Action by the Plaintiffs against the Defendant for the eviction of the Defendant from premises comprising a building and land known as "Moulin Huet Tea Room.

[2024]GRC051

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between:

GEORGE RAYMOND LE PAGE

and

MAISIE BELLA LE PAGE

Plaintiffs

AND

CB CATERING LIMITED

Defendant

Date of hearing: 1st July 2024

Judgment handed down: 7th August 2024

Before: Simon William Francis Howitt, Lieutenant Bailiff and

Jurats: Stephen Murray Jones, OBE, Steven John Morris and Heather Reed

Advocate for the Plaintiffs: Advocate R J R Cowling
Advocate for the Defendant: Advocate R D Breckon

Introduction

1. This is an action by the Plaintiffs against the Defendant for the eviction of the Defendant from premises (the "**Premises**") comprising a building and land known as "Moulin Huet Tea Room" at Rue du Moulin Huet, St. Martin's. The basis of the Plaintiffs' claim to be entitled to an order for eviction is that the Defendant has "failed to pay rent since January 2024".

2. As will become apparent, this is an unusual case because, whilst the rent due on 1st February 2024 was undoubtedly paid some 8 days late, it was paid before eviction proceedings were commenced and paid very shortly after the Plaintiffs' Advocate sent a letter (as an attachment to an e-mail) to the Defendant's Advocate purporting to terminate the lease of the Premises by virtue of the non-payment. Subsequent payments have been made on time, but the Plaintiffs have sought to reject them on the basis that the Defendant's tenancy has been terminated. The facts of the case give rise to issues of law which do not appear to have been previously decided.

Legal directions

3. The Lieutenant Bailiff directed the Jurats on their respective functions and the standard and burden of proof. In doing so, he reminded them that his function was to decide the law and procedure, and that the Jurats must accept his directions on the law and follow them, and their function was to determine questions of fact. In considering the evidence and determining the facts the Jurats were directed to apply the civil standard of proof of the balance of probabilities, and that the burden of proving any fact is on the party asserting it. In any event, there was little dispute between the parties as to the relevant facts.

Background

4. The Plaintiffs are the owners of the Premises, and have been for almost 40 years.

5. By a lease (the "**Lease**") dated 7th July 2023, the Plaintiffs let the Premises to the Defendant for a term commencing on 1st July 2023 and ending on (and including) 31st October 2026. The rent payable was £17,000 per annum, rising to £18,000 per annum with effect from 1st July 2024.

6. In relation to the payment of rent, the Lease provides that "*Rent shall be paid in equal instalments, monthly in advance, by standing order and on the first day of each calendar month*".

7. The Lease is in short form. Notably, it contains no express provision entitling either of the parties to terminate it in the event of breach by the other party and no provision as to the giving of notice by one party to the other, both of which one would expect to find in a fuller form of commercial lease.

8. The relationship between the parties since the commencement of the tenancy has been fraught. In particular, the Defendant sought, and was granted, a liquor licence for the Premises, to which the Plaintiffs objected, and there has been an ongoing dispute as to the sewage system serving the Premises.

9. The Defendant failed to set up the standing order stipulated by the terms of the Lease, but paid the rent each month electronically. The Plaintiffs do not contend that the failure to set up a standing order constitutes a breach on the part of the Defendant which entitles the Plaintiffs to terminate the Lease.

10. The rent, up to and including the February rent, was never paid on time, although it was always paid during the month to which it related and all payments except one were made within two weeks of the dates on which they were due. The January rent, due on a public holiday, was paid on 2nd January.

11. The Plaintiffs do not seek to rely on the late payments during 2023, or in January 2024, as a basis for eviction. Their action is based solely on failure to pay rent "since January 2024".

