[2023] JMCA Civ 21

JAMAICA

IN THE COURT OF APPEAL

BEFORE: **THE HON MISS JUSTICE STRAW JA**
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE G FRASER JA (AG)

PARISH COURT CIVIL APPEAL NO 6/2017

BETWEEN	**EASTON BOWEN**	**APPELLANT**
AND	**JUDITH MYERS**	**RESPONDENT**

Ronald Paris instructed by Paris and Company for the appellant

Donald Gittens instructed by Bryan Clarke and Company for the respondent

30 March 2022 and 21 April 2023

STRAW JA

[1] I have read the draft judgment of my sister, G Fraser JA (Ag), and agree with her reasoning and conclusions. I have nothing further to add.

EDWARDS JA

[2] I too have read the draft judgment of G Fraser JA (Ag) and agree with her reasoning and conclusions. I, therefore, have nothing further to add.

G FRASER JA (AG)

Background

[3] This is an appeal by Mr Easton Bowen ('the appellant') against the decision of Her Honour Ms Winsome Henry, Judge of the Parish Court, for the parish of Hanover (who at the time of the filing of the plaint was referred to as a Resident Magistrate), made on 28 March 2017, granting judgment in favour of the respondent, Ms Judith Myers ('the

respondent') for recovery of possession of land, with costs to be agreed or taxed. This matter has its genesis in an alleged agreement between the appellant and the respondent's father, Mr Victor Myers, to lease property situated at Haughton Court in the parish of Hanover ('the subject property').

[4] Mr Victor Myers died intestate in 1981, and upon his death, his widow (the mother of the respondent) assumed responsibility for the affairs of the subject property. According to the respondent's testimony, between 1981 and 1991, her mother was in charge of the land, even though she had relocated to Kingston and subsequently migrated overseas. In her absence, her family employed an agent, Mr Noel Brown ('the agent'), and during that period the mother would give instructions to the agent. After 1991 the respondent appears to have assumed the responsibility for the affairs of the subject property and continued the arrangement with the agent Mr Brown. The agent had oversight of the subject property and the family home, including the collection of the annual rent of $2,000.00 from the appellant and the payment of the taxes for the subject property.

[5] The respondent further testified that the appellant continued in possession of the subject property from the death of her father and was paying rent at the previously agreed rate. However, over time the appellant became non-compliant with the rental payments after she increased the rent to $3,000.00, sometime in 2002. As a result, the respondent served the appellant with a notice to quit in 2005. He, however, refused to vacate the subject property. Subsequently, in 2007, she discovered that the appellant had been paying taxes on the subject property, even though no one had authorized him to do so. She concluded that "something fishy going on". She said that she repeatedly told the appellant not to pay the taxes on the subject property, but to pay the rent instead or get off. There was no compliance with her demands for the outstanding rent nor did the appellant quit the premises. During this phase, the respondent testified that she had allowed another person to utilize the subject property to pasture cattle for an unspecified period of time.

[6] The respondent took further action to end the tenancy by serving the appellant with another notice to quit and also demanded payment of the outstanding rental amounts. Her demands were not satisfied, and so, in 2009, she initiated proceedings in the then Hanover Resident Magistrates' Court, against the appellant, for rental arrears. Judgment was entered in her favour, but the appellant took the view that since he had made no arrangement with the respondent, he did not have to pay her rent. He appealed the order of the then Resident Magistrate, His Honour Mr Burton. This court overturned the decision of the learned Resident Magistrate, on 14 May 2013, on the basis that the respondent did not possess the requisite *locus standi* to sue for or demand outstanding rent. The respondent, appreciating her lack of standing to sue the appellant in respect of the subject property, thereafter, obtained letters of administration on 14 August 2012, for her father's estate.

[7] On 29 January 2013, the respondent served, on the appellant, a third written notice to quit dated 28 December 2012 ('the relevant notice to quit') wherein he was required to deliver up possession of the subject property, "on or before the 30th day of June, 2013 or at the end of six (6) months of [his] tenancy which [would] expire next after the end of six months from the date of service of [this] notice". As a result of the appellant's failure to vacate the subject property, the respondent initiated court proceedings against him as outlined below.

