

IN THE COURT OF APPEAL OF BELIZE AD 2018
CIVIL APPEAL NO 22 OF 2016

KISS THIS LIMITED
(dba "Tackle Box Bar and Grill")

Appellant

v

SECOND TIME LIMITED

Respondent

—

BEFORE

The Hon Mr Justice Samuel Awich
The Hon Madam Justice Minnet Hafiz-Bertram
The Hon Mr Justice Murrio Ducille

Justice of Appeal
Justice of Appeal
Justice of Appeal

S K Ebanks for the appellant.
E Perera for the respondent.

25 October 2017 and 16 March 2018.

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AWICH JA

[1] I concur in the judgment of Hafiz JA.

AWICH JA

HAFIZ-BERTRAM JA

Introduction

[2] This is an appeal against the decision of the Honourable Chief Justice, Kenneth Benjamin dated 20 May 2016, in which he ordered the appellant to deliver up possession of the premises comprising the restaurant called Tackle Box Bar and Grill to the respondent, on or before 15 June 2016. He also ordered judgment for the sum of \$42,500.00 as mesne profits with interest from the date of the judgment with payment and continuing in the sum of \$2,500.00 per month until possession is delivered to the respondent. A counterclaim by the appellant was dismissed. This Court heard the appeal on 25 October 2017 and reserved judgment.

[3] The appellants and the respondent are Companies incorporated under the laws of Belize. The appellant, Kiss This Limited owns and operates a restaurant situated in San Pedro Town, Ambergris Caye, in the Belize District, under the business name of “Tackle Box Bar and Grill”, (referred herein as “Tackle Box”). The respondent (herein referred to as “Second Time”), is the holder of a licence in respect of a pier at the same address.

The claim

[4] By a fixed date claim form dated 17 April 2015, Second Time claimed from Tackle Box possession of premises being land area and building comprising the restaurant called the Tackle Box Bar and Grill, which was on a portion of the property of Second Time. That property being a pier which is situated at the same address.

[5] Second Time claimed that on 27 January 2014, Tackle Box agreed to pay to them a monthly rental of \$2,500.00 for the rental of the premises. It paid the rental up to December 2014. The payments for the months of April to August 2014 were paid in September 2014. Second Time served a notice dated 28 August 2014 on Tackle Box to vacate the premises on or before 1 March 2015. Tackle Box thereafter paid the outstanding rent. But, thereafter it failed to pay its rent on time again and once again, Second Time served on Tackle Box a month’s notice to vacate the premises on 6 January 2015. Tackle Box was later given until 1 March 2015 to vacate the premises. Tackle Box failed to vacate the premises.

[6] The relief sought by Second Time was for (a) permanent injunction restraining Tackle Box from operating the Tackle Box bar and Grill or any other business on the rental property; (b) an order requiring Tackle Box to remove with immediate effect the furniture located in the business; (c) possession of the premises and mesne profits up to the date the said premises is delivered to Second Time; (d) interest and costs.

The defence and counterclaim

[7] In response Tackle Box said that it is owned and operated by Mr. Joseph Moore, a director of Kiss This Limited which is doing business as Tackle Box Bar and Grill. He purchased Tackle Box from Deep Fried Enterprises Limited in December 2007. It further stated that Second Time was always aware that Tackle Box was not a part of the property that it purchased and that it is owned and operated by Joseph Moore.

[8] Tackle Box further stated that on 27 January 2014, it agreed to pay to Second Time monthly rent of \$2,500.00 in accordance with a Mediation Agreement in order to utilize the pier to access the Tackle Box.

[9] Tackle Box stated that it paid rent to Second Time for the months of April and May 2014 as evidenced by cancelled cheques. But in June 2014, Bruce Badolato, Director of Second Time, in breach of the Mediation Order, communicated to Mr Joseph Moore, Director of Kiss This Limited that he should vacate the Tackle Box building and should not send any more rent as it would not be accepted. Tackle Box however, paid in October 2014, the sum of \$12,500.00 for the months of June through October 2014. Thereafter, Second Time refused to collect any more rent.

[10] Tackle Box stated that it did pay rent from November 2014 through January 2015 but the cheque that Mr Moore sent to Mr. Badolato in January 2015 was unclaimed and returned to Moore. That since Second Time received and accepted payment from them for rent, they waived any right of action or cause of action which may have accrued. Tackle Box said that they paid rent despite the letter dated 10 December 2014 received from Mr. Badolato informing Mr. Moore that the month to month tenancy agreement would be terminated and that they should vacate the premises on or before 1 January 2015.

