COLONY OF MONTSERRAT

IN THE HIGH COURT OF JUSTICE
A.D. 1994

CIVIL SUIT NO. 174 OF 1993

BETWEEN: JOHN PUNTER AND MARCIA PUNTER Plaintiffs

AND

THOMAS DAWKINS	First Defendant
JUDITH DAWKINS	Second Defendant
ANGUS STEELE	Third Defendant
ANTHONY OVERMAN	Fourth Defendant
ROBERT DONNELLY	Fifth Defendant
JEFFREY DONNELLY	Sixth Defendant
BRIAN MARGLIN	Seventh Defendant
COLM D'ARCY	Eighth Defendant

Appearances:

Jean E. H. Kelsick, for the Plaintiffs
Justin L. Simon, for the Defendants

JUDGMENT

[1] The plaintiffs are husband and wife who lived at Old Town in the Island of Montserrat. They are both restaurateurs and at the material time operated a restaurant called Ziggy's in the said Island of Montserrat firstly in premises called Oriole Plaza and later at the premises of the Montserrat Yacht Club in the district of Wapping.

[2] The defendants, except the seventh, were all at one time or another members of the unincorporated association known as the Montserrat Yacht Club. The first defendant was at relevant times the commodore of the said yacht club. The Montserrat Yacht Club occupied premises at Wapping from where it conducted all such business as a yacht club will conduct on land and in which the club also had a restaurant operating.

[3] The plaintiffs were approached by certain of the defendants who thought that they might be good for the operation of the restaurant in the yacht club when the earlier operator renting the club's premises no longer did so. The plaintiffs took over the operation of the club's restaurant in early April 1992. It appeared that the original intent of the parties was for the plaintiffs to operate the restaurant under a 3-year lease but the plaintiffs went into occupation before any document was executed. Indeed no formal document for the lease was ever executed.

[4] There was a short honeymoon between the parties in the operation of the restaurant but things soon started going wrong and by July 1992 the first defendant as commodore of the yacht club was writing the plaintiffs detailing a number of things which seemed to have been irritating the members of the yacht club. Things went thereafter from bad to worse until the yacht club was clamouring for

the plaintiffs to vacate the restaurant. It reached the stage where the plaintiffs were forcibly evicted.

[5] The defendants have maintained that they did not unlawfully evict the plaintiffs. Aggrieved by what they perceived as forcible eviction and unlawful treatment at the hands of the defendants and complaining of having suffered loss the plaintiffs had a writ of summons issued against the defendants. By the said writ the plaintiffs claimed the following reliefs, namely:

"(a) damages for loss of income and goodwill and unlawful eviction and the detention of their personal property.
(b) special damages of $13,129.11."

[6] In the statement of claim endorsed on the said writ of summons the plaintiff made certain allegations. Those allegations were in paragraphs 2,4,5,7,8,10,11,12,13, and 14 which are set out hereafter as follows:

"2. On or about the month of October, 1991, and on divers dates thereafter, the first defendant purporting to act on behalf of the Montserrat Yacht Club, approached the plaintiffs on several occasions whilst they were operating a restaurant and bar at the Oriole Plaza, Plymouth, and invited them to move their operation to the premises of the Montserrat Yacht Club at Wapping.

3. The first and second defendants assured and promised the plaintiffs that they would be granted an acceptable lease by the said Club should they move their operation as aforesaid.

4. During the month of March, 1992, the plaintiffs met with the first and second defendants and reviewed and approved a lease of the premises of the said Club for a period of three years.

5. The plaintiffs were informed by the first and second defendants that if they were to assume the tenancy of the premises of the said Club the said lease would be signed shortly thereafter by those members of the Club authorized to do so and that in any event the said lease represented the understanding in full between the parties and spelt out in full the working relationship between them.

7. As a consequence of the first and second defendants' assurances, the plaintiffs left the said Oriole Plaza and assumed the tenancy of the Montserrat Yacht Club on 1st April, 1992, and commenced operating a bar and restaurant thereat.

8. During the month of October, 1992, and on divers dates thereafter, the first and second defendants, conspiring together and acting in concert, harassed and embarrassed the plaintiffs and obstructed them in the conduct of their business at the premises of the said Club in a manner which was calculated to cause the plaintiffs loss of income, custom and goodwill.

PARTICULARS

(a) Intimidating the plaintiffs' staff.
(b) Conducting themselves loudly and offensively in the presence of the plaintiffs' customers.
(c) Grilling food in the dining area of the said Club whilst customers were dining therein.
(d) Lacerating the upholstery of the plaintiffs' dining chairs and blocking the bathroom toilets.

