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ROYAL COURT
(Héritage Division) 91.

14th May, 1996.

Before: The Deputy Bailiff, Jurat P.G. Blampied OBE
and Jurat P.J. de Veulle

Between	Kensington Central Properties (C.I.) Limited	Plaintiff
And	Repose Hotels (Jersey) Limited	First Defendant
And	Barry Shelton	Second Defendant

Advocate W.J. Bailhache for the Plaintiff
Advocate R. Morris for the Defendants

This is an application by Repose Hotels (Jersey) Limited and Mr. Barry Shelton, (who for the purposes of this application we shall call "the applicants") applying for a judgment obtained by Kensington Central Properties (C.I.) Limited ("Kensington") in the Royal Court on 18th August, 1995 *inter alia*, in the sum of £104,707.13 to be set aside.

By way of background to this unusual application, the facts show that on 27th June, 1986, Kensington entered into a lease with the first applicant. It was a ten year lease from 1st November, 1987, and was for two properties, the Hotel Central in Kensington Place and No. 4 Kensington Villas. The rental was set initially at £155,000 per annum, subject to annual increase. On 16th October, 1994, the rental was increased to £260,165.88. The rental was in the terms of the lease payable six monthly in advance on 1st November and 1st May in each year.

Contrary to the terms of clause 1 of the lease, the first applicant failed to pay the full rental due for the period commencing 1st November, 1994 to 30th April, 1995 (the sum outstanding was £7,144.69) and the full rental due for the period commencing 1st May, 1995 to 31st October, 1995 (the sum outstanding was £130,082.94.) That made a total sum outstanding of £137,227.63. Because of the difficulties in receiving payment and following the terms of the lease, Kensington obtained an *Ordre Provisoire* against the first applicant on 11th May, 1995, in the sum outstanding. As a result of that *Ordre Provisoire*, an arrest

was made on the contents of the Hotel Central and on an account maintained by the first applicant at the Royal Bank of Scotland plc, St. Helier. On 15th May, the second applicant agreed with Kensington for himself and his heirs to guarantee the due performance of all the obligations of the first applicant to Kensington under the terms of the lease. The second applicant further agreed to guarantee the payment of interest on all sums outstanding by the first defendant to the plaintiff from the date when the same shall have become due to the date of payment thereof at the rate of 4% over the Bank of England minimum lending rate together with the reasonable costs incurred by the plaintiff on a full indemnity basis in connection with the proceedings brought by the plaintiff against the first applicant in respect of the rental payment which was acknowledged to be due.

To fortify that guarantee the second applicant on 15th May 1995 presented Kensington with four post-dated cheques which totalled £130,082.94. That amount was in respect of the six months rental due.

Negotiations took place and on 19th May, 1995 when the matter came before the Samedi Court, it was agreed between the legal advisers that the action would be adjourned *sine die* with the first applicant agreeing to appear on three hours' notice. It was also agreed that the arrest of the contents of the hotel should remain on.

Unfortunately, matters did not take a measured course, because on 29th June, 1995 only one of the post-dated cheques delivered to Kensington had been honoured. It was in the sum of £32,520.50. The rest of the cheques had been dishonoured. Kensington therefore wrote to the lawyers of the first and second applicants saying that they would be reinforcing the restraint on the bank account of the first applicant and proceeding with an action against the second applicant and accordingly, on 30th June, 1995 the *Ordre Provisoire* was reinforced on the bank account of the first applicant.

Attempts were apparently made by the first and second applicants to liquidate some assets in order to settle the alleged outstanding debts but no offer was forthcoming from them in relation to payment of the outstanding sums and on 28th July, 1995, proceedings commenced against the first applicant and the second applicant in the sum of £104,707.13 plus interest in accordance with the terms of the lease. Kensington's lawyers also applied for the lease to be cancelled and terminated immediately with possession of the property to be given to Kensington forthwith, again all in accordance with the terms of the lease.

We would note that, at this stage, the rental due had been outstanding for several months and we would further note that it appears to us that Kensington was entitled to take the action that it took. On the face of it, the Act of Court of 18th August, 1995 is clear and unequivocal. It records the following:

"The defendants having appeared the Court confirmed the said Order of Justice and (1) cancelled the lease, (2) condemned the defendants to pay to the plaintiff the said sum of £104.707.13 together with interest thereon pursuant to the terms of clause 2 of the said lease and the taxed costs of the action, (3) authorised the plaintiff to cause the movables of the defendants to be distrained on and sold and (4) ordered that the Act be registered in the Public Registry of the island.

The Act has been duly registered in Book 95 of the Public Registry and in Book 87 of the Book of Obligations."

It is this order that the first and second applicants now apply to have set aside and in support, we have an affidavit filed by the second applicant and what Mr. Morris called the "proposed answer" to the Order of Justice. We must note that this is only a proposed answer although it is set out in formal terms. No answer has been filed at the Judicial Greffe.

The affidavit of the second applicant says that he verily believed that there was a defence to the full amount claimed by Kensington in the Order of Justice. On reading the affidavit of the second applicant it is extraordinarily difficult to see what that defence could possibly be.