Further, despite Second time efforts to prevent the sale of Tackle Box, it continued to pay the rent.

[11] Tackle Box in the counterclaim sought a declaration that the Mediation Agreement dated 27 January 2014, and the Order subsequent to the Mediation Agreement made on the 17 June 2014, and entered on 12 August 2014, in Claim No. 680 of 2012, remains valid, effective and in force between the parties.

Reply to defence and counterclaim by Second Time

[12] Second Time stated that the claim does not concern ownership of the pier as that had been decided and an order was granted in Claim No. 680 of 2012. It is therefore an abuse of process for that issue to be raised in the claim.

[13] Further, Tackle Box had always been a tenant of the owner of the pier. The previous owner of the pier was Giovanni Marin and not Deep Fried Enterprises Ltd.

[14] Prior to Second Time purchasing the pier, it stated that it had done its due diligence and out of an abundance of caution had requested Tackle Box, who was a tenant at the time, to provide a signed document stating that it had no objection to the pier being sold. Second Time stated that thereafter it purchased the pier and all rights connected therewith from Giovanni Marin.

[15] Second Time also claimed that when it purchased the pier in 2012, it received a licence to manage and control the entire pier and has held the licence for over 3 years and had always collected rent from its tenants including Tackle Box.

[16] In relation to the notice of eviction, Second Time claimed that it was forced to send to Tackle Box several demand letters and notice to quit due to the continuous breach of the monthly tenancy agreement by Tackle Box who continuously failed to pay its rent on time. On 6 January 2015, it sent the final notice to quit through its attorney due to the consistent failure of Tackle Box to pay rent on time and further, since that time, it has refused to accept any payment from Tackle Box. Although Tackle Box claimed to have sent a cheque via registered post, it (Tackle Box) has acknowledged that the letter was

marked “*returned to sender*” by the post office. As such, Second Time stated that it has not waived its right to evict Tackle Box.

[17] Second Time disputed the counterclaim and stated that the Order of the court in Claim No. 680 of 2012, has not been appealed and that Tackle Box consented to its terms and paid its monthly rent for the property. As such, the relief sought in the counterclaim should be refused.

Witnesses

[18] The witness for Second Time was Bruce Badolato and the witness for Tackle Box Bar and Grill was Joseph Moore and Richard McMinimy.

The decision of the trial judge

[19] The trial judge considered two issues, namely (a) whether the Tackle Box Bar and Grill was owned by Tackle Box or Second Time and (b) whether Second Time was entitled to possession of Tackle Box for non-payment or late payment of rent by the defendant.

[20] In relation to the first issue, the learned Chief Justice held at paragraph 31 of his judgment that, “*more probable than not, the entire physical structure of the pier is owned by Bruce Badolato. There is no evidence that he has transferred his interest to the Claimant; be that as it may, the pier licence being issued to the Claimant (Second Time) it is entitled to claim rent from the Defendant (Tackle Box).*”

[21] As for the second issue, the judge concluded that there was non-payment of rent at the time of the notice to quit and neither side had disputed that in law, the non-payment of rent gives rise to an entitlement to an order for possession. Therefore, Second Time was entitled to an order for possession and judgment for mesne profits in the sum of \$42,500.00 with interest.

[22] The order made as shown at paragraph 37 of the judgment was as follows:

- (1) *Possession of the premises comprising the restaurant called the Tackle Box Bar and Grill to the Claimant on or before June 15, 2016.*

- (2) *Judgment for the sum of \$42,500.00 as mesne profits with interest at the rate of 6% per annum from the date of judgment with payment and continuing in the sum of \$2,500.00 per month until possession is delivered up to the Claimant.*
- (3) *Costs to the Claimant as prescribed on the sum of \$42,500.00 amounting to \$10,625.00.*
- (4) *The counterclaim stands dismissed with no order as to costs.*

The Appeal

[23] Tackle Box appealed paragraphs (1) and (3) of the order dated 7 June 2016, of the Chief Justice. That is in relation to possession and costs.