(e) Publishing and circulating to members of the public writings which undermined the plaintiffs' business integrity and credibility.

10. Further thereto, during the month of October, 1992, the first defendant served a notice on the plaintiffs that they were to quit the premises of the said Club by 16th January, 1992. The plaintiffs refused to comply with the said notice and applied to the High Court for a determination of the matter, which application is still pending.
11. On 27th August, 1993, the third defendant wrote to the Montserrat Water Authority unlawfully instructing them to disconnect the supply of water to the plaintiffs at the said Club.
12. Further thereto, on 1st September, 1993, the first, third, fourth, fifth, sixth, seventh and eighth defendants, acting in concert and conspiring together, unlawfully and forcibly entered the premises of the said Club and evicted the plaintiffs therefrom and wrongfully took into their possession and detained all personal property situate therein and belonging to the plaintiffs.
13. As a consequence of the said eviction and the detention of the said personal property, the plaintiffs have suffered loss and damage and loss of goodwill.

PARTICULARS

(i) Loss of foodstuffs and alcoholic and non-alcoholic beverages which rotted and were damaged respectively whilst in the custody of the defendants to this action or alternatively which were not returned.
(ii) Damaged appliances.
(iii) The loss of a strand of electric lights, a marine radio aerial and mount, garbage bin and a professional bar sink, which the defendants to this action have converted to their own use.
(iv) Loss of income as a result of not being able to conduct business.

PARTICULARS OF SPECIAL DAMAGE

(a) Loss of income of $1500 a day commencing the 1st September 1993, and continuing.

(b)	Rotten, damaged and missing foodstuffs ……..	$ 4630.46
(c)	Alcoholic and non-alcoholic beverages……..	$ 979.00
(d)	One professional bar sink ……	$ 1735.00
(e)	One marine radio aerial and mount ……..	$ 225.00
(f)	One strand of electric lights ……..	$ 68.00
(g)	One garbage bin ……..	$ 85.00
(h)	One damaged upright wine cooler ……..	$ 2000.00
	TOTAL	$9722.46

[7] To the plaintiff's statement of claim the defendants entered a defence. The important paragraphs of that defence were 3,4,5,8,9,10,11,13,14,16,17, and 18. Those paragraphs were in the following terms:

3. By advertisement appearing in the January 10, 1992 issue of the Montserrat Reporter the second-named Defendant as Secretary of the Montserrat Yacht Club invited tenders from the general public in respect of running the Bar and Restaurant facilities of the Montserrat Yacht Club on behalf of the Club's members, which said facilities are situated on the upper floor of the Yacht Club premises in Wapping. The said facilities were then being managed by one Edward Edgecombe who relinquished his tenancy on or about the 31st day of March 1992.
4. The first-named Defendant admits inviting the Plaintiffs to submit a tender and states that they declined so to do as they were then negotiating to take over the management of the restaurant at the Montserrat Golf Club.
5. By letter dated March 6 1992 the Plaintiffs applied for a tenancy of the Yacht Club pledging, inter alia, to co-operate with the Club's committee to improve the Club and increase the membership thereof. The plaintiffs were at that date familiar with the Club membership's rights which would be made conditional to any tenancy granted by the Club.
8. Following a Club Committee meeting on March 24 1992 the second-named Defendant and other Club members were mandated to discuss a draft lease agreement with the Plaintiffs and a meeting was subsequently held with the Plaintiffs at the home of one Stuart Arnold.
9. The Defendants state that the Plaintiffs were advised that the said draft lease was a discussion document only and that a lease could not be executed until the resolution of an internal constitutional and proprietorship issues within the Club.
10. No agreement was reached on the draft lease agreement as the Plaintiffs requested changes to certain provisions which were not acceptable to the three Club members referred to in paragraph 8 above.
11. The Defendants deny paragraph 7 of the Statement of Claim and state that in mid April 1992, the Plaintiffs were let into possession of the Club's Bar and Restaurant facilities on only on an oral monthly tenancy at a monthly rental of $1,100.00. Further the Plaintiffs agreed inter alia to the following terms and conditions.
    (a) that club members would be entitled to a 10% discount;
    (b) that on designated Club days the Bar and Restaurant would be open for the exclusive use of Club members;
    (c) the Club would run the Bar and Restaurant during its fund raising events to a maximum of 12 per year;
    (d) that all bills for utilities would be to the Plaintiffs account;
    (e) that a damage deposit of one month's rents be paid forthwith by the Plaintiffs' and
    (f) that a security deposit of one month's rent be paid forthwith by the Plaintiffs.
13. The first Defendant did sign a Notice to Quit dated October 27 1992 which said notice was delivered to the Plaintiffs requesting possession of the Club's premises which they then occupied on January 16 1992. There has been no application by the Plaintiffs to the High Court for a determination of the issue of the said notice.
14. By letter dated October 16 1992 the first-named Defendant had intimated to the Plaintiffs the Club's dissatisfaction with the manner in which they had been conducting themselves and their business in total breach of the oral agreement referred to in paragraph 11 above and in total disregard of the wishes of the Club.