Proceedings in the court below

[8] In July 2013, the respondent lodged two plaints (nos 260/13 and 261/13) in the Hanover Parish Court claiming recovery of possession of the subject property occupied by the appellant and arrears of rent in the sum of $20,000.00 for 10 years from 2003 to 2013.

[9] The appellant, in his defence of the plaints, challenged the respondent's claim for entitlement to possession of the subject property. He also filed a special defence and argued that the respondent was statute barred as a result of section 3 of the Limitation of Actions Act. It was also his position, that he had been in adverse possession of the

subject property since 1969/1970 and, therefore, had acquired an equitable interest in it. As it relates to the issue of the recovery of rental arrears, the appellant urged the court to non-suit the respondent's claim on the basis that no relevant evidence pertaining to the amount of rent due and owing was before the court.

[10] The learned Judge of the Parish Court had identified the issues for her determination at the beginning of the trial (I and II below). However, after the close of the respondent's case, counsel for the appellant raised two further issues (III and IV below). Ultimately, the issues that she considered and determined were as follows:

I. Was the respondent entitled to possession of the property; or

II. Was the appellant in adverse possession of the property by virtue of section 3 of the Limitation of Actions Act, therefore dispossessing the respondent.

III. Was the appellant a yearly tenant of the estate of Victor Myers?

IV. If the appellant was a yearly tenant, had the respondent established the anniversary date of the tenancy in order to determine the validity of the notice to quit served on him?

[11] The learned Judge of the Parish Court dealt with all four issues and made the following findings: (i) at no stage was the subject property abandoned; (ii) the appellant was in possession of the subject property at all material times, but he was there as a tenant with the consent of the owner; and (iii) the appellant was not a squatter and "had failed to establish that he had dispossessed the Myers family for 12 years". The learned Judge of the Parish Court further found that the appellant was a tenant of Victor Myers and that the respondent had knowledge of this "original tenancy agreement" and played an active part in the administration of the subject property. She also found as a fact, that the appellant accepted, at least up to 2002, that there was still in existence a tenancy, since prior to that time, he had been in arrears of rent and had "paid up". The learned

Judge of the Parish Court found that since the rent was being paid after the death of Victor Myers, the tenancy continued, and even though the appellant subsequently refused to pay the increased rent, he still remained in occupation. She also made the finding that, verbal and written notices to quit were served on the appellant in 2005 and 2007 but he continued in occupation of the subject property. Having considered that the respondent's claim for the payment of the rental arrears was overturned on appeal because she lacked standing, the learned Judge of the Parish Court articulated that in the circumstances of the plaint before her, the respondent, as the personal representative of Victor Myers' estate, had the requisite standing, and the relevant notice to quit was valid.

Preliminary applications

Applications to file additional grounds of appeal and to amend Ground of appeal 1

[12] On 12 November 2019, Mr Paris, counsel for the appellant, filed a notice of application to file and argue additional grounds of appeal in this court. The basis for that application was the late receipt of the record of proceedings, which was filed late in the year 2019.

[13] At the hearing of the appeal, counsel Mr Paris did not pursue his application to file additional grounds of appeal, but instead sought permission from this court to amend ground one of his original grounds of appeal, filed on 11 April 2017, and to solely argue ground one, amended as follows:

> "1. The decision of [the learned Judge of the Parish Court] was against the weight of [the] evidence adduced at the hearing in that no *viva voce* evidence was adduced at the trial in support of [the respondent's] assertion as to the creation of a valid tenancy by [the respondent's father] with [the appellant] and that that tenancy was validly terminated when the plaint was filed on 18 July 2013 by [the respondent]."

[14] Mr Gittens, on behalf of the respondent, strenuously objected to the amendment of the ground of appeal, on the premise that, by not taking the point on the determination

of the tenancy, in the court below, the appellant had deprived the respondent of a chance to counter same. Counsel submitted two counterpoints as follows:

> i. By disclaiming and repudiating the tenancy, the appellant rendered irrelevant the issue of the effectiveness of the notice; and
>
> ii. If the plaint was filed prematurely and the notice to quit did not terminate the tenancy (which the respondent had maintained existed but denied by the appellant) and there was no adverse possession, the respondent was an occupier whose occupation was nevertheless effectively terminated by the notice to quit (see **Muriel Reid and another v Denise Johnson and others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 135/2007, judgment delivered 3 April 2009, at paras. 33 and 39).