Grounds of appeal

[24] There are eight grounds of appeal, as follows:

- (1) The trial judge erred in law and misdirected himself in that he failed to appreciate, consider and/or properly treat the Tackle Box's claim to ownership to the structure, Tackle Box Bar and Grill based on the evidence before him;
- (2) The trial judge misdirected himself on the evidence and erred in deciding that "Bruce Badolato is the owner of the physical portion of the pier structure occupied by the Tackle Box Bar and Grill.
- (3) The trial judge wrongly held that Bruce Badolato is the owner of the physical portion of the pier structure occupied by Tackle Box and erred in law and/or misdirected himself in holding that Second Time is entitled to an order against Tackle Box for possession of part of the pier being the premises occupied by Tackle Box and as a result Second Time is entitled to possession of the premises comprising the restaurant called the Tackle Box.
- (4) The judge misdirected himself on the evidence, particularly:

- (a) That the Tackle Box is a business and not a wooden structure or building;
 - (b) That the letter from Joseph Moore to Giovanni Marin gave permission to sell the pier and not the Tackle Box; and
 - (c) That provision was made for the transfer of ownership to Tackle Box to the Buyer in the agreement between Deep Fried Enterprises and Joseph Moore.
- (5) The trial judge in arriving at his decision did not take into consideration or failed to give sufficient weight to the following evidence:
- (a) All of the terms of the agreement of 17 December 2007, between Deep Fried Enterprises Limited and Joseph Moore;
 - (b) All the terms of the agreement of 14 August 2001, between Giovanni Marin and Sharks Enterprises Limited;
 - (c) All the terms of the agreement of 30 April 2004, between Sharks Enterprises Limited and Deep Fried Enterprises Ltd; and
 - (d) The Licensor/Licensee agreement of 20 December 2007 between Giovanni Marin and Kiss This Limited.
- (6) The trial judge erred in deciding that in the agreement of 14 August 2001, between Giovanni Marin and Sharks Enterprises Ltd., the Vendor sold the *“business known as Sharks Bar and Restaurant located on the pier”* and retained ownership of the pier while granting total access and use of the pier.
- (7) The trial judge erred in deciding that the pier licence issued to Second time entitles it to claim rent from the appellant.
- (8) The decision of the trial judge was unreasonable and against the weight of the evidence.

Relief Sought

[25] An order setting aside paragraphs (1) and (3) of the order of the trial judge and costs in this Court and the court below.

History of ownership of the Tackle Box and Bar

[26] In 1998 Giovanni Marin bought the pier from Allan Foreman and at the time there was no pier licence in existence. There was a bar and a “fish pen”. This pier was totally destroyed by Hurricane Mitch and the pier was rebuilt by Marin. The bar called “Sharks Bar” was rebuilt and the “fish pen” was removed. As shown in the witness statement of Moore, in August 2001, Marin sold the business known as Sharks Bar to “Sharks Enterprises Limited but retained his rights and ownership of the pier which includes the bar.

Agreement dated 14 August 2001 between Marin and Sharks Enterprises Ltd

[27] In an agreement dated 14 August 2001, Marin as Vendor sold to Sharks Enterprises the **business** of Sharks Bar and Restaurant (“First agreement”). Richard McMinimy was called by Tackle Box for the purpose of tendering the agreement of sale between Marin and Sharks Enterprises Ltd. The agreement states that the purchaser agrees to purchase, “*That business known as Sharks Bar and Restaurant located on the pier at the end of Black Coral Street, San Pedro Town, Ambergris Caye, Belize.*”

[28] At Clause 1 of Part B of the agreement it states that, “*The total purchase price of the aforementioned property is the sum of: One Hundred and Fifty-Five Thousand US Dollars US\$155,000.00.*”

Clause 10 and 11 states:

“10. Vendor will retain ownership of the pier but grants to the Purchaser total access and use of the pier for all of the needs of operating the bar and restaurant. The pier permit will be owned and paid by Vendor and will require the purchaser to pay a monthly maintenance fee of \$75.00 Belize for the maintenance of the pier starting January 2002.

11. Purchaser will pay all property taxes assessed on the building and/or the bar and restaurant business.

12. Vendor grants to the Purchaser the right of first refusal at any time the Vendor offers the pier and his water taxi business for sale and vice-versa.”