16. By letter dated August 12 1993 the Club Committee through their solicitor advised the Plaintiffs' solicitor that the Plaintiffs were now trespassers on the Club's premises and requested that rent arrears be paid and that the Plaintiffs
remove their belongings forthwith from the said premises.
17. By letter dated August 26 1993 the Club Committee through their solicitor advised the Plaintiffs to vacate the Club's premises on or before August 31 1993.
18. As to paragraphs 12 and 13 of the Statement of Claim the third, fourth, fifth, sixth, and eighth Defendants admit evicting the Plaintiffs from the Club's premises and secured the moveable possessions of the Plaintiffs until their delivery to the Plaintiffs on September 18 1993.

[8] The plaintiffs filed a reply joining issue with the defendants on their defence except in those areas where the defendants made admissions of the plaintiffs' allegations.

[9] The matter eventually came on before me for trial at which time both plaintiffs testified to support their case. They called one other witness, a Mr. St. Clair Simmons, to give evidence on their behalf. The first, second and fourth defendants testified for the defence.

[10] Since the gravamen of the plaintiffs' case would seem to lie in their quest for damages arising out of their eviction from premises belonging to the Montserrat Yacht Club it would be incumbent on them to satisfy the court on at least a balance of probabilities that their occupation of the premises was such at the relevant times as would entitle them to the damages they sought. An offshoot of that will be that the plaintiffs would have had to show the court that defendants were the parties responsible for doing the unlawful things they claim would have entitled them to the damages.

[11] In his submissions to the court counsel for the defendants elegantly encapsulated what the whole case was about and the plaintiffs ought not to take umbrage or think there has been any bias against them if I used herein that encapsulation for identifying issues. In his closing address to the court counsel for the defendants submitted, and I use the ipsissima verba, "That in spite of the evidence in the matter the issues for determination are simple. I submit that 5 issues are relevant in establishing the plaintiffs' case. Those are:

(a) What was the nature of the occupation by the plaintiffs in respect of the premises of the Montserrat Yacht Club?
(b) What terms, if any, would be implied or can be found to have been expressed in respect of the plaintiffs' occupancy?
(c) Did the defendants in the course of their conduct harass embarrass and obstruct the plaintiffs in the conduct of their business?
(d) Was the taking of possession of the premises by the defendants on 1/9/93 unlawful as claimed by the plaintiffs? and,
(e) What loss, if any, could be said that the plaintiffs suffered through the actions of the defendants?

[12] What is the evidence adduced for the plaintiffs to do for them what it is shown they had to do?

[13] What is the evidence adduced for the plaintiffs to do for them what it is shown they had to do? John Punter testified that he and his wife as restaurateurs were operating a business known as Ziggy's Restaurant situated in the Oriole Plaza in Montserrat in October 1991 when the first defendant approached him and threw out to him the idea of the plaintiffs taking over the restaurant that was operated at the Montserrat Yacht Club. He said that at the time he was in negotiations with the Montserrat Golf Club to run a restaurant for that entity and he was also doing very well with Ziggy's.

[14] Mr. Punter said that although he at first rejected the suggestion from the first defendant to operate the restaurant he eventually agreed to take up the offer which was sweetened with the honey of longevity as he was promised a 3-year lease of the premises from which the restaurant was to be operated.

[15] The plaintiff further testified that he started meeting with the committee of the Montserrat Yacht Club on whose behalf the first defendant had approached him. He said that certain matters pertaining to the proposed lease of the premises had been agreed including the term of the lease and the monthly rent. There were some other matters discussed on which there was no agreement and a draft lease was drawn up to be executed. Although they agreed that the arrangement was to commence on the 1/4/92 no final agreement on the terms of the lease were settled and no formal document was executed.

[16] Despite the absence of a formal lease Mr. Punter said that the plaintiffs went into occupation of the yacht club's premises from the 1st April 1992. He said that he paid moneys on the lease as had been agreed in the discussions. These moneys were $1100.00 for the first month's rent, $1100.00 as a month's rent in advance and $1100.00 against any claim for damages for which the plaintiffs might become liable as a result of their occupation of the premises. He produced a draft lease which he said contained the terms which had been agreed for the lease.

