



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

**2023: No. 83**

**In the matter of an Appeal under the Civil Appeals Act 1971**

**B E T W E E N:**

**(1) Sto'Nea Eve  
(2) Colston McKenzie** **Appellant**

**and**

**Tanaya Christopher** **Respondent**

**And**

**2023 No. 359**

**B E T W E E N:**

**Tanaya Christopher** **Plaintiff**

**-and-**

**(3) Sto'Nea Eve  
(4) Colston McKenzie** **Defendants**

## JUDGMENT

**Date of Hearing: 18 December 2024**

**Date of Judgment: 13 January 2025**

**Appearances:** *Bruce Swan* of Bruce Swan and Associates for the Appellants in 2023 No 83 and the Defendants in 2023 No 359

Christopher Swan of Christopher Swan and Co for the Respondent in 2023 No 83 and the Plaintiff in 2023 No 359

## **DECISION ON APPEAL AND JUDGEMENT of Martin J**

### **Introduction and background**

1. This matter came on for hearing on 18 December 2024 as an appeal from the Magistrates' Court in respect of an Order for Possession and the grant of a Warrant for Eviction of premises located at West Apartment 4 Bat and Ball Lane, Sandys Parish MA03 ("the premises") against the Appellants on 3 November 2023<sup>1</sup>. The Order granting possession and warrant for eviction from the premises was based upon the allegation that the Appellants had persistently failed to pay the rent for the apartment which had been agreed at BD\$3,400 per month and had accrued substantial arrears for over 12 months. The date for surrender of possession was 15 December 2023.
2. The Appellants sought a stay of the eviction pending the hearing of an intended appeal against the possession order on the grounds that they had in fact paid the rent for the relevant period, but this application was refused after a short hearing before the Magistrate (Ms Auralee Cassidy) on 6 December 2023<sup>2</sup>. The Appellants applied for a stay of the Order of 3 November 2023 pending appeal from the Supreme Court, which was refused by Order of the Chief Justice on 11 December 2023. However, following the filing of the Notice of Appeal, the Bailiff did not proceed with the eviction pending the determination of the Appeal<sup>3</sup>.
3. In the interim, the Appellants did not pay any rent and so the Respondent applied to the Court for directions to expedite the hearing of the Appeal. On 4 July 2024 the Chief Justice gave directions for the hearing of the appeal and directed that pending the hearing, the Appellants were to pay the rent on the first day of each month to the Respondent's attorney, and to pay July's rent forthwith, with the rent to be held in escrow pending the hearing of the appeal.
4. The Appellants again failed to pay the rent for July and August 2024 in accordance with the Order of the Chief Justice, and on 24 August 2024 the Respondent issued a Motion to Commit the Appellants for breach of their obligations. That motion was delayed and did not come on for hearing until 24 October 2024. The application was

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<sup>1</sup> Record of Appeal page 51.

<sup>2</sup> Record of Appeal pages 51 to 54.

<sup>3</sup> The reasons for this are not clear.

then adjourned due to the Appellants' counsel being off the island, but at the short hearing on 24 October 2024 the first appellant asserted that rent had been paid for September and October 2024. On further investigation, these payments were found to be in fact late payments of the rent for July and August 2024, from which certain deductions had been made in respect of alleged repair costs.

5. The matter came back before the Court on 5 November 2024 at which time the Appellants' counsel confirmed on behalf of his clients that no rent had been paid by the Appellants between October 2023 and July 2024. In answer to the complaints about breaching the Chief Justice's Order, an immediate payment of BD\$3,400 for November 2024 was offered, and the Appellants' counsel agreed to set down the hearing of the Appeal on an expedited basis. (In the event, no rent was in fact ever paid as promised).
6. At the hearing on 5 November 2024 the Respondent's counsel referred to parallel proceedings in the Supreme Court (Action 2023 No 359) in which the Respondent to the appeal claimed judgment for arrears of rent against the appellants, who are the Defendants in those proceedings. The Respondent's counsel submitted that the central issue in the appeal is the very same issue that has been raised by the Appellants as their Defence to the claim for arrears of rent in the Supreme Court proceedings 2023 No 359. He submitted that the two matters were therefore inextricably entangled at the hearing of the Appeal and asked for the two matters to be dealt with at the same time.
7. For reasons of judicial economy and fairness, the Court acceded to that submission and directed that both the Appeal and the civil claim made for arrears of rent were to come on for hearing at the same time.
8. For clarity in this Judgment, I shall therefore refer to the Appellants as "the Tenants" and the Respondent as "the Landlord", which description covers their respective capacities in both proceedings.
9. The matter was listed for hearing on 26 November 2024, but on the hearing day, the Appellants' counsel was overseas receiving medical treatment, so the matter was adjourned once more to 18 December 2024.