Agreement dated 30 April 2004 between Sharks Enterprises Ltd and Deep Fried Enterprise Ltd (“Second agreement”)

[29] Sharks Enterprises Limited sold to Deep Fried Enterprises Limited. McMinimy tendered an agreement dated 30 April 2004, between Sharks Enterprises Limited and Deep Fried Enterprise Ltd. which shows the following:

“All that **business** known as SHARKS BAR AND RESTAURANT located on the pier at the end of Black Coral Street, San Pedro Town, Ambergris Caye, Belize, Central America together with all fixtures, furnishings, licenses, trademarks, logos and permits thereon and more particularly detailed in the schedule attached hereto (hereinafter known as the Property)”

Agreement dated 17 December 2007 between Deep Fried Enterprises Ltd and Joseph Moore (“Third agreement”)

[30] Deep Fried then sold to Joseph Moore of Tackle Box. On 17 December 2007, Deep Fried Enterprises sold to Joseph Moore, the following:

“ALL THAT **BUSINESS** AND ONGOING CONCERN KNOWN AS THE TACKLE BOX BAR AND GRILL TOGETHER WITH ALL ITEMS, FURNISHINGS, INVENTORY, CHATTELS, PERMITS, LICENSES, GOLF CART AND BOAT AS SHOWN TO THE BUYER ON NOVEMBER 20th 2007.”

[31] Clause 11 of the agreement provides for dock access and maintenance which Moore had to secure from Marin (the owner of the pier and who had a pier license). It states:

“All additional provisions are contingent upon this agreement.”

- a) *Subject to and contingent upon the Buyers ability to secure a favourable agreement with Giovanni Marin in regards to the dock access and maintenance.”*

Licensor/licensee arrangement for access to the pier between Marin and Moore

[32] Moore was able to secure access to the pier without paying rent. An agreement was entered between Marin as Licensor and Moore/Tackle Box as Licensee. Clauses 1, 2, 3, 8, 13 and 14 of the agreement which is dated 20 December 2007 provides:

“1. The Licensor agrees that he shall grant access to the Pier to the Licensee and his business patrons for the purpose of right of entry into the Business from this day forward and shall continue to grant access to the Pier in perpetuity so long as the Licensee shall abide by such conditions set forth by the Ministry of Natural Resources and by all those conditions set forth in this Agreement.

2. The Licensee further agrees that he shall pay the sum of Two Hundred Dollars (\$200.00) monthly to the Licensor for maintenance and for such access granted in Clause 1. Such payments shall be made semi-annual payments due on the 1st day of January and the 1st day of June for each year.

3. The Licensor covenants with the Licensee that he shall keep Ministry of Natural Resources License No. E.P. 29/03 (29) current at all times. The Licensee covenants to the Licensor that he shall be responsible for **fifty (50%) of the annual pier license fee** due to the Ministry of Natural Resources ... The abovementioned pier license fee shall be due and payable to the Licensor on the 1st day of January of each year.

8. The Licensee shall be responsible for all property taxes for the Business structure due to the San Pedro Town Council.

13. The Licensor and the Licensee agree to grant each other a right of first refusal should either of them decide to sell their respective business or assets directly attached to the dock. Should either party decide to sell their business or assets the party must declare so in writing to the other party at which

time the said party will have the first right to purchase said business or assets. Should the party decline to purchase said business or assets the other party may sell those on the open market.

14. The Licensee agrees that should he decide to sell the business known as Tackle Box Bar and Grill he must advise the Licensor of such intent and the licensor will have a new agreement put in place for the new owner of the business in the same spirit of this agreement.”

Sale of Pier and transfer of licence by Marin to Bruce Badolato – 27 January 2012 (“Fourth Agreement”)

[33] Marin sold the pier and as a consequence had to transfer the pier licence to the purchaser with the permission of Ministry of Lands. In an agreement dated 27 January 2012, Marin sold to Bruce Badolato, Director of Second Time Ltd (including his designee, assignee or successor) his pier and interest in the pier licence. This agreement shows that Marin is the holder of a pier management license dated 16 October 2004, issued by Ministry of Natural Resources. (It was pursuant to the pier license, Marin erected a pier and a structure at which the business establishment, Tackle Box Bar and Grill, formerly Sharks Bar, was located). The pier and the structure is referred to in the agreement as “the pier”. See BB7

[34] At Clause 1, the agreement states that *“The Vendor will sell and Purchaser will purchase all the Vendor’s rights and interest in the Pier license and the pier on the conditions set out below.”* It was sold for US\$165,000.00. At the time of the sale of the pier and the interest in the pier licence, Marin had already sold the business.