[17] The plaintiff testified that some of the terms provided in the draft lease he wanted to have changed but there was no acceptance of the changes he contended for. In the result no formal document was executed but he maintained that when the plaintiffs went into occupation they did so on the understanding that they had a lease for three years as he said he would not have moved into the yacht club's premises if he were doing so as a monthly tenant.

[18] The plaintiff further testified that after they moved into the premises of the yacht club "things went well". From about October 1992 however he said that things started to go sour when he learnt of what the yacht club was planning to do about the restaurant during the coming Christmas season.

[19] One of the tenant's covenants provided in the draft lease was to the effect that the tenant will "permit the demised premises to be used for Montserrat Yacht Club functions, that is to say:

(a) Exclusive use of the demised premises on each Sunday Tuesday evening and Saturday afternoon;

(b) Holding of general meetings of the Montserrat Yacht Club;

(a) Other functions up to a maximum of twelve (12) occasions per year in which case the landlord will give the tenant at least two (2) weeks notice, whereby the landlord reserve the right to provide his own catering and or bar facilities."

[20] The plaintiff testified that he was dissatisfied with that clause and wanted it changed so that the words "exclusive" and "Tuesday" would come out of paragraph (a). He said he thought that the yacht club had accepted those changes. And he also thought that it was accepted that certain other changes he suggested would be effected.

[21] The plaintiff further testified that in October 1992 the plaintiffs approached the first defendant with a view to learning from him what arrangements the yacht club was making for the use of the restaurant. When the first defendant told him what was being planned he said he objected because the club's plans would have badly interfered with his own plans for the busiest and most rewarding part of the year. The first defendant insisted that the arrangements for dealing with the premises were as set out in the lease and those permitted the yacht club which was the landlord to have the premises as set out in the draft.

[22] The position the yacht club adopted was that the plaintiffs had gone into occupation of the premises under the terms of the draft lease even if the plaintiffs did not have the three-year legal lease. The plaintiffs' position was that they were on a lease which if it were not a three year lease it was more than an mere monthly tenancy.

[23] The plaintiff testified about several other matters that cropped up as problems in the tenancy when the two sides seemed to take up arms against each other. He further testified of letters written for the club with charges of breaches of covenants and countercharges by them and denials of breaches. Further testimony was to the effect that the warring reached such a stage that the plaintiffs wrote the yacht club to inform it that they the plaintiffs would have been removing their equipment so that the club will have the premises solely over a particular period which included the Christmas season.

[24] Worse was to follow for on the 27th October 1992, the plaintiffs received from the first defendant a notice to quit the premises and give them up on the 16th January, 1992. The plaintiffs seemed also to have accepted membership of the yacht club and their obligations as such members were taken by the club as affecting the landlord tenant relationship.

[25] Much of what the plaintiffs complain about depends upon the type of tenancy they had. Their contention was for a lease of three years even though there was no legal lease executed to ground that claim; and if there were no lease for three years they would have settled at the worst for a lease from year to year. They relied on the law that is to the effect that a lease for three years does not have to be by deed.

[26] Notwithstanding that a lease for a term of three years need not be secured by a deed it is not only the absence of a deed that affects the validity of the lease taken up by the plaintiffs. What seems to have been clear from the evidence is that there had not been complete agreement on what exactly were the terms of the plaintiffs' occupation of the yacht club's premises. The only thing that seemed to have been settled when the plaintiffs went into occupation was that there was to have been a monthly rent of $1100.00 which was to be paid monthly in advance.

[27] The law which is applicable to the circumstances of the occupation by the plaintiffs on the evidence of the plaintiff is relatively clear. On that evidence the plaintiffs went into occupation of the yacht club's premises before all the terms of their occupation were settled. There was no three-year lease created. A tenancy from year to year is created where the rent paid is a yearly rent. Here the rent was entirely referable to a monthly reservation and would thus have created a tenancy from month to month. Such of the conditions agreed in the discussions for the three-year lease that may be applicable to a monthly tenancy could also attach to the tenancy created by the plaintiffs' early entry into occupation.

[28] It could be taken therefore that the plaintiffs held a mere tenancy from month to month which would have been determinable by one month's notice. That monthly tenancy may also have been subject to an agreed condition of re-entry by the landlord on the default in the payment of rent for a period of 21 days.

[29] The validity of the notice to quit was questionable but even if it were taken to have been a good notice nothing turned on it as the plaintiff said that they went back into occupation of the premises in January 1993 and continued to pay the monthly rent to the yacht club. The yacht club accepted rent thereafter for the months of January, February March and April of 1993. The plaintiffs had left the premises in late December 1992 to accommodate the yacht club activities as outlined in the conditions of the draft lease related to the use of the leased premises by the club itself.