### **Summary and disposition**

10. At the conclusion of the hearing on the 18 December 2024 the Court dismissed the Tenants' appeal and lifted the stay of the Possession Order and ordered possession of the premises to be surrendered by the Tenants on or before 31 December 2024. In addition, the Court entered judgment against the Tenants and in favour of the

Landlord in the amount of BD\$ 87,346.00 in Action 2023 No 359 being the accumulated arrears of rent and/or mesne profits for the occupation of the premises.

11. The Court indicated that the interests of justice required the Order for Possession to be made at the hearing, with reasons to follow. These are the reasons for the decisions that the Court made on 18 December 2024.

#### **The issues in dispute between the parties**

12. The Tenants' defence to the claim for the arrears of rent and the Appeal against the refusal of the stay of the possession order and warrant for eviction and their defence to the Landlord's Supreme Court claim for arrears was that the Tenants had paid the rent, at least insofar as it related to the period from December 2022 until October 2023 when the Possession Order was made<sup>4</sup>.
13. Between October 2023 until June 2024 did not pay any rent at all, which they admitted in person at an earlier hearing and by their counsel at the hearing of the Appeal. The Tenants claimed that they had paid the rent pursuant to the Chief Justice's Order by way of a payment of BD\$1,746 on 5 August 2024 and BD\$3,100 on 21 October 2024<sup>5</sup>. A deduction was made from the August 2024 payment on account of certain unspecified "repairs" to the premises, purportedly on the grounds that the lease permitted these deductions. Although these two payments were made in August and October 2024, in fact they related to the rent for the months of July and August 2024.

#### **Deductions from the rental payment for July 2024**

14. For convenience I shall deal with the issue of the deductions from the payment of the July rent at the outset.
15. The addendum to the Lease Agreement was produced<sup>6</sup>. This allowed for a deduction of expenses for repairs to the premises incurred by the Tenants in an emergency with the Landlord's consent.
16. The receipts produced in support of the deductions were not in respect of any emergency repairs and related to other matters including the purchase of a lawn mower, cutting trees, repairs to the air conditioning, plumbing, tank cleaning and sundry other items<sup>7</sup>.
17. It is clear on the face of the receipts that these did not relate to emergency repairs to the premises, and it was not suggested that the Landlord had given her consent—she

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<sup>4</sup> Record of Appeal pages 22-5 and paragraph 1b of the Notice of Appeal.

<sup>5</sup> The payment of these amounts were facts agreed between counsel.

<sup>6</sup> Record of Appeal at page 38.

<sup>7</sup> See for example Record of Appeal at pages 43-9.

denied she had given her consent. Therefore, the Court finds that the Tenants were not entitled to deduct these sums from the rent that was due for July 2024.

### **Admissions of arrears**

18. In the course of the hearing on 5 November 2024 and again at the hearing of the appeal on 18 December 2024 it was admitted by counsel for the Tenants that the Tenants owed rent or mesne profits for their occupation of the premises between October 2023 to July 2024 and between September 2024 to December 2024.
19. The Landlord's counsel took the position that in the light of those admissions, whatever the Tenants were claiming in respect of the period between December 2022 and October 2023 (which was the subject of the appeal), the Tenants were admittedly in substantial arrears of rent. He submitted that his client was therefore entitled to judgment for the arrears of the rent for those periods, and that his client was entitled to an Order for Possession of the premises on the grounds of the arrears of rent in any event. The Landlord therefore sought judgment for the arrears admitted by the Tenants, and which had been claimed in the civil proceedings. The Landlord's counsel submitted that the only issue to be determined on the appeal was whether the Tenants had in fact paid the rent for the period between September 2022 and October 2023. This was the factual basis on which the Tenants sought to challenge the Magistrate's refusal to grant a stay pending appeal.

### **The Tenants' Appeal**

20. The Tenants say that they had paid the rent for the period between December 2022 to October 2023 to the Landlord's cousin, who had told them that he had been authorised to receive the payments of rent on her behalf because she is living overseas. The Tenants therefore say that they do not owe the Landlord any rent for that period, and that if she did not receive the rent then that is between her and her cousin. The person who claimed to be authorised to receive the rent on the Landlord's behalf was known to the Tenants as one "Mr. Butterfield"<sup>8</sup>.
21. The Landlord denied that she authorised anyone to collect the rent on her behalf and denied that she received any of the payments that were allegedly paid to her 'cousin'. The Landlord said she did not even know a Mr. Butterfield. The Court was informed by her counsel that the Landlord had produced her bank statements to the Magistrate to verify that no payments were made into her bank account during the relevant period<sup>9</sup>.