12. The rent due on 1st February was not paid on time.

13. On 9th February, the Plaintiffs' Advocate, Advocate Cowling, caused a letter (the "**9th February letter**") to be sent, as an attachment to an e-mail, to the Defendant's Advocate, Advocate Breckon. The material part of the 9th February letter reads:

> "*4. Further, your clients have not paid February's rent, which was due on 1 February 2024. As of the date of this letter, they are eight days in arrears and thus in material breach of the lease.*
>
> *5. Our clients have accepted your client's breach, and will be commencing eviction proceedings against them with regards (sic) to their tenancy at the Property*."

14. The e-mail to which the 9th February letter was attached was transmitted at 14:57 on 9th February and was received into Advocate Breckon's inbox almost instantly.

15. Advocate Breckon forwarded the e-mail to which the 9th February letter was attached to Natalia Silvester, a director of the Defendant, at 15:23 on 9th February.

16. In the meantime, the February rental payment had been made. The payment was timed as having been made at 14:58 on 9th February, approximately one minute after the transmission and receipt of the e-mail to which the 9th February letter was attached but some 25 minutes before the 9th February letter was passed on by Advocate Breckon to Mrs Silvester.

17. Some time before the 9th February letter was sent, Advocate Cowling had a telephone conversation with Advocate Breckon. Advocate Cowling indicated that his clients wished to serve notice by letter on the Defendant. Advocate Breckon's exact words are unknown, but the agreed position between the parties is that Advocate Breckon indicated that it was in order to send the letter to his firm and that he would pass it on to his clients and seek confirmation as to whether his firm was instructed in relation to the subject matter of the letter.

18. Payments due under the terms of the Lease for March, 2024 and subsequent months have been made on the due date. The Defendant has eventually established a standing order, the effect of which is that the rent is paid automatically on the first day of every month, with the first such payment having been made on 1st April, 2024.

19. The Plaintiffs contend that the rent for February and subsequent months was not "due" because the Lease had already been terminated by the time the February rent was paid. The Plaintiffs have sought to make it clear that the February, and subsequent, payments, are not accepted as payments of rent. The Plaintiffs (who do not have electronic banking facilities) made cheques payable to the Defendant for the February and March payments which were attached to a letter from Advocate Cowlings firm to Advocate Breckon's firm dated 7th March, 2024 (the "**7th March letter**"). The Defendant has destroyed these cheques. No attempt has been made to return the payments made in April and subsequent months, but Advocate Cowling has made it clear in correspondence that the Plaintiffs should not be treated as having accepted these payments and that they hold the money received to the order of the Defendant.

20. Following receipt of the 9th February letter Advocate Breckon was instructed by the Defendant in relation to the matters dealt with in it. There was further correspondence between Advocates Cowling and Breckon in which, in particular, Advocate Cowling sought to establish precisely when the February payment was made. In the 7th March letter Advocate Cowling stated that:

> "*If it transpired that your client had paid February's rent before our letter was received, then our client (sic) accepts it (sic) would not be able to pursue eviction proceedings against your client in respect of the late payment of February's rent alone (however our clients reserve their rights in relation to any claim for damages that may flow from the late payment).*"

21. Information as to the precise time when the February payment was made was difficult to find. Eventually, on 11th March, Advocate Breckon wrote to Advocate Cowling with evidence, in the form of a document issued by the Defendant's bank, which showed that the February payment was made at 14.58 on 9th February.

22. On 12th March Advocate Cowling wrote to Advocate Breckon indicating that, because the February payment had been made after the transmission by e-mail of the 9th February letter, his clients were issuing eviction proceedings returnable on 15th March. The matter was adjourned

by consent for a hearing on 24th April. The matter was further adjourned and eventually heard on 1st July.

Tenancies in Guernsey law

23. Put briefly, a lease in Guernsey law is a form of contract. It creates no estate in the property let, but it is a form of contract to which special rules apply. For example, a periodic tenancy can only be terminated (other than by agreement) by notice to quit served by HM Sergeant. Where a tenancy ends, the tenant can only be dispossessed of the property let by means of eviction proceedings, unless the tenant gives up possession voluntarily. Although the matter is by no means beyond argument, it appears that the usual rules of privity of contract do not apply to a Guernsey tenancy, in the sense that, if the landlord sells the property let, the tenant's rights against the buyer of the property are the same as they would have been against the original landlord even though the buyer is not a party to the contract between the tenant and the original landlord (see Tramallier and Shade v Blanchet and Le Page – Cour de Samedi 21.10.1721).