The reasons set out by the second applicant in his affidavit for saying that the Order of Justice can properly be resisted are that because Kensington has been taking profits from the property those profits should be set off against the moneys which are due and owing under the terms of the lease. The proposed answer however says that the non payment of rent was due to "inadvertence" by the first applicant it having failed (despite having received due notice of the increase in rental) to amend its standing order accordingly. That appears to us to be a totally specious argument. Further, that because the lease was determined, the first and second applicants were not able to mitigate their loss in respect of the moneys due or owing under the terms of the lease. That again seems to us to be an entirely specious argument. What the first and second applicants appear to be saying is that because they failed to present cheques which would be honoured (which cannot conceivably be the fault of Kensington) and because Kensington took back its lease quite justifiably it thereby prevented the first and second applicants from finding funds to pay their dishonoured cheques. The first and second applicants also say that they are entitled to the furniture, fixtures and fittings and to the wet and dry stock as some form of set off to the moneys owing under the terms of the lease. That again appears to us to be an argument devoid of merit.

There is then a further extraordinary claim that by determining and cancelling the lease and taking possession of the property on 18th August, 1995, Kensington effectively terminated

the first and second applicants' obligation to pay rent from that period to 31st October, 1995 and therefore cannot seek the rent actually due for that period pursuant to the lease. It is because the rental was unpaid and that money is due that an *Ordre Provisoire* was able to be founded and the argument again is false in our view both in law and in logic.

The proposed answer gives absolutely no basis for a defence to be brought forward. We have only to test the merits by looking at one particular paragraph which is 4(d) which claims that the second applicant argues that no *"cause"* was provided to him in return for his entering into the guarantee. That is an entirely false argument because the *"cause"* was the very fact that the *Ordre Provisoire* was not proceeded with by Kensington in return not only for the guarantee being entered into but also, of course, the fact that the second applicant gave, and Kensington accepted, post-dated cheques, only one of which was eventually honoured.

It does seem to us the most extraordinary legal argument for the first and second applicants to claim that because Kensington cancelled the lease as the result of a breach of contract, there is now in law a right to set off against rental any profits that Kensington might make in the future.

We have to look at what in fact happened when the matter came before Court on 18th August, 1995. In Strata Surveys Limited and Flaherty & Company Limited (15th February, 1994) Jersey Unreported CofA the Court of Appeal referred to the case of Evans v.Bartlam (1937) A.C. 473 when the House of Lords considered the power of the English Court to set aside default judgments. The learned Court of Appeal referred to the judgment of Lord Atkin at page 480, where he said:

> ***"The principle obviously is that unless and until the Court has pronounced a judgment on the merits or by consent it is to have the power to revoke the expression of its coercive power but that is only to be obtained by a failure to follow any of the rules of procedure."***

The learned Court of Appeal decided in that case that the discretion which the Court undoubtedly has under Rules 9/3 of the Royal Court Rules should be exercised in favour of setting aside the default judgment because amongst other reasons ***"(1) Strata had a reasonably arguable defence to the claim (2) the default arose through no fault of Strata but solely through the error of their lawyer (3) there was no delay by Strata before applying to set aside the default judgment (4) serious injustice would be done to Strata if they were not to be allowed to defend the action and to have the claim and their defences heard at trial and (5) the plaintiff would suffer no injustice if the default judgment were set aside and their claim against Strata proceeded to trial."***

The applicants appear to believe that in the present case they have a defence to the full amount claimed by Kensington. We

have examined what defence they might have had and we cannot see that there is any defence there at all.

Nevertheless, on 18th August, Advocate Morris appeared in Court and while he had hoped that the matter could be adjourned, his opponent, Advocate O'Connell did not agree. Advocate Morris allowed judgment to be taken. He did not apply to put the matter on the pending list.

There then followed a series of unfortunate errors. An immediate appeal was apparently filed on 30th August, 1995. The applicants, however, decided to appear in person and ceased instructing their lawyers. The second applicant at this point said that he was *"unaware of the Court of Appeal Rules requiring certain papers to be filed with the Court by a certain date."* In fact he then did nothing and has now been advised by the same lawyers that the applicants are out of time for filing the appropriate papers with the Court of Appeal and that they are required to apply to the Court for an extension of time.

The applicants purported to set down their notice of appeal on 11th December, 1995, but had not filed any contentions by 11th April and the Appeal Court Rules make it very clear that if they fail so to file contentions then the appeal is deemed to be abandoned. We envisage it to be extremely difficult for them to renew the matter with the Court of Appeal.

We take the view that in the light of judgment having been obtained in the presence of Advocate Morris, and with his consent, we are quite unable to see that we have that discretionary power given to us under Rule 9 of the Royal Court Rules as clarified by the learned Court of Appeal in Strata v. Flaherty. If we are wrong in that view, then in any event even if we had power in law and jurisprudence to apply our discretion we have no hesitation in saying that we will not do so because of the inordinate delay and because of the totally unmeritorious defence claimed by the applicants both in the second applicant's affidavit and in the proposed answer that was filed with us just before we came into Court.

Costs must follow the event and this was conceded when I heard arguments on costs at the hearing.

I have no hesitation in the particular circumstances of this case but to award full indemnity costs to Kensington of and incidental to the application.

Authorities

Strata Surveys, Limited -v- Flaherty and Company, Limited (15th February, 1994) Jersey Unreported C of A.

Evans -v- Bartlam [1937] A.C. 473.