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<sup>8</sup> This appears from the note of the evidence at the hearing on 6 December 2023 when the Tenants sought a stay of the Possession Order and Warrant to Evict at page 51 of the Record of Appeal.

<sup>9</sup> These documents are not in the Record of Appeal, but there appears to be a reference to the review of these documents at page 51 of the Record of Appeal ("no funds in only bank account") and the Landlord's counsel confirmed that the Magistrate reviewed the Landlord's bank records.

22. The Tenants produced a bundle of copy documents purporting to be the receipts for the rent paid to Mr. Butterfield, which were exhibited to the affidavit of Ms Eve<sup>10</sup>. These documents were adduced in support of the application for a stay pending appeal, not in defence to the claim for possession.
23. The learned Magistrate who heard the application reviewed the evidence, heard the witnesses and counsel's submissions. She concluded that the Tenants had acted "in bad faith" in failing to make any effort to pay the arrears of rent and dismissed the application for a stay pending appeal.
24. The Tenants appealed against the Magistrate's decision on the grounds (i) that the Landlord had not proved that she had not received the rent and (ii) that the Magistrate did not take into account the facts of the payment of the rent and ought to have adjourned the matter for a hearing on the merits and ought to have granted a stay pending that hearing.
25. Counsel for the Tenants urged the submission upon the Court that once the issue of payment to the authorised agent of the Landlord had been raised, the Landlord had to disprove that the Landlord had not authorised Mr. Butterfield to accept the rent and that this was a triable issue and ought not to have been determined without a trial.
26. It is relevant to note that the Tenants do not appear to have appealed against the actual decision by which the Order for Possession was granted, however the Appeal proceeded on the basis that the Appeal (if successful) would have rendered the Order for Possession ineffective. The Court has therefore taken a view of the merits of the matter as a whole.

### **The evidence**

27. The hearing of an appeal from the Magistrate in a civil matter is by way of a *de novo* hearing<sup>11</sup>, and the Court has all the same powers the Magistrate could have exercised in hearing the matter at first instance. The Court does not usually re-hear the evidence but can do so. In this case the matter proceeded on the affidavit evidence and several new documents that were handed in to the Court in the course of the hearing of the appeal.
28. The Court reviewed the central documents that were tendered in support of the claim that the Tenants had paid the rent for the relevant period (i.e. September 2022 to October 2023). These are printed documents<sup>12</sup> in almost identical form that each purport to be receipts of rent for the relevant month to which they purport to relate.

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<sup>10</sup> Record of Appeal at pages 26-37.

<sup>11</sup> Section 14 (2) (3) and (5) of the Civil Appeals Act 1971.

<sup>12</sup> See pages 26 to 37 of the Record of Appeal.

29. The following is a list of the purported payments (using the year/month/day for dating).

2022-10-04	USD3400	“Bank”
2022-11-24	USD1075	“Bank”
2022-12-15	USD3400	“Cash”
2023-01-03	USD3200	“Cash”
2023-02-06	USD3200	“Cash”
2023-03-07	USD2970	“Cash”
2023-04-04	USD3200	“Cash”
2023-05-02	USD3200	“Cash”
2023-06-15	USD3074.31	“Cash”
2023-07-03	USD2794.67	“Cash”
2023-08-04	USD2000	“Cash”
2023-09-07	USD3000	“Cash”

30. By way of example the following is the text of the first of the receipts which says:

“	<i>Tanaya Christopher</i>	<i>Receipt</i>
<i>Receipt No 1</i>		<i>Date 2022-10-04</i>
<i>Received with thanks from S Eve &amp; C McKenzie the sum of USD three thousand four hundred by Bank for the rent \$3400</i>		<i>Received by</i>
		<i>For Tanaya Christopher”</i>

31. It is notable that this first two receipts were purportedly paid to the “Bank”, but all the rest were receipts for “Cash”. The first discrepancy is that the Tenants later claimed they had no details of the Landlord’s bank. The second discrepancy is that no explanation was given as to why the Tenants stopped making their payments to the Landlord’s bank and started allegedly giving the rent money in US\$ in cash to someone the Tenants did not know but who simply told them that he had authority to accept the money on the Landlord’s behalf.
32. There are a number of other inconsistencies which emerge from a cursory review of these documents. They are not signed at all: neither by the Landlord, nor by someone purporting to do so on her behalf, and there is no reference to Mr. Butterfield.
33. The documents appear to be printed from a *pro forma* template and they are not countersigned by the Tenants. The amounts recorded vary. There are two receipts for

the full amount of the rent of US\$3,400 (October and December 2022) and the other receipts vary between US\$3,200 and US\$1075. They do not reflect payment of the full amount of the rent due in any event, but they are put forward as evidence that the rent had been paid in full for these months.