Bill of sale dated 28 February 2012 between Marin and Second Time

[35] A Bill of sale dated **28 February 2012** shows Marin as Vendor and Second Time Ltd as the Purchaser. (In the agreement for sale it was Badalota, Director of Second Time Ltd. who was the purchaser). This is in relation to the pier and its structure and the transfer of the pier licence. In the recital it is stated that:

“WHEREAS the Vendor is the owner of a **pier and structure** more specifically described by the drawing in the schedule hereto annexed and located at ... San Pedro, Ambergris Caye, Belize.

[36] Thereafter, it is stated that for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the vendor and purchaser agree as follows:

1. “For the sum of US\$165,000.00 received, the Vendor hereby grant, bargain, sell, assign and transfer unto Purchaser all of the Vendor’s rights and interest in the pier.”

[37] The Bill of Sale shows that Marin sold the Pier and its structure to Second Time Ltd. as valuable consideration was received from Second Time Ltd.

Rental agreement between Second Time Ltd and Kiss This Ltd

[38] On 27 January 2014, Tackle Box (Kiss This Limited) agreed to pay Second Time Ltd. a monthly rental of \$2,500.00 by virtue of a court order. As shown at paragraph 3 of the judgment of the Chief Justice, the payment of rent was agreed by the parties in previous proceedings which resulted in a consent order pursuant to a mediation agreement made on 27 January 2014. Thereafter, rent was paid on time from month to month up until March 2014. Tackle Box received a notice dated 28 August 2014, to vacate the premises as a result of non-payment of rent. The outstanding rent of \$10,000.00 was paid for up to September 2014. A further notice dated 6 January 2015, was served on Tackle Box to vacate the premises by 1 March 2015 for non-payment of “lease payments”. Thereafter, no rent had been collected by Second Time. There was evidence that a cheque for \$2,500.00 dated 1 January 2015 was tendered by letter but that was returned to the sender.

Owner of Pier licences

Pier licence No. E.P. 29/03 (29) dated 16 October 2004 granted to Marin

[39] On 16 October 2004, Giovanni Marin was issued a pier license, No. E.P. 29/03(29) by the Ministry of Natural Resources. The interest in this licence was sold to Badolato

(Second Time) as shown in the agreement dated 27 January 2012. The license had to be transferred to Badalato, Director of Second Time Ltd.

Pier licence No. EP BZ 29/03 (75) dated 16 July 2015 granted to Second Time

[40] On 15 July 2016, the Commissioner of Lands and Surveys Department granted to Second Time pier “*License to utilize the Seabed*”, licence No. EP BZ 29/03 (75) to manage the existing pier (formerly owned by Marin with one restaurant and one rental building). The license conditions, so far as relevant are as follows:

- “1. The pier shall remain approved by the Ministry of Natural Resources and Agriculture, not exceeding 375 feet in length by 7 feet in width, with a platform measuring 27 feet x 27 feet at the base, one ski rental building measuring 16 feet x 52 feet, 1 restaurant/Bar in the middle having dimensions of 32 feet in width by 34 feet in length, three boat slips having dimensions of 25 feet in length by 4 feet in width for each slip and a deck at the end having dimensions of 16 feet in length by 33 feet ...
2. The license is valid for a term of 3 years. ..
3. *This is only a privilege to utilize National Land and does not confer ownership nor an interest in the land (seabed);”*

The grounds on ownership of the Tackle Box Bar and Grill and entitlement to rent

[41] All of the grounds of appeal are inextricably linked as they concern the ownership of Tackle Box and consequently entitlement to possession and rent if the ownership point is proved in favour of Second Time.

[42] Mrs Keddo-Ebanks, learned counsel for Tackle Box submitted that there was sufficient evidence before the trial judge to prove that the director of Tackle Box, Joseph Moore is the owner of the structure known as Tackle Box as it purchased same from Deep Fried Enterprises Limited in December 2007 as shown by the agreement for sale. Counsel also relied on three other agreements, namely (a) Giovanni Marin and Sharks Enterprises Ltd dated 14 August 2001 and (b) Agreement dated 30 April 2004; (c) A

licensor/licensee agreement dated 20 December 2007 between Giovanni Marin and Tackle Box.

[43] Counsel submitted that the agreement between Marin and Sharks Enterprises showed that Marin could not have sold the Tackle Box to Second Time or to Badolato in February 2012, because he had already sold Tackle Box to Shark Enterprises in 2001. Counsel contended that the agreement dated 30 April 2004 show the history of the ownership of Tackle Box. She contended that the agreement of 14 August 2001, between Marin and Sharks Bar show that Marin sold Sharks Bar and Restaurant which comprised of a building and a business. As such, she submitted that the Chief Justice erred when he decided that only the business was sold and that Marin retained ownership of the pier.