[30] The plaintiff further testified that the plaintiffs did not pay rent in July 1993 and on the 26th August 1993 they received a letter which was written to their lawyer and copied to them by a lawyer for the yacht club. The letter reminded the plaintiffs that they had not paid any moneys to the yacht club since July 1993 and ended with the following threat:

"Further your clients are hereby advised to remove their belongings from the yacht club on or before Tuesday, August 31, 1993. Should they fail to do so they will be forcibly removed since they are now deemed to be trespassers."

[31] The reference in the threat to the plaintiffs as trespassers was as a result of the said lawyer treating the notice to quit sent to the plaintiffs as being a valid notice determining the tenancy on the 16th January 1993. Indeed in an earlier letter to the plaintiffs' lawyer the lawyer for the yacht club had written the following "I have advised my clients that the Punters are trespassers, their tenancy having been determined on January 16, 1993. In all the circumstances, we believe that your clients have now been afforded reasonable time to remove their possessions from the property of the Montserrat Yacht Club." Another part of the said letter stated "kindly advise your clients to remove their belongings from the yacht club forthwith failing which I have advised my clients to pursue a certain course of action." These letters were produced as exhibits by the plaintiffs.

[32] Mr. Punter further testified that when the plaintiffs did not remove their belongings in the time the defendants thought they should the first defendant, the third defendant, the fourth defendant, the fifth defendant, the sixth defendant, the seventh defendant and the eighth defendant all on the 1st September 1993 descended upon the yacht club's premises that still had in the plaintiffs' belongings and removed therefrom those belongings and effectively evicted the plaintiffs. The plaintiffs did not get those belongings back until mid September. The plaintiff said that it is as a result of this detention of their belongings that certain damage was caused to them and they suffered loss of some of their goods.

[33] The plaintiff also produced a letter he received from the first defendant which in part stated "as trustees of the club we find ourselves unable to proceed with any lease agreement and under the circumstances are perfectly within our rights to demand your immediate departure. But, in recognition of the work you have done, albeit in the name of your own business and to allow you a little more time to seek alternative premises we require that you vacate the premises of the Montserrat Yacht Club within three months of the above date." This letter was dated the 16th October 1992.

[34] The said letter also contained the warning that "we require an agreeable written reply within the next seven days or we shall be submitting a formal notice to quit under section 27 of the Small Tenements Act (Montserrat)". It would appear that this warning was the harbinger of the notice to quit which was sent on the 27th October 1993.

[35] The plaintiff also testified of several instances where one or other of the defendants did things which he thought were done to harass and embarrass the plaintiffs in their operation of the restaurant. The entry into occupation by the plaintiffs before all the terms of the occupation were hammered out was the main reason for much of what happened to the plaintiffs. It struck me that the plaintiffs were of the impression that they had taken a lease of the yacht club's premises and were entitled to carry on their earlier business of running a restaurant called Ziggy's completely divorced from the yacht club restaurant. On the other hand the relevant persons for the yacht club which was the owner of the premises and true landlord were of the view that the plaintiffs were engaged to run the yacht club's restaurant with the right to cater to members of the public.

[36] Mrs. Punter also gave evidence which in the most part supported the evidence given by her husband. Another witness St. Clair Simmons was also called for the plaintiffs. He testified as to what property he saw when he accompanied the plaintiffs to recover it from the defendants after the eviction.

[37] When the first defendant testified he denied most of the allegations of wrongdoing complained of by the plaintiffs and given in evidence by the Punters. From what the first defendant stated the circumstances surrounding the plaintiffs' entry into occupation of the premises of the yacht club were completely different from what the plaintiffs described. And he spoke of terms and conditions which were discussed which suggested that the differences between the plaintiffs and the defendants on the plaintiffs' operation of the restaurant were great. The first defendant was the commodore of the yacht club at the time the plaintiffs became the tenants of the club and envisaged a different relationship between the club and the plaintiffs from that which the plaintiffs had.

[38] The first defendant admitted that there was an eviction of the plaintiffs on the 1st September 1993 and a subsequent detention of some of the belongings of the plaintiffs. He denied though that he took part in the eviction. He thought that the eviction was justified in the light of the notices sent to the plaintiffs for them to quit the premises and the plaintiffs' continued occupation of the premises after the expiry of the notices and their failure to pay for that continued occupation.

[39] The first defendant testified of an injunction which the plaintiffs got from the court restraining the yacht club and its members from interfering with the plaintiffs' return to the club's premises after they had left them to permit the club to hold the affairs which it thought it was able to do while the plaintiffs held their tenancy. The plaintiffs had gone out of occupation after the notices to quit had been served on them.