24. There is very little Guernsey authority on the matter in hand. Indeed, neither of the parties have cited any authority from any other jurisdiction which is immediately on point. They have relied on basic principles of English contract law.

25. It is clear that no formal notice to quit is required where rent has not been paid. Thomas Le Marchant commenting on the works of Terrien in his "Remarques et animadversions sur L'Approbation de Lois" (published in 1826 but written in the late 17th century) states that:

> "*... si le ... louager manque à payer son louage au terme assigné et coustumier de payer convenu entre le locateur et lui, il en peut estre mis hors par voye justiciaire, sans le dit advertisement...*"

26. This translates (the translation is from Laws of Guernsey by Advocate Gordon Dawes at page 685) as:

> "*if the... tenant fails to pay his rent at the assigned and customary time agreed between the landlord and himself, he can be put out by judicial process, without [notice to quit being served]...*".

27. It is clear that, subject to whatever the parties may have agreed to the contrary, a tenant can be evicted by virtue of a single late payment of rent.

28. That was the law in the 17th century, when Le Marchant wrote his work, and it remains the law today. Unlike many other jurisdictions, Guernsey has not introduced any legislation which alleviates the harshness of this customary law rule. However, where an eviction order is made, the Court has power, which is discretionary, to stay the eviction pursuant to the "Law giving the Court increased power to stay execution in actions for eviction" of 1946. On occasions, where a landlord has been entitled to an eviction order by virtue only of a technical breach by the tenant, or a breach which has been rectified, the Court has been known to grant a stay of eviction up to the end of the term of the relevant lease or even during the whole of the tenant's lifetime (see, for example, Motor Developments v King and Smith – Plaids de Meubles 27.7.1989).

29. Reference was made by Advocate Cowling to the case of Bodman and Bodman v Gorselands Limited – Plaids de Meubles 23.5.1991. That was a case where the Plaintiffs sought an eviction order against the Defendant, the tenant of property owned by the Plaintiffs, in circumstances where the Defendant counterclaimed for damages for breach of covenant to repair and requested that the Court delay the hearing of the eviction proceedings until the hearing of the counterclaim

on the basis that, if the Defendant's counterclaim was successful, the amount of damages awarded would exceed the amount of the unpaid rent and could be set off against it, thereby meaning that the Plaintiffs would not be entitled to an eviction order. The Court refused the application. The Deputy Bailiff said:

> "*It is Guernsey law that payment of rent and the right of a lessee to possession go hand in hand, regardless of any other disputes between the parties. The moment rent is withheld the landlord can proceed to evict and is entitled to an eviction order forthwith, however long stayed.*"

30. It is clear, however, that non-payment of rent does not automatically terminate a lease which lacks any express provision as to termination, as in this case. The landlord has to take some positive step to indicate termination. In most cases, where rent has not been paid, the landlord simply institutes eviction proceedings. Whilst, in such cases, the landlord does not usually expressly state that it is accepting the tenant's breach (by non-payment) as having terminated the contract between them, it is implicit from the issue of proceedings.

31. In this case, the Plaintiffs took the further step, prior to issuing proceedings, of notifying the Defendant, by the 9th February letter, that, by virtue of the non-payment of the February rent, the Lease was terminated. There is nothing in Guernsey law which prevents such a notice given prior to the issue of eviction proceedings taking effect in accordance with its terms, nor anything which requires the notice to be in any particular form or to be served in any particular way.

When was the 9th February letter received by the Defendant?