[44] Learned counsel further contended that the conditions in the pier licence issued to Second Time does not entitle it to claim rent and as such the judge erred in deciding that the pier licence issued to Second time entitles it to claim rent from Tackle Box.

[45] The contention by counsel is that the Chief Justice failed to appreciate that it was possible for Tackle Box, (as a structure), to be owned by an individual whilst a separate individual owns the pier. She submitted that Badolato is not the owner of the pier and therefore not entitled to possession of that part of the pier where Tackle Box occupies.

[46] Counsel for Tackle Box also referred to letters sent by its attorneys-at-law to Mr. Badolato and Mr Castaneda which informed them that Tackle Box is Mr. Moore's property. She also relied on the letter dated 17 July 2012, from Ministry of Natural Resources which she contended acknowledged the ownership and the operation of Tackle Box. Counsel further relied on a letter from Moore which she said gave permission to sell the pier and not Tackle Box. It was for all these reasons that counsel contended that the appeal should be allowed with costs to Tackle Box.

[47] Mr Perera, learned counsel for Second Time in response contended that the findings of the Chief Justice was correct. Therefore, the appeal ought to be dismissed with costs to Second Time. Counsel argued that the structure for Tackle Box is located on the pier since it is physically attached on the pier as described in the pier licence. Further, that Tackle Box's position is that it does not want the pier and failing to accept

that the pier is the entire structure. Counsel submitted that the pier licence dated 16 July 2015 granted by the Ministry of Natural Resources and the Government of Belize shows that the entire structure is inclusive of two buildings.

[48] Counsel submitted that by the sale agreement dated 14 August 2001, between Marin and Sharks Enterprises Ltd, the vendor sold the “*business known as Sharks bar and restaurant located on the pier*” and retained ownership of the pier while granting total access and use of the pier. Tackle Box owns the business name and the restaurant furniture and equipment. Further, that the evidence before the court showed that at no point either Deep Fried Enterprises Limited or Sharks Enterprises Limited, owned a pier licence and therefore could not have sold any interest in the pier license. Their interest would be limited only to the business name.

[49] Learned counsel further submitted that Tackle Box by entering into the mediation agreement dated 27 January 2014, and the Order dated 12 August 2014 in Claim No. 680 of 2012, had admitted that it is a tenant of Second Time.

Discussion

[50] The Chief Justice commenced his decision making by considering the rights granted under the pier license by the Ministry of Lands. At paragraph 14 of his judgment, he said that “*the pier licence confers upon the holder permission to use the seabed for the purpose of managing and maintaining a structure upon payment of an annual rental fee. The licence is one that allows the utilization of National Land as a privilege and does not confer ownership of or any interest in the seabed.*” The trial judge correctly construed the Pier licence No. EP BZ 29/03 (75) dated 16 July 2015 granted to Second Time on 15 July 2016, by the Commissioner of Lands and Surveys Department. It is a pier “*License to utilize the Seabed*” to manage the existing pier. The licence describes the existing pier and this includes the restaurant and bar. Further, the licence shows that the three year licence at condition 3 “*is only a privilege to utilize National Land and does not confer ownership nor an interest in the land (seabed);*” Having considered the pier licence, the judge stated that the issue for him to consider was the ownership of that part of the physical structure of the pier upon which the Tackle Box is operated.

[51] The learned trial judge considered all the evidence before him including all the agreements. Moore in his witness statement traced the ownership of Tackle Box. Richard McMinimy was called as a witness for Tackle Box for the purpose of tendering the agreement between Marin and Sharks Enterprises dated 14 August 2001 (first agreement) and the agreement between Sharks Enterprises and Deep Fried Enterprises Ltd. dated 30 April 2004 (second agreement). The agreement dated 17 December 2007 between Deep Fried Enterprises and Moore was tendered by Moore (third agreement). Badolato in his second witness statement exhibited the sale agreement dated 27 January 2012 (fourth agreement) between Marin and himself where he obtained all the rights and interest in the pier licence for the sum of US\$165,000.00.