[40] The fourth defendant, Anthony Overman also testified for the defendants. He was a member of the management committee of the Montserrat Yacht Club from 1992 to 1995 and was therefore a member of that committee at all the relevant times. He testified that he did not sign any of the letters that were sent from the club to the plaintiffs but was present at the club on the morning the plaintiffs were evicted from the premises. He admitted that he was part of the club's team that oversaw the eviction of the plaintiffs and there was a letter produced that tended to show that he wrote a letter to the water authorities inviting them to discontinue the service to the premises for the plaintiffs.

[41] The fourth defendant further testified as to how the eviction was accomplished and described what he and various other members of the club committee did. He identified the third, seventh and eighth defendants as assisting him in cataloguing and otherwise dealing with the property of the plaintiffs that had to be moved in the eviction. He said he saw the first defendant around the area but he did not join them in the eviction exercise.

[42] The fourth defendant also testified that he made an inventory of the items belonging to the plaintiffs that were removed from the premises and put away for safekeeping. He said too that there were foodstuff, alcoholic and other beverages and other perishable items belonging to the plaintiffs that he did not itemise.

[43] As had been adumbrated earlier herein the nature of the plaintiffs' occupation of the Montserrat Yacht Club's premises is of utmost importance in resolving this matter. Counsel for the plaintiffs readily accepted that the plaintiffs did not have the three-year lease that was first discussed by the parties. Relying on what was decided in the Trinidadian case of Metcalfe & Eddy Ltd v Edghill counsel for the plaintiffs submitted that what the plaintiffs got was a tenancy from year on the basis that there was an agreement for a three year lease when the plaintiffs went into occupation of the premises at a monthly rent.

[44] Quite apart from the fact that the Trinidadian case was determined on provisions in a Trinidadian statute which has not been shown to have a Montserratian equivalent the evidence adduced on both sides in that case was to the effect that all the terms for the lease which both parties wanted had been unconditionally accepted. In this case there was no agreement on all the terms. And as long as there is no complete agreement on all the terms there would be no concluded contract.

[45] When the plaintiffs took up occupation of the premises the parties were still in negotiations. The plaintiffs assumed, whether they wanted to do so or not, a tenancy the duration of which would have been left to be determined by the way the rent was reserved. A tenancy from year to year would only result if the rent were reserved by reference to a year. The rent agreed between the parties in this case was referable exclusively to a monthly reservation.

[46] I have no doubt that the plaintiffs got themselves a mere monthly tenancy.

[47] There are certain terms and conditions that would adhere to a monthly tenancy whether they were expressed or not. From the evidence adduced however there appears to have been unconditional acceptance by both parties of some of the terms and conditions set out in the drat lease tendered in evidence; and those unconditionally accepted terms and conditions which can suit a tenancy from month to month would also adhere to the tenancy assumed by the plaintiffs. The term in the draft lease which could be taken to have become a term of the monthly tenancy and which on the evidence would seem to loom to great proportions was the term relating to re-entry and forfeiture.

[48] The plaintiffs gave a great deal of evidence about individual incidents that happened during the course of their operation of the restaurant in the premises of the yacht club. There was a denial of the kind of incidents and their effect by the defendants when their turn came to give evidence. The gravamen of the plaintiffs' grouse lay more in the eviction; and it does not strike me that the evidence adduced would support any independent finding of damnable conduct such as would generate a separate award of damages against any of the defendants for causing the plaintiffs any loss of income custom and goodwill.

[49] I shall now turn to the matter of the eviction of the plaintiffs by the yacht club as it did so through the agency of some of the defendants. There is acceptance by the defendants that the plaintiffs were evicted from the yacht club's premises on the 1st September 1993. And I must determine whether the eviction was lawful or not. The defendants say that it was and the plaintiffs contend that it was unlawful and injurious.

[50] As I have found, the tenancy taken up by the plaintiffs was one from month to month. As such it would have been determinable by notice of at least one month. I had also found that the right of re-entry and forfeiture would have attached to the tenancy and thus on the non payment of rent for a period of at least 21 days the landlord would have been able to re-enter and bring about a determination of the tenancy.

[51] On the basis of the evidence adduced the yacht club did have a notice to quit served on the plaintiffs and on a date in August 1993 when a demand was made by the yacht club on the plaintiffs for the payment of rent past due the plaintiffs were in default of the payment of rent for more than 21 days. On the face of things and in the ordinary course of the law it would appear that there may have been some justification for an eviction.