32. Advocate Cowling, by the 7th March letter, conceded that the Plaintiffs could not evict the Defendant if the rent was paid before the 9th February letter was received. He has now changed his position, and argues that the Plaintiffs were entitled to terminate the Lease even if the rent was received before the 9th February letter was received. His argument in this respect will be dealt with in greater detail later in this judgment, but it is necessary to consider first when the 9th February letter was received by the Defendant.

33. Advocate Cowling contends that the Court should treat the 9th February letter as having been received when the e-mail to which it was attached was received at the offices of Advocate Breckon's firm. There is no basis for that contention. The Plaintiffs have not shown in any way that Advocate Breckon was the Defendant's agent so that receipt of the 9th February letter by him can be taken as receipt of the letter by the Defendant. Advocate Breckon simply agreed that the 9th February letter could be sent to him, and undertook to pass it on and see whether the Defendant wished to instruct him, which is what he did. He was just a messenger.

34. To the extent that Advocate Cowling has sought to justify his position, it appears to be on the basis that it would be unfair to his clients to make a finding contrary to his position. There is no merit in that submission. If the Plaintiffs had wished to ensure that notice was given within a particular timescale, there are other methods which they could have adopted. In particular, they could have arranged the service of a signification by HM Sergeant, which would have been treated as having been received as soon as it was left at the registered office of the Defendant.

35. The finding of the Jurats is that the 9th February letter was received by the Defendant, and took effect (to the extent that it had any effect) no earlier than 15:23 on 9th February, when it was forwarded by Advocate Breckon to Mrs Silvester, and that it was therefore received after the February rent payment was made.

Did the notice of termination in the 9th February letter take effect even though it wasn't received until after the February rent had been paid?

36. It is highly unusual for eviction proceedings to be instituted for non-payment of rent, as they have been in this case, in circumstances where, by the time they are instituted, the rent has been paid up to date. For that reason, neither of the parties has been able to find any Guernsey case on the question of whether, where, as in this case, there is no express agreement between the parties as to termination, a lease can be terminated for non-payment of rent even where, at the time of termination, the rent has been paid.

37. The case of Smith v Atlantique Holdings Limited (Court of Appeal 5.6.2013) was cited by Advocate Cowling. In that case the Appellant was the tenant of a hotel. The lease contained an express provision that if the rent "*is outstanding for 21 days after becoming due whether formally demanded or not*" then "*the Landlord may enter the Property…at any time*". The Appellant paid the rent late and the Respondent purported to terminate the lease and sought to evict the Appellant. The Royal Court granted an eviction order. The Court of Appeal found that the Appellant had paid the rent within the 21 day period permitted by the termination provision in the lease of the hotel, and so allowed the Appellant's appeal on that issue.

38. The question at issue in this case does not appear to have been addressed in Smith. In any event, there is no doubt that, where a lease contains an express provision as to termination in the event of non-payment of rent, the lease can be terminated in accordance with that provision.

39. In this case, there is no express provision. The parties have put forward submissions on the basis of English principles of contract law. No authority on the Guernsey customary law has been found which answers the question raised in this case. No authority on this point in the general customary law of Normandy has been cited by the parties nor found by the Lieutenant Bailiff. In those circumstances it might, at first sight, appear to be appropriate to adopt English law contractual principles.

40. Notwithstanding the concession made by Advocate Cowling in the 7th March letter to the effect that his clients would not be in a position to evict the Defendant if the rent had been paid before receipt of the 9th February letter, he now seeks to argue that the right to terminate survived the payment of the February rent.

41. Advocate Cowling says that the failure to pay rent when due was a breach which entitled the Plaintiffs to terminate the Lease; a repudiatory breach. That is undoubtedly correct.

42. On that basis, he contends, the Plaintiffs were entitled either to affirm the Lease or to accept the repudiation. Their right to accept the repudiation was not, he says, affected by the payment of the rent prior to the notice of termination having been given. He cites Chitty on Contracts (35th Edition at 24-002):

> "*The length of the period given to the innocent party in order to make up his mind will very much depend on the facts of the case*".