[15] Mr Paris, in response, referred to and relied on **Dalton Wilson v Raymond Reid** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 14/2005, judgment, delivered 7 April 2006, for the principle that, although an appellate court may not be inclined to hear an issue raised for the first time on appeal, there is absolutely no prohibition to so do. In that case, this court had adopted the dictum of Lord Watson in **Connecticut Fire Insurance Co v Kavanagh** [1982] AC 473. At page 480, he articulated that, where a question of law is raised for the first time in the court of last resort upon construction of a document or facts, it is not only competent but expedient in the interests of justice to entertain such a plea. Therefore, the influencing factors to be considered are fairness to all parties, the interests of justice, and the governing rules of practice.

[16] Counsel submitted that the questions of fact, in terms of the amendment, were not in dispute. According to him, the facts of this case are simple and straightforward, and as such, they support the amendment.

[17] After considering these arguments, this court granted Mr Paris' application for the amendment of the single ground of appeal.

The appeal

Appellant's submissions

[18] The thrust of counsel Mr Paris' contention was that, on 18 July 2013, the respondent prematurely filed a plaint in the court below for recovery of possession whilst the notice period or tenancy period was extant. Counsel highlighted that based on the respondent's evidence, the appellant was a yearly tenant of the subject property which had commenced in the month of September.

[19] Counsel further highlighted that the law provides that six months' notice should be given to terminate a yearly tenancy. Therefore, a notice to quit may be given on the anniversary or a period at the end of the tenancy. However, in the case at bar, he noted that there was no evidence concerning the anniversary date of the tenancy. As a result, the correct approach, he submitted, in the absence of an anniversary date was to give six months' notice. To buttress this point counsel relied on **Addis v Burrows** [1948] 1 KB 444 and Butterworths Forms & Precedents, 4th Edition, Volume 12 at page 1406 at footnote 2.

[20] In the instant case, counsel pointed out that the relevant notice to quit was served on the appellant on 29 January 2013. It stated that the appellant was to give up possession of the subject property on or before 30 June 2013, or at the end of six months of his tenancy, which would expire from the date of the service of the notice. Counsel contended that, in the circumstances, the date 30 June 2013 would no longer be operative since the appellant was served on 29 January 2013, and in order to terminate a yearly tenancy six months' notice from the date of service was required. As such, the

tenancy would have been terminated on 29 July 2013. Further, the termination date of 30 June 2013, was arbitrary, in the absence of an anniversary date of the tenancy.

[21] Based on the foregoing, Mr Paris argued that the notice was ineffective to terminate the appellant's tenancy. Accordingly, he said, the tenancy found by the learned Judge of the Parish Court is still subsisting.

[22] Counsel also submitted that the learned Judge of the Parish Court did not only state that the appellant had six months to leave by 30 June 2013, but had also stated, in the alternative, that he had until the end of six months from the date of service to leave. It was counsel's complaint that although the learned Judge of the Parish Court indicated these alternative words, she erred in failing to take into account the date of service being 29 January 2013, in determining the actual end of the tenancy period, which he calculated to be 29 July 2013.

Respondent's submissions

[23] Counsel Mr Gittens, in response, referred to and relied on his written submissions. He reiterated that it was unfair for Mr Paris to belatedly take that point on appeal, having failed to raise it at the trial. Counsel urged this court to consider the inconsistent position of the appellant who, at trial, was saying that there was no tenancy and now on appeal is implicitly saying there was a tenancy that had not been terminated when the plaint was filed.

[24] This, counsel strenuously pointed out, puts the respondent in an embarrassing position since she did not have a chance to answer this issue at trial. According to Mr Gittens, the respondent could have been afforded the opportunity to address the point by an amendment or a refiling of the plaint. Therefore, the course taken by counsel for the appellant, was not in the best interest of all the parties, as noted in **Dalton Wilson v Raymond Reid**. In closing his submissions, Mr Gittens further contended that where there is no tenancy for a strict period, that is, where there is no beginning or end, any

effective indication to recovery of possession is sufficient to determine the tenancy (see **Muriel Reid and another v Denise Johnson and others**, at paras. 33 and 39).