[52] The trial judge referred to recital (c) of the Badolato agreement (fourth agreement) dated 27 January 2012, which says that "*Pursuant to the Pier License the Vendor (Marin) erected a pier and structure at which the business establishment, Tackle Box Bar and Grill is located (hereinafter "the Pier").*" He stated that no exception is made in the Badolato agreement for ownership of any part of the pier by Moore or Tackle Box. Indeed, the sale agreement to Badolato/Second Time was in relation to the entire pier and structure. The trial judge, in my opinion, was correct in his interpretation of the agreement. See paragraph 30 above which shows the terms and conditions of the agreement. At Clause 1, the agreement states that "*The Vendor will sell and Purchaser will purchase all the Vendor's rights and interest in the Pier license and the pier on the conditions set out below.*" I agree with Mr Perera that the pier licence dated 16 July 2015 granted by the Ministry of Natural Resources shows that the entire structure is inclusive of two buildings. Therefore, the rights and interest in the agreement was the pier and the structure.

[53] In my opinion, the first agreement and the last agreement involving Marin are very crucial in determining the issue of ownership. The trial judge considered what interest Marin transferred in the first agreement and in my view correctly stated at paragraph 30 of his judgment that Marin sold the "*business known as Sharks Bar and Restaurant located on the pier.*" In my opinion, Marin could not have sold any part of the pier since he held the pier licence and only the Ministry of Lands could transfer or issue a pier license. It follows that in the second and third agreements only the business could have

been sold since those purchasers had no interest in the pier. I disagree with counsel for Tackle Box that Marin sold Sharks Bar and Restaurant which comprised of a building and a business. The Chief Justice, in my opinion, was correct when he stated that Clause B 5 I of the agreement between Sharks Enterprises Ltd and Deep Fried Enterprises could not confer on the purchaser any greater interest than that enjoyed by the vendor in its original agreement with Marin. He also correctly stated that in the first agreement there is no mention of a sale of a portion of the pier structure.

[54] In relation to the last agreement involving Marin, he sold only the pier to Badolato/Second Time as shown by the agreement since he was no longer the owner of the business. In my opinion, the trial judge correctly concluded at paragraph 29 of his judgment that the agreement dated 27 January 2012, “*plainly confers ownership of the entire pier inclusive of the portion occupied by the Tackle Box Bar and Grill upon Bruce Douglas Badolato, who is the Director of the Claimant.*” In that agreement, as noted by the trial judge, the definition of pier sold to Badolato includes the “*structure at which the business establishment, Tackle Box Bar and Grill is located*” (See recital (c) of the 2012 sale agreement between Marin and Badolato). Marin as the holder of the pier licence was the only person who could have sold the pier and transfer the pier license with the permission of Ministry of Lands.

[55] Further, in the fourth agreement, at Clause 2 b, it states that the balance of the purchase price shall be paid into an escrow account within five business days “*after the holder of the Right of First Refusal (Kiss This Ltd.) indicates in writing its refusal to purchase the Pier and Pier License.*” The right of first refusal was Moore of Kiss This Ltd (Tackle Box). (See also agreement dated 14 August 2001 between Marin and Sharks Enterprises Ltd. Clause 12 provides for the right of first refusal at any time the vendor was offering the pier and water taxi business for sale). By a letter dated 20 January 2012, Moore granted permission to Marin to sell the pier. Badolato could not have purchased the pier without that permission. The letter from Moore which is exhibited at “BB2” states that, “*I hereby grant permission for Giovanni Marin to sell the pier for 125,000.00 US dollars.*” Mr. Moore accepted under cross-examination that he gave permission to sell the pier and that he does not want the pier. However, he said that permission does not

apply to Tackle Box because he is the owner of the building. This position taken by him is based on his understanding that *“Tackle Box does not sit on the pier. It sits adjacent to the pier.”* In my opinion, this position is misconceived as the pier licences granted firstly to Marin and secondly to Second Time clearly show that the pier includes the structures attached to it. The Chief Justice was therefore, in my opinion, correct in finding that a part of the pier was not sold.

[56] Learned Counsel, Mrs. Keddo-Ebanks for Tackle Box contended that the letter dated 17 July 2012, from Ministry of Natural Resources acknowledged the ownership and the operation of Tackle Box. That letter which is at “JM 9” was written to Badolato by the Commissioner of Lands based on complaints regarding the pier licence granted to Second Time. Ministry of Lands was not a party to the agreements and therefore could not determine ownership, that is, whether the business was sold or the structure was sold. Further, it could not determine what is a reasonable rent for the building. However, the letter rightly pointed out that the pier license was transferred to Second Time by the Ministry of Lands based on approval given by Marin who previously held the pier licence.