43. Advocate Cowling has not sought to address the Court on what the relevant period in this case is. He simply says that it hadn't elapsed by the time the 9th February letter was sent, and he says that the time given to his clients to make up their minds was unaffected by the payment of the February rent in the meantime.

44. Neither party addressed the Court on the issue of whether a repudiatory breach could be remedied so as to prevent acceptance. The leading modern case is Bournemouth University Corporation v Buckland (2010) EWCA Civ 121. That was an employment case where the employer had committed a repudiatory breach of contract against its employee. An issue which arose was whether, if the breach had been cured (as the employer had sought to do) prior to the

employee's repudiation of his employment contract, his right to repudiate was lost. In the leading judgment LJ Sedley said:

> "*36. It is common ground that no decided case holds in terms that a repudiatory breach, once complete (that is, not a merely anticipatory breach), is capable of being remedied so as to preclude acceptance. It follows, Mr White submits, that, absent waiver or affirmation, the wronged party has an unfettered choice of whether to treat the breach as terminal, regardless of his reason or motive for so doing. There is, in other words, no way back.*
>
> *37. I confess that, if this is the state of the law, it seems to me capable of working injustice.*"

45. Notwithstanding this potential to work injustice, he then went on, somewhat reluctantly, to find that that was the state of the law in England, so that a repudiatory breach could not be remedied so as to prevent acceptance of the breach by the innocent party. If that principle were to be followed in the present case, that would mean that the payment of the February rent prior to notification of the termination of the Lease had no effect on the Plaintiff's ability to terminate the Lease.

46. LJ Sedley was bound by English law, but this Court is not. It has already been said that leases are a form of contract to which, as a matter of Guernsey law, special rules apply, and there is no reason why a rule should not apply to a lease which does not apply to other contracts. A number of instances where that is already the case have been referred to above.

47. It would not be appropriate, in Guernsey, simply to apply the basic principles of English contract law to this question in circumstances where the English law itself has made the issue in this case largely irrelevant by the introduction, by statute, of relief against forfeiture, and done so some 172 years ago. By section 212 of the Common Law Procedure Act, 1852 a tenant became entitled to relief against the termination of the tenant's tenancy if all rent and arrears had been paid prior to the trial of a landlord's claim for an order of "ejectment" of the tenant.

48. The finding of the Lieutenant Bailiff is that, where a lease contains no provision for termination, it cannot be terminated by reason of non-payment of rent after the rent has been paid up to date. That was the position which Advocate Cowling initially took on behalf of his clients, and he may have done so because it is the obvious position for the law to take. To find otherwise would be inequitable and capable of producing injustice.

49. Advocate Cowling contended that, if the Court were to find as it has, this would set a dangerous precedent, whereby tenants in breach of a lease could simply pay (by bank transfer) arrears to the landlord at any time and use this as a way to defend eviction proceedings. The Lieutenant Bailiff is far from convinced that this does set a dangerous precedent, but in any event, nothing in his finding prevents a lease being terminated prior to the late payment of rent, and such termination may be effected by notice (as the Plaintiffs attempted to do in this case) without the need to issue eviction proceedings until a later date. Payment of rent after the termination of a lease (whether the termination was by notice in advance of the issue of eviction proceedings or, as is more usual, the issue of such proceedings without giving notice of termination in advance of such issue) would not prevent an eviction order being made.

50. Chitty describes a breach of contract which entitles the innocent party to terminate the contract as one where "*the consequences of the breach are such as to deprive the innocent party of substantially the whole benefit which it was intended that he should obtain.*" In the case of a lease, that benefit is the rent payable. If the rent is paid, the innocent party is no longer deprived

of that benefit, and there seems to be no good reason why the landlord should continue to have the right to terminate the lease.

51. Accordingly, because it has been found that the February rent was paid before the receipt by the Defendant of the notice contained in the 9th February letter purporting to terminate the Lease, the Plaintiff is not entitled to an eviction order.