The issues

[25] I have formulated three issues arising from the submissions of counsel, these are as follows:

> 1. Whether the evidence adduced at the trial supports the finding of the learned Judge of the Parish Court that there existed a valid tenancy agreement between the appellant and the respondent's father, Mr Victor Myers.
>
> 2. Whether if a tenancy existed, by disclaiming the existence of same, the appellant repudiated the tenancy, and forfeited his status as a tenant.
>
> 3. Whether the respondent was obliged to serve on the appellant a notice to quit before she filed her plaint for recovery of possession on 18 July 2013.

Discussion and analysis

Issue 1- whether the evidence adduced at the trial supports the finding of the learned Judge of the Parish Court that there existed a valid tenancy agreement between the appellant and the respondent's father, Mr Victor Myers.

[26] The appellant sought to challenge the learned Judge of the Parish Court's findings that a tenancy existed between the parties and that it was terminated by a valid notice to quit. Although the issue as to whether a valid tenancy existed was not abandoned by the appellant, the submissions in support of that ground, however, concentrated on the latter complaint. More specifically, the appellant has asserted that the requisite notice period had not expired by the time the claim was initiated. For that reason, counsel for the appellant has contended that the learned Judge of the Parish Court erred when she

gave judgment in favour of the respondent for the recovery of possession of the subject property, for which title was disputed.

[27] I appreciate that any scrutiny of the learned Judge of the Parish Court's findings of fact must be conducted against the background of the guidance of the Judicial Committee of the Privy Council in **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21. In essence, the relevant dictum in that case is to the effect that, in order to warrant interference by the appellate court, the finding of fact the learned Judge of the Parish Court that is being challenged, must be shown to be "plainly wrong".

[28] To appreciate the fulcrum of the findings of the learned Judge of the Parish Court, one must examine the nature and content of the plaints before her, as well as the defence filed. The amalgam of averments contained in the particulars of claim that is annexed to plaint note no 261/13, and the defence filed by the appellant, gave rise to issues of succession in title, interests in title, and landlord and tenant relationship.

[29] I regard as significant, the fact that the appellant did not pursue his grievance regarding the findings of the learned Judge of the Parish Court concerning his status relative to the disputed subject property. He has not sought to challenge her findings that (a) he had no beneficial interest in the property; (b) he was not entitled to rely on the doctrine of adverse possession; and (c) he was a tenant at all material times. Apart from the mere mention of it in the ground of appeal, he has not put forward any arguments to the effect that she erred in law or that she misconstrued the evidence and made erroneous findings of fact in respect of his status as a tenant. The appellant, it seems, at this juncture, has acquiesced that at all material times, he was a tenant. He is now seeking to raise a technical point of contention regarding the validity of the relevant notice to quit, which he has argued was short-served.

[30] To my mind, before that issue can be addressed, this court needs to be satisfied that there existed a landlord and tenant relationship between the parties, for which the termination of same would require the service of a valid notice to quit. Indeed, the issue

of a valid tenancy between the parties was raised in the existing ground of appeal and therefore, it cannot be said that this court considered an issue that was not raised before it or did not afford the parties an opportunity to make submissions, accordingly. Although the appellant has not actively challenged the learned Judge of the Parish Court's finding that there was such a tenancy, I am of the view that it is an issue for this court's determination, concomitant with the issue of the validity of the notice to quit.

[31] The appellant's occupation of the subject property can neatly be placed into three phases. "Phase one" is the period from the 1970's to 1981, during the lifetime of Mr Victor Myers. "Phase two" commenced in the aftermath of Mr Victor Myers' death and continued until 2002, inclusive. This was the period wherein the appellant was allegedly paying rent to the respondent's agent. "Phase three" is the period commencing in 2003, when the appellant occupied the subject property without paying rent. I will, therefore, analyse his status relative to these three phases, and determine whether there was any change in the appellant's status as a tenant, since any such change will impact the issue of the notice to quit.

