of either party – or by the death of either party.
- (b) Mr. Samuel Kemp is not a tenant. There was never a lease between Mr. Samuel Kemp and The Minister Responsible for the Department of Lands and Surveys and/or the Ministry of Agriculture & Marine Resources. Further Mr. Samuel Kemp was not invited to enter the premises, by the Landlord, after the death of Frederick Kemp.
- (c) Injunctive relief is not available against the Crown.

[16.] Whilst the first point raised by the Defendants as to the nature of the tenancy following the death of Frederick does not appear correct in law, the more fundamental contention that, Samuel in his personal capacity, has no locus standi seems unsurmountable.

[17.] In the Trinidadian case of *Romany v Romany* [1972] 21 WIR 491, 496, *de la Bastide JA* provides a useful discussion on the nature of a tenant at will. He stated:

The general rule is clear; a tenancy at will exists when a person occupies the land of another on the understanding that he may go when he likes and that the owner may terminate his interest at any time the owner wishes so to do. A tenancy at will has been properly described as a personal relation between the landlord and his tenant and it is important, in this case, to note that it is determined by the death of either of them or by one of a variety of acts, even by an involuntary alienation, which would not affect the subsistence of any other tenancy (*Wheeler v Mercer* ([1956] 3 All ER 631, [1957] AC 416, [1956] 3 WLR 841, 100 Sol Jo 836, 21 Conv 78, reversing, [1956] 1 QB 274, [1955] 3 WLR 714, 99 Sol Jo 754, 105 LJ 803) ([1956] 3 All ER at p 634)).

The express creation of a tenancy at will is somewhat rare but where a person has been given exclusive possession of premises for an indefinite period without any declaration of the exact interest he is to hold and without anything to explain why he has been allowed into occupation, he may be presumed to be a tenant at will.

But this is not necessarily conclusive, for, his true position depends, in the final analysis, upon the intention of the parties, the presumption being rebutted if the circumstances negative an intention to create a tenancy at will and it may then well appear that he was let into possession as a mere licensee if the inference to be drawn from the circumstances and the conduct of the parties is that he shall have a mere personal privilege of occupation but no definite interest in the land. This situation in law has been well illustrated by a number of comparatively recent authorities and well known cases which, inter alia, include *Booker v Palmer* ([1942] 2 All ER 674, 87 Sol Jo 30, 30 Digest (Repl) 539) ([1942] 2 All ER at p 677); *Errington v Errington & Woods* ([1952] 1 KB 290, [1952] 1 TLR 231, [1952] 1 All ER 149, 96 Sol Jo 119, 214 LT 35, 102 LJ 355, 15 MLR 236, 68 LQR 337) and the authorities cited ([1952] 1 KB at p 297); *Cobb v Lane* ([1952] 1 All ER 1199, [1952] WN 196, [1952] 1 TLR 1037, 96 Sol Jo 295, 102 LJ 355, affirming (1952), 102 LT 123, 16 Conv 220, 225); and finally a case from Trinidad *Isaac v Hotel de Paris Ltd* ([1960] 1 All ER 239, [1960] 1 WLR 239, 2 WIR 105, 104 Sol Jo 230, 24 Conv 246, 104 Sol Jo 245).

[18.] The initial lease expired on 30 April 2012 and was not renewed. I should note that, at the hearing, Counsel for the Defendants conceded that the vast majority of the vendors at Arawak Cay do not have renewed leases. It is therefore surprising that they would contend that the expiry of the leases, notwithstanding the continued possession of the vendors, made all of these vendors mere tenants at will. I am not satisfied that this represents the state of the law. When the initial term of the lease expired, Frederick did not become a tenant at will but a periodic tenant. Where a lease expires and the tenant remains in possession or holds over, continuing to pay the leasehold payments, a periodic tenancy is created. According to the learned authors of *Commonwealth Caribbean Property Law* at page 20:

A periodic tenancy may be created expressly or by implication. It is created expressly where some words such as 'yearly tenant' or 'monthly tenant' or 'tenant from year to year' (or from month to month) are used. More often, such a tenancy will arise by implication of law. In such a case, the periodic tenancy will be measured according to the frequency of payment of rent. Thus, if L lets land to T at '\$12,000 a year', a yearly tenancy arises; if it is at '\$1000 per month', there is a monthly tenancy and so on. Where a tenant under a lease for a fixed term 'holds over' – that is remains in possession after the expiry of the term – and rent is paid and accepted on a periodic basis, for example, monthly, a periodic tenancy arises.

...

[19.] The term of the periodic tenancy, created upon the holding over, is therefore the frequency of the rent payments, whether monthly, quarterly or annually. In this case the

rate of the rental was monthly. All other terms of the lease remain in effect. This appears to be the factual position which is reflected by the fact the primary complaint of the Defendants appeared to be centered on claims of breaches of terms of the lease namely subleasing and building without permission. The termination of such a lease must be done with notice, the period of the notice being the term of the periodic tenancy, i.e. the frequency of the leasehold payment.

[20.] A leasehold interest creates an interest in the land. Upon Frederick's death that interest devolved to his estate. Samuel is not the Administrator of Frederick's personal estate and we are told that the estate has yet to be administered. Whilst it is possible to apply to the Court to obtain a limited grant of representation for the limited purpose of protecting the interest of the estate in a case such as this, no such application had been made prior to the commencement of this action. The result therefore is that Samuel had no standing to commence this action prior to doing so, in the result that his prospects of success are dim and no interlocutory injunction ought to issue.

[21.] The application for an interlocutory injunction is therefore refused with costs to the Defendants to be taxed if not agreed.

Dated this 12th day of August 2021

A handwritten signature in black ink, appearing to be 'I. R. Winder', written over a horizontal line.

Ian R. Winder
Justice