[52] These things rarely are so straightforward and counsel for the plaintiffs submitted that they were not straightforward. He contended that the notice to quit was bad because the plaintiffs were in occupation of the premises under an agreement for a lease of three years and thus a notice to quit of 3 months would not be valid. He further contended that the yacht club accepted rent after the notice to quit was served and that too would invalidate the notice. Counsel also submitted in relation to the possible right of re-entry that the acceptance of rent prior to re-entry waives the right of re-entry as does a demand for rent both of which things the yacht club did.

[53] There was a notice to quit served on the plaintiffs on or about the 16th October 1992 which told the plaintiffs that they were to quit the premises within 3 months of the said 16th October 1992. There was another notice sent to the plaintiffs which fixed a wrong date for the vacation of the premises by the plaintiffs. It called upon them to leave by the 16th January 1992 a date long past.

[54] Once a valid notice to quit has been served it automatically brings the tenancy to an end on the expiration of the notice. The plaintiffs' tenancy would therefore have come to an and by the 16th January, 1993 if the notice were a valid notice. In a letter sent to the plaintiffs' lawyer on the 12th August 1993 the lawyer for the yacht club wrote "according to my instructions, your clients Mr. and Mrs. John Punter were let into possession of the bar and restaurant facilities at the Montserrat Yacht Club as tenants at will in April, 1992, during negotiations for lease. I am further instructed that your clients paid a monthly rental of $1100.00 for that date until January 16, 1993 when the tenancy was determined by a notice to quit. After that date your clients continued to pay the sum of $1100.00 monthly until July 31, 1993 when they refused to make any further payments for the use and occupation of the premises."

[55] After a valid notice to quit has been served the landlord and tenant may agree expressly or by implication for the grant of a new tenancy to take effect on the expiry of the notice. The taking of rent by the yacht club after the 16th January, 1993 therefore would seem to have nullified the effect of the notice to quit even if it were valid. A new tenancy would seem to have impliedly been given the plaintiffs by the yacht club. The eviction could not therefore have been made on the 1st September 1993 on the basis of the notice to quit given in October 1992.

[56] The new tenancy created in the way I indicated immediately above would have also had the right of re-entry and forfeiture as a term. The plaintiffs did not pay the July 1993 rent or the August 1993 rent timeously. Indeed they were in default for more than 21 days on the 26th August 1993 when the dunning letter was sent to them and their lawyers by the yacht club's lawyer. They were in arrears for both the July 1993 rent and the August 1993 rent for more than 21 days and thus the right of re-entry and forfeiture arose for those rents.

[57] The yacht club effected the eviction on the 1st September, 1993 when the right of re-entry was current. The plaintiffs sent cheques to the yacht club for the amounts of the rents and the yacht club seemed to have accepted them on the said 1st September 1993. That is why counsel for the plaintiffs made the submission stated above.

[58] The law on the matter is though that waiver of forfeiture may arise where the landlord, after the cause of the forfeiture has come to his knowledge does any act whereby he recognises the relation of landlord and tenant still continuing. A subsisting tenancy is recognised and the forfeiture is waived by the receipt of rent which has accrued due since the cause of the forfeiture. The rent which the yacht club demanded and which it may have subsequently received was not rent that accrued due after the cause of the forfeiture. Indeed it was the rent that generated the forfeiture and accrued before the cause of the forfeiture. The rent received did not accrue after the cause of the forfeiture.

[59] On the basis therefore that the yacht club did on the 1st September 1993 have a right of forfeiture the plaintiffs having been in default of payment of rent for July and August 1993 for more than 21 days the defendants who were effecting the yacht club's right of re-entry and forfeiture could not be said to have been trespassers. Their entry on the premises would not have therefore been unlawful and I do not find it to be so.

[60] If the yacht club were entitled to re-enter the premises and bring the plaintiffs' tenancy to an end then it would also have been within its rights to remove the plaintiffs' belongings from the premises. The defendants did remove the plaintiffs' belongings and had them stored, they said, for safekeeping from where the plaintiffs could have got them at any time. The plaintiffs did not recover those articles until the 18th September 1993 after getting their lawyer to write on the 9th September to demand them from the yacht club. The evidence adduced by the defendants was to the effect that the plaintiffs could have recovered their belongings at any time and before they claimed them on the 18th September. There was nothing shown by the plaintiffs to gainsay that evidence and I would accept it.

[61] Having determined the nature of the plaintiffs' occupancy of the premises of the yacht club and the legality of the re-entry and forfeiture by the defendants on the 1st September 1993 I must now see whether the defendants or any of them would be liable to the plaintiffs for any loss the plaintiffs may have suffered.

[62] The plaintiffs complained that among the losses they suffered was the loss of income of $1500.00 a day commencing on the 1st September, 1993 and continuing and loss of goodwill. In his testimony Mr. Punter said that he made a gross of $1500.00 a day and a net of $800.00. He operated on 5 days a week being Monday to Saturday and did not operate on Wednesdays or Sundays.