[32] I note that the learned Judge of the Parish Court, having assessed the evidence, had determined that the appellant was a tenant at all material times, that is, throughout all, what I have categorized as, the three phases. She did not, however, indicate clearly who the parties to the tenancy or tenancies were for each phase or the periods the tenancy or tenancies existed. She specifically found that there existed a tenancy agreement between Victor Myers and the appellant which commenced in the 1970's. What is not clear to this court is whether she gave any consideration to the impact, if any, that Victor Myers' death, in 1981, would have had on the appellant's tenancy. The learned Judge of the Parish Court also did not make any explicit finding that the respondent was the appellant's landlord, but inferentially, she must have accepted that such a relationship existed. This is evidenced by, among other things, her finding that the respondent's demands for rent were being enforced through the agent.

[33] As indicated earlier, phase one represented the period during Victor Myers' lifetime. The appellant had alleged that he was gifted the subject property by Victor Myers and alternatively, that he had dispossessed Victor Myers and his family. It was, therefore, important for the learned Judge of the Parish Court to have given due consideration as to whether there existed between Victor Myers and the appellant, the relationship of landlord and tenant.

[34] To create a valid and enforceable leasehold interest, whether under common law or equity, the relationship must possess certain fundamental characteristics. All leases must confer exclusive possession upon the lessee, there must be consideration, usually the monetary payment of rent, there must be certainty as it relates to the parties amongst other things. Establishing the essence of a lease is important in the circumstances of this case, since it is the foundation upon which the claim was based.

[35] The learned Judge of the Parish Court, found that the relationship of landlord and tenant between the appellant and Victor Myers commenced in the 1970's. I wish to highlight the fact that the evidence of that tenancy agreement was sparse since there was no documentary proof of same nor was there evidence as to whether it was for a fixed term of years or a periodic tenancy. Notwithstanding, its existence was unsuccessfully challenged by the appellant's counsel during the cross-examination of the respondent. The learned Judge of the Parish Court had assessed the respondent's evidence and accepted it as credible and cogent. I am mindful that she would have had the advantage of observing her demeanour, and in the absence of any evidence to the contrary, I cannot identify any reasons for disturbing that finding.

[36] The learned Judge of the Parish Court did not, however, make any finding in relation to the type of tenancy that existed. The subject property is agricultural land, some five acres that were originally let to the appellant for the purpose of grazing his cattle, but upon which he began to cultivate crops. Since the subject property was not building land or controlled premises and there was no evidence of a written contract, neither the Rent Restriction Act nor the Agricultural Small Holdings Act would be

applicable. This tenancy would therefore fall outside of the statutory regimes and would instead be governed by the common law which recognizes the presumption of tenancy where there is exclusive possession of the property for a fixed or periodic term in consideration of the payment of rent (per Lord Templeman in **Street v Mountford** [1985] 2 All ER 289). As mentioned earlier, no evidence was adduced as to a term of years, and so as a result of evidence that rent of $2000.00 was paid annually, a periodic tenancy from year to year would be presumed (per Chambre J in **Richardson v Langridge** (1811) 4 Taunt 128).

[37] Having regard to the above, I agree with the learned Judge of the Parish Court's finding that a tenancy existed between Victor Myers and the appellant and that it was a periodic tenancy (year to year) at common law.

[38] The crucial question at this juncture, is whether at the end of phase one, the tenancy agreement between Victor Myers and the appellant expired upon the former's death in 1981?

[39] A lease is a personal, contractual agreement between a landlord and a tenant, but although primarily a contractual arrangement, because of its application to the land and its conferral of exclusive possession, a leasehold has come to be recognised and classified as an interest in land. It is this feature which transforms the lease from a personal, contractual right into a form of real property, existing for the duration of time that the tenant is entitled to possession. The landlord will, however, retain a reversionary estate for the duration of the lease, which will vest in possession once the lease is extinguished.

[40] In their text, The Law of Real Property (fifth edition), Messrs Megarry and Wade asserts that because of the nature of a yearly tenancy, it continues indefinitely from year to year unless it is determined by a proper notice on either side, and this is so, "notwithstanding the death of either party or the assignment of his interests". In this case, there was no evidence of any notice emanating from Victor Myers to the appellant

nor vice versa, prior to Mr Myers' death. The presumption, therefore, is that the tenancy survived Mr Myers' demise.

[41] On the death of a landlord, his reversion as well as all his other property will vest in his personal representative. If he died leaving a will that named his executors, then the reversion will immediately vest in those executors and the lease will continue with rent being paid to the executors until such time when the property in question is distributed to the intended beneficiary or beneficiaries.