Other matters

52. Even if the law were not that a lease (lacking any provision as to termination) cannot be terminated for non-payment of rent after the rent has been paid up to date, and if this matter were to be decided applying basic principles of the English law of contract, the Plaintiffs would not succeed in their claim.

53. Advocate Breckon has cited Chitty's statement (paragraph 28-056) that, where an innocent party seeks to terminate a contract as a result of a breach by the other party:

> "*The acceptance of the repudiation (as the decision to terminate the contract is often termed) must be "real" that is to say, there must be a "conscious intention to bring the contract to an end, or the doing of something that is inconsistent with its continuation".*"

54. Advocate Cowling contends that the terms of the 9th February letter express an unequivocal intention on the part of the Plaintiffs to bring the Lease to an end. If one were to view those terms on their own, that might well be correct, but the overall behaviour of the Plaintiffs has to be considered.

55. By the 7th March letter, Advocate Cowling made it clear that his clients were only intending to terminate the Lease if it transpired that the February payment had been made after receipt of the 9th February letter.

56. No attempt was made to return the February payment until 7th March. When asked why there had been such a delay Advocate Cowling indicated that his clients were waiting to find out whether the February payment had been made before the 9th February letter was received before deciding whether to proceed to evict the Defendant. That is entirely inconsistent with his clients having formed a conscious intention to bring the Lease to an end.

57. The Plaintiffs' behaviour was equivocal. It indicated no more than an intention to bring the Lease to an end if the February payment was made after the 9th February letter was received. Even if such a conditional "acceptance of the repudiation" were to be legally effective (and there is no need for the Court to make any finding on that issue) the Court has found that the February payment was made before the 9th February letter was sent, so the condition would not have been met.

58. Accordingly, even if this case were to be considered applying the principles of English contract law, the Plaintiffs would not be entitled to an eviction order, because the Lease would not have been terminated.

59. Even were that analysis to be wrong, there would remain the issue of the time taken to return the February payment. Having been received on 9th February, it was returned (in the sense that a cheque for an identical amount was attached to the 7th March letter) on 7th March.

60. The Plaintiffs received the February payment electronically. There was nothing they could do to prevent the payment, so the fact that they received it does not mean that they should be treated as having accepted it. However, it did impose on them an obligation to return the money

within a reasonable period, in default of which they would be treated as having accepted the payment. The Jurats find that the period taken exceeded that reasonable period.

61. Accordingly, even if the Court's previous findings (to the effect that the Lease was not terminated) were wrong, the Plaintiffs would not be entitled to an eviction order, because they accepted the February rental payment.

62. If the Court had found that the Lease was terminated by the notice contained in the 9th February letter, its finding that the February rent was accepted could have given rise to an argument as to whether that meant that a new periodic tenancy had been created by the acceptance of the February payment or whether the tenancy was on the same terms as previously. The Court does not need to make a decision on that issue. Suffice it to say that, even if the Court had found that the Lease was terminated by the notice contained in the 9th February letter, there would have been some form of tenancy in existence which would have meant that the Plaintiffs were not entitled to an eviction order.

63. If one considers this matter at its simplest, and asks whether the Plaintiffs have shown what they allege in their cause to be correct, they have not. The Plaintiffs' cause requests an order for eviction on the grounds that the Defendant has "no right to remain [at the Premises] having failed to pay rent since January 2024, in breach of the Lease". Both at the time when the summons was issued and at the date of the trial of this matter, the Defendant had paid all the rent due, albeit that, in the case of the February payment, it had been paid late.

Conclusion

64. The Plaintiffs' application for an eviction order is dismissed for the reasons set out above.

Costs

65. The Lieutenant Bailiff is minded to award costs in this matter to the Defendant on a recoverable basis, but if either party wishes to request a different order they should apply to HM Greffier within 7 days of the date of delivery of this judgment.