[57] The license agreement dated 20 December 2007 between Marin and Moore shows that Marin gave permission to Tackle Box and its customers to access the pier for the purpose of entering the business. Tackle Box had to pay the sum of \$200.00 for such access into the business and maintenance. Further, Tackle Box also agreed to pay 50% of the annual pier license and it had to pay the property taxes on the structure. That was the agreement so far as relevant to this appeal between these two parties as licensor and licensee. There was no agreement in relation to the sale of the structure (restaurant building).

[58] In my opinion, the structure in which the business is located could not be sold by Mr. Marin or anyone else. I disagree with counsel for Tackle Box that it was possible for Tackle Box, (as a structure), to be owned by an individual whilst a separate individual owns the pier. The pier licence from the Ministry of Lands grants privilege to utilize national land and does not confer ownership nor an interest in land. Marin had that privilege with the licence granted to him and had to seek the permission of the Ministry of Lands to transfer to Badolato, Director of Second Time Ltd. Deep Fried Enterprises

Limited and Sharks Enterprises Limited did not have a pier licence and therefore could not have sold any interest in the pier license.

[59] Based on the foregoing, it is my opinion, that the judge was correct when he held that it is more probable than not, that “the entire physical structure of the pier is owned by Bruce Badolato.” There is no evidence that Badolato, Director of Second Time Ltd. has transferred his interest to Second Time. However, there is evidence that the Bill of Sale issued by Marin is in the name of “Second Time”. Further, the pier licence issued by the Ministry of Land was granted to Second Time Ltd and not its Director. As such, I am of the opinion, as held by the trial judge, that the pier licence issued to Second Time entitles it to claim rent from Tackle Box. I disagree with counsel for Tackle Box that the conditions in the pier licence issued to Second Time does not entitle it to claim rent. There is no such condition preventing the holder of the license from renting. The conditions of the license show that the Ministry of Lands had to give approval for a transfer of the license. Condition 13 of Second Time Limited license provides that the Physical Planning Section of the Lands and Surveys Department should be informed if management/ownership of the structure to which the licence applies is transferred.

[60] Further, I am in agreement with Mr. Perera that Tackle Box by entering into the mediation agreement dated 27 January 2014, and the Order dated 12 August 2014 in Claim No. 680 of 2012, had accepted that it is a tenant of Second Time. The Chief Justice at paragraph 3 of his judgment referred to the said mediation agreement which shows that the monthly rental was \$2,500.00. The non-payment of rent entitles Second Time for possession of the part of the pier being the premises occupied by Tackle Box Bar and Grill.

Conclusion

[61] The Chief Justice properly considered the evidence which included all the agreements and correctly held that Badolato is the owner of the entire physical structure of the pier which includes the portion of the pier occupied by Tackle Box. He also correctly held that Tackle Box is a business and not a wooden structure. In the first agreement Marin sold the business located on the pier and retained his interest in the pier. In the fourth agreement, Marin sold the pier to Badolato (Director of Second Time) and the

license for the pier was transferred to him. There is no evidence that Badolato transferred his interest to Second Time as noted by the trial judge. But since the pier licence was issued in the name of Second Time, it is entitled to claim rent from Tackle Box (Kiss This Limited). It was therefore, not unreasonable for the trial judge to find that Badolato is the owner of the physical portion of the pier structure occupied by Tackle Box and that Second Time is entitled to an order against Tackle Box (Kiss This Ltd) for possession of part of the pier, being the premises occupied by Tackle Box. In my opinion, all eight grounds, are without merit. I would propose that the appeal be dismissed with costs to the respondent.

Disposition

[62] The order I would propose is as follows:

- (i) The appeal is dismissed.
- (ii) The appellant, Kiss This Limited shall pay the costs of the appeal to be taxed if not agreed. This order for cost is provisional in the first instance, to be made final in 15 days from today unless Kiss This Ltd were to file for a contrary order within such period, in which event the matter of costs would be decided on written submissions to be filed and exchanged by the parties in 10 days from the making of such application.

HAFIZ BERTRAM JA

DUCILLE JA

[61] I have had the benefit of reading the draft of Hafiz JA in the above captioned matter and am in full agreement with the reasoning and conclusion and cannot add anything further.

DUCILLE JA