34. These receipts are also inconsistent with the statements made by Ms Eve in her testimony to the Magistrate that the Tenants had not paid the rent for a period of time because they did not know where or to whom to pay it<sup>13</sup>.

35. The Magistrate's note records Ms Eve as saying:

*"I gave him [Mr. Butterfield] US cash and he came to collect at house. Didn't contact Landlord, she (landlord has a lawyer). I never asked lawyer about paying the money. We were waiting on where to put the funds. Been looking since got letter from the bank in May 2023. Believes neighbour contacted landlord and found out what was going on and landlord acted like she didn't know what was going on".*

36. The Landlord's counsel submitted that the receipts are a fraud and have been concocted by the Tenants to obfuscate and delay, as well as to provide a basis for remaining in the premises rent free pending the determination of the appeal.

37. The Landlord's counsel pointed out that the payment of US\$ in cash is also a clear indication of a false record because neither of the Tenants are paid in US\$ and there is no explanation offered as to how they came to possess a regular monthly supply of US\$3000 in cash.

38. The Landlord's counsel also submitted that the Magistrate was satisfied from the review of the bank records that no payments were received by the Landlord for the relevant period, and no records were produced by the Tenants to show where the funds came from to pay the rent in cash. No explanation is offered as to why the Tenants had any reason to believe that Mr Butterfield was the authorised agent of the Landlord. He said that at the Appeal hearing the Tenants could not even remember the man's name, which they had given as Mr. Butterfield in the court below. He submitted that it was clear that the Tenants had just made him up.

39. Finally, the Landlord's counsel said that the documents were produced in support of the application for a stay of the Possession Order in December 2023, not at the hearing before the Magistrate when the Possession Order was granted a month before, when one might expect them to have been most important and relevant. The Court was asked infer that the reason for this was that they did not exist at the time of the

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<sup>13</sup> Record of Appeal at page 52.



November hearing, but had been concocted to justify the application for a stay a month later.

### **The Court's evaluation**

40. The Court does not find the Tenant's explanation as to why they started paying rent in cash to Mr. Butterfield (if he existed) as being credible or having any basis in reality. There was no reason to accept a complete stranger's word that he had authority to receive the rent. I note that this occurred against the background that the Landlord had served the Notice to quit on 1 January 2023 on the basis of arrears of rent that already accrued.
41. I find the Landlord's submissions highly persuasive on the evidence and that (in the absence of any independent record of payment) that the most likely explanation is that the Tenants did not pay any rent between December 2022 and October 2023, and, as submitted by the Landlord's counsel, they just made these receipts up to try to persuade the Magistrate to grant a stay pending appeal to gain time.
42. In addition, none of the unexplained inconsistencies in the receipts referred to above supports the claims made by the Tenants. Taking all the unexplained anomalies and inconsistencies into account, I am of the view that the purported receipts are clearly unreliable as evidence of the facts which they purport to show.
43. Because they are documents, not live testimony, the Court cannot simply prefer the account of one witness account over another: it is not possible to explain the existence of these documents without coming to the inevitable conclusion that they have been made up to mislead the Court and play for time.
44. In my view, the whole story put forward by the Tenants is lacking in reality and substance. The Tenants were given the Landlord's bank details in January 2023<sup>14</sup>, and although Ms Eve denies receiving the Notice to Quit which sets all the information out, this is not really credible. For example, the Tenants had paid some rent for the months prior to the service of the Notice to Quit without difficulty. Alternatively, the Tenants could have contacted the Landlord's attorney and made arrangements through him.
45. Weighing this evidence together, on a clear balance of probabilities, I am satisfied that (i) the learned Magistrate was entitled to disbelieve the Tenants when they claimed to have paid the rent for the relevant period on the strength of the purported receipts and (ii) on an independent review and consideration of the evidence this Court does not accept the account of events given by the Tenants as to the payment of rent or the authenticity of the purported receipts.

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<sup>14</sup> Record of Appeal at page 16.

### **Conclusions on the Appeal**

46. It follows from what the Court has concluded as to the veracity and reliability of the documents tendered as “receipts” and the account of events given by the tenants that the Court is satisfied (i) that the learned Magistrate was entitled to come to the view she did and to decline to exercise her discretion to grant a stay of the Order for Possession and Warrant for Eviction pending appeal (ii) that the learned Magistrate was entitled to view the Tenants as having acted in bad faith (although she did not expressly refer to the discrepancies in the documents).
47. The Court has also come to the independent conclusion that the documentary “evidence” by way of receipts were falsely produced to provide a plausible defence to the claim, in order to delay the grant of the Order for Possession and to obtain a stay of the Warrant of Eviction. The Court has no hesitation in dismissing the Appeal.