[63] This claim was based on the plaintiffs' reckoning that they had assumed a tenancy from year to year which could not have been determined by re-entry in the way the defendants effected it. Indeed if the plaintiff had been occupying the premises under an agreement for a three-year lease the notice to quit sent to them would have been invalid from the beginning. And to effect re-entry and forfeiture in the circumstances of an agreement for a three-year lease the defendants would have had to pay attention to section 70 of the Conveyancing and Law of Property Act. It appears that the defendants did not pay much attention to that section when they re-entered on the 1st September.

[64] Since however I have determined that the action taken by the defendants on the 1st September 1993 would be justifiable that action would not constitute a ground on which the plaintiffs could claim compensation. The court would not therefore be in a position to award the plaintiffs any damages under this claim.

[65] The plaintiffs also claimed damages for the detention of their personal property and special damages of $9722.46 for loss of goods and damage to certain articles. The original figure claimed was $13,129.11. There was evidence adduced by the plaintiffs to show that they did suffer some loss of goods due to the same being held in the basement of the premises by the defendants presumably without adequate means of preventing their deterioration. As I have indicated above however the defendants would have been justified in removing the belongings of the plaintiffs from the premises. If they had removed them and put them beside the road it is likely that more damage would have been suffered by the plaintiffs for which they would not have been able to recover from the defendants.

[66] The defendants are not liable to the plaintiffs on the claims made by the plaintiffs against them except on the detention of the plaintiffs' property for the period of several days from the 9th September 1993 when the plaintiffs made a formal demand on the defendants for the return of those belongings. I am not persuaded though that I can do more than make a global award of $1,000.00 as damages to cover what loss I find the plaintiffs may have suffered as a result of the detention by the defendants of the plaintiffs' property beyond the 9th September and to the 18th September, 1993.

[67] Submissions were made to me by counsel for both parties as to the identification of the persons who could have become liable to the plaintiffs if I did find for the plaintiff. In these circumstances where the real entity sued by the plaintiffs was an unincorporated members' club individual members of the club sued in their personal capacity would only have become liable for torts in which they themselves have participated. The evidence adduced is to the effect that the third, fourth, fifth, sixth, seventh and eighth defendants could be liable to the plaintiffs. That said evidence however is also that the seventh defendant was not a member of the club.

[68] In the defence filed by the defendants it was pleaded that the third fourth fifth sixth and eighth defendants admitted "evicting the plaintiffs from the club's premises and secured the moveable possessions of the plaintiffs until their delivery to the plaintiffs on September 18 1993." The seventh defendant was omitted in that admission. Taking all this together therefore I would award the damages of $1,000.00 to the plaintiffs against the said third fourth fifth sixth and eighth defendants.

[69] In the result therefore I would dismiss the plaintiffs case against the first defendant the second defendant and the seventh defendant. I give judgment to the plaintiffs against the third, fourth, fifth, sixth and eighth defendants and award the plaintiffs damages in the amount of $1,000.00 against them. The plaintiffs will have their costs against the said third fourth fifth sixth and eighth defendants such costs which shall be as if there were one defendant are to be taxed if not agreed. The amounts to be certified as costs if taxed shall be three fifths only of the normal amounts.

[70] This judgment has been delivered long after the parties would have expected the same to have been and after a longer time than litigants should be expected to wait for their judgments. To underscore the court's rue for the delay the following explanation is given.

[71] I completed the hearing of this matter during the discommodious period of the court's volcanic episode when sittings of the court were held in ordinary dwelling houses and the records kept in unusual places. Shortly after I completed the hearing of this and a few other matters and before I was able to complete and deliver the judgments I moved to St. Kitts firstly on a temporary assignment and immediately thereafter permanently. I never returned to Montserrat.

[72] The notes I took and the other records of this case were eventually shipped to me with my other things but by that time the Virgin Islands case of Cobham v Frett had made the delivery of judgment more than a year after the hearing of the last witness an injudicious act. Only since December last year it has been indicated in a decision of the Judicial Committee of the Privy Council in the same case of Cobham v Frett that the rendering of a judgment more than a year after the last witness had been heard is not ipso facto injudicious.

[73] I commend counsel on both sides for the industry they exhibited in the presentation of their cases and I had been greatly helped by the very able manner in which both counsel performed. It is not therefore any reflection on the work of counsel that I have not referred specifically to the cases

cited or set out in detail the many powerful submissions made by them. And I thank both counsel for that considerable help they gave me. It is because of that help from counsel that I particularly rue the long delay.

Dated the day of 2001.

Neville L. Smith
High Court Judge