[42] If the landlord died intestate, as in the instant case, then the situation is different because, on his death, an intestate's estate vests in no one until the grant of letters of administration. Halsbury's Laws of England, 4th edition reissue, Volume 17(2), para. 33, indicates that:

> "Source of administrator's title.
>
> The administrator derives his title entirely from the grant of letters of administration, and the deceased's property does not vest in him until the grant, so he cannot make a lease or other disposition before the grant. After the grant of administration the administer has, subject to the limitations contained in the grant, the same rights and liabilities and is accountable in the same way as if he were the executor of the deceased."

[43] By virtue of section 3(1) of the Real Property Representative Act, the interests in the property of a deceased person devolves upon the deceased's personal representative upon a statutory trust, had there been persons in whose favour such trusts could operate as provided for by section 4 (1) of the Intestates' Estates and Property Charges Act. Mr Myers' spouse, the respondent or any of his other children would have had the authority to apply for letters of administration in order to obtain the requisite authority to deal with the subject property in his stead. None of them, however, before 2012, did so, with the result that the respondent had no authority as a landlord in succession for the intervening 31 years. Illustrative of this point is the case of **Ingall v Moran** [1944] KB 160. In that case, the deceased died intestate in a road accident, the intestate's father commenced an action 'as administrator' for wrongful death/negligence, prior to obtaining a grant of

letters of administration. He obtained judgment for damages in respect of his son's death. The Court of Appeal, however, held that the action was incompetent since it was commenced without authority (it was irrelevant that the father obtained a grant some two months later).

[44] It is to be noted that the respondent herein, had suffered a similar fate as the claimants in the **Ingall v Moran** case cited above, when she had previously sued the appellant for outstanding rent in 2009. Although her suit was successful before the Judge of the Parish Court, it was overturned on appeal as she lacked status or capacity to sue the appellant at that time. Prior to this spectacular failure, the respondent had taken no steps to legitimize her status qua the administration of her father's estate until some 30 years after the intestate's death, and six years after the last payment of rent was received from the appellant.

[45] It is to be noted also, that no title is conferred on a spouse or child or any potential beneficiary, who takes possession of the intestate's property without the grant of letters of administration (**George Mobray v Andrew Joel Williams** [2012] JMCA Civ 26). In the circumstances of this case, therefore, although initially the spouse of Victor Myers and then the respondent sought to take charge and administer his estate, neither the widow nor the respondent had acquired any title, nor were they successors in title for the purposes of stepping into the intestate's shoes and becoming *de jure* landlords to the appellant. Accordingly, upon Victor Myers' death the right to possession of the subject property would have reverted to his estate.

[46] That finding urges further contemplation of the repercussions of the appellant's continued occupation of the subject property following the death of Victor Myers, and particularly whether he paid rent to the respondent. This is especially important since the respondent's subsequent conduct was that of a landlord, and further, the appellant had claimed in the court below that he dispossessed the respondent and her family.

[47] The consideration of whether the tenancy created between Victor Myers and the appellant continued between the appellant and the respondent could have also arisen on the circumstances and conduct of the parties themselves. It can be inferred, as the learned Judge of the Parish Court did, that the appellant had recognised the authority of a "landlord" by paying rent to the respondent's agent. The conduct of the appellant in paying rent (including rental arrears) to the agent for approximately 21 years after Victor Myers' death, was certainly regarded by the learned Judge of the Parish Court as indicative of the existence of a tenancy. In such circumstances the irresistible inference also arose that the appellant had accepted the respondent as a landlord by attornment, that is to say, tacitly agreed to be the tenant of a "new" landlord and continuing the lease agreement he had made with Victor Myers. The finding of the learned Parish Court Judge was that the appellant had paid rent to the respondent for over 21 years following the death of Victor Myers. It, therefore, lies ill in his mouth to have suddenly denied that he was a tenant of Victor Myer's estate and had no obligation to pay rent. Particularly, since there was no suggestion that the payment of rent to the respondent was made through a mistake or in consequence of any misrepresentation by the respondent.