### **The Landlord’s claim for arrears of rent in the civil proceedings 2023 No 359**

48. The Landlord’s counsel submitted that once the Tenants admitted that they had not paid rent for the premises for the period after the Possession Order was granted (i.e. between October 2023 and July 2024), the Landlord was entitled to seek judgment on those admissions. Further, once the veracity of the purported receipts has been discredited, as it has, the Landlord’s counsel submitted that there remains no evidence upon which the Tenants can rely to defend the Landlord’s claims for the arrears of rent for the period between December 2022 and October 2023. Finally, the Landlord’s counsel submitted, the Tenants also admitted that no payments have been made for their continued occupation from September 2024 to December 2024. The Court accepted those submissions.
49. The Landlord has given credit for the sums paid by the Tenants in August and October 2024 (for the period of July and August 2024).
50. The Landlord’s bank has obtained judgment against the Landlord for arrears of her mortgage payments, which she failed to make because she had relied upon the payment of rent from the premises to pay the mortgage. The Landlord’s counsel submitted that it would be manifestly unjust to require the Landlord to take out a separate application to obtain a summary judgment against the Tenants in the civil proceedings, when the very same facts are being relied upon by the tenants to defend the Landlord’s claim. The Landlord wishes to obtain possession in order to re-let the premises to service her own debt obligations to the Bank.
51. The Court has concluded that the Tenants have not in reality paid any rent for their occupation of the premises for two years, except for the two payments made in August and October 2024 following the Order made by the Chief Justice on 4 July 2024. This is most unjust.

52. In those circumstances I considered that the principles the Court must take into account in applying the Overriding Objective justified the Court in granting judgment to the Landlord for the full amount of the arrears claimed without requiring the Landlord (i) to issue a separate summons for judgment based upon the admissions of the Tenants referred to above, and (ii) to issue an application for summary judgment on the basis that the defence to the claim for the rent is “shadowy” and for which leave to defend the claim should not be given<sup>15</sup>.
53. For the reasons already explained, the Court is satisfied that the explanation given by the Tenants is not only not credible but false in substance, and therefore the Court should not permit the Tenants to continue to deny their liability on the basis of false documents and inconsistent evidence—there is no *bona fide* defence to the claim. Furthermore, all the same parties are involved in both sets of proceedings, the grounds of the defence to the claim and the evidence in support of that defence are the same as the grounds for the appeal, and the decision of the Court will bind all relevant interests. Therefore, it seemed to the Court to be most appropriate to proceed to deal with both matters at the same time.
54. Accordingly, at the conclusion of the hearing on 18 December 2024, the Court also entered judgment against the Defendants to Action 2023 No 359 for the arrears of rent in the amount of BD\$87,346.00 comprising the unpaid rents as follows: (1) December 2022 to Oct 2023 in the amount of BD\$37,400 (being the period for which receipts were allegedly produced) (2) October 2023 to September 2024 in the amount of BD\$42,226 (ie 51,000 less BD\$8774.00) in which period the Tenants admitted they had only paid \$8,774.00 for rents due and (3) October to December 2024 in the amount of BD\$10,200, which the Tenants also admitted was unpaid.
55. The Court awards interest on the Judgment sum at a rate of 3.5% per annum until payment in full commencing from the 18 December 2024 when judgment was given.
56. For the avoidance of any doubt or further delay the Court made an Order for Possession of the premises with effect from 31 December 2024 and lifted the stay of execution of the Warrant to Evict from that date.

### Costs

57. The Tenants are to pay the costs of the Appeal to be taxed if not agreed.

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<sup>15</sup> See *National Westminster Bank plc v Daniel* [1993] 1 WLR 1453 where the English Court of Appeal held that if the evidence of the defendant is incredible in any material respect, it cannot be said that there is a fair or reasonable probability that the defendant has a real or bona fide defence and judgment should be given to the plaintiff.

**Committal**

58. Finally, the Landlord's counsel issued an application to commit the Tenants for contempt of the Court's Order to pay the rent for the period pending the appeal. This was adjourned at the end of the Appeal for six weeks to 29 January 2025 to enable the Tenants to demonstrate a more sincere effort to comply with their obligations and to provide the Landlord with a realistic payment plan.

Dated this 13<sup>th</sup> January 2025



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**THE HON. ANDREW MARTIN**  
**PUISNE JUDGE**