[48] In my opinion, the appellant's conduct of paying rent to the respondent via her agent was a tacit acknowledgment of his status as a tenant. Furthermore, the appellant's action of paying rent and the irresistible inference of a landlord and tenant relationship, belied his claim of adverse possession.

[49] Alternatively, it could be said that the respondent had intermeddled in her father's estate, because prior to 2011, she had made no application to the court to be vested with the powers of an administratrix, but nonetheless had held herself out to be the landlord of the subject property, and had appointed an agent to collect rent from the appellant. She testified that the appellant had paid rent for his occupation of the subject property and had continued in exclusive possession up until at least 2009. Based on her conduct, she, therefore, intermeddled into the estate of Victor Myers**.** A person who, not being a personal representative of a deceased's estate and not having authority from a will or letters of administration, who takes upon herself to intermeddle with estate matters or to

do acts characteristic of the office of a personal representative makes herself an *'executor de son tort'.* The term *'executor de son tort'* is interchangeably referred to as an '*executor in his own wrong'*.

[50] An *executor de son tort* is liable to the estate to the extent of the assets received or coming into his hand, with the exception of any debt due to him from the deceased or a payment that might lawfully be made by the personal representative. That principle of law was set out by Sir R Malins VC in **Coote v Whittington** (1873) LR 16 Eq 534 as follows:

> "…where a person possesses himself of the assets of a testator or intestate without having administered he may be treated as executor de son tort, and that an executor de son tort has all the burdens, but not the privileges, of a regular executor..."

[51] Halsbury's Laws (Wills and Intestacy) Volume 102 (2010) 5th Edn. at paragraph 1263 describe the nature of the acts that would result in an individual being deemed *executor de son tort* as:

> "The slightest circumstance may make a person executor de son tort if he intermeddles with the assets in such a way as to denote an assumption of the authority or an intention to exercise the functions of an executor or administrator. Demanding payment of debts due to the deceased, paying the deceased's debts, carrying on his business or disposing of goods…"

[52] Examples of such circumstances are; carrying on the deceased's business (**Paget v Priest** (1787) 2 TR 97; **Hooper v Summersett** (1810) Wight 16), selling his goods (Read's Case (1604) 5 Co Rep, 33b) and receiving payments of debts due to him (**Sharland v Milldon** (1846) 5 Hare 469).

[53] It is not in every instance that an *executor de son tort* will be considered a wrong-doer, because it is not every intermeddling with the goods of the deceased which is wrongful. Acts which are not destructive of the property, and which do not

otherwise amount to a conversion of goods, are not considered wrongful, however, acts, if done as an assertion of dominion and act of ownership, would be wrongful (see **Sykes v Sykes** (1870) 5 CP 113). The respondent, by her conduct, can properly be described as an *executor de son tort* who intermeddled in her father's estate and her conduct, demonstrably, was an assertion of dominion and an act of ownership. Fortunately for her, there is no likelihood of anyone suing her or holding her liable for any tortious acts, as she is now the administratrix and apparently the sole surviving beneficiary of Victor Myers' estate.

[54] In the case at bar, it is pellucid that the agent, Mr Brown, was employed by Victor Myers' potential beneficiaries in their capacity as representatives of his estate without the requisite grant of letters of administration to that effect. The foregoing evidence, as stated, was that subsequent to Victor Myers' death, the agent collected rent from the appellant and paid the property taxes on behalf of Victor Myers' spouse, who assumed responsibility for the intestate's affairs. Subsequently, the agent acted on behalf of the respondent after her mother ceded responsibility to her. The evidence which the learned Judge of the Parish Court accepted was that the appellant only ceased paying the rent when the respondent sought to increase the rental amount in 2003, with which he did not find favour.

[55] That evidence was challenged in cross-examination. The respondent, however, remained steadfast in her position and no evidence was canvassed by the appellant to refute it. Even in the absence of supporting evidence from the agent, the respondent's averments were clearly accepted by the learned Judge of the Parish Court and I see no reason to say she was plainly wrong to have done so. There was sufficient evidence on which the learned judge of the Parish Court could have arrived at her decision that the respondent had proven, on a balance of probabilities, that there had existed a lease agreement between the appellant and her father Victor Myers.

[56] Though neither the widow nor the respondent had asserted that they were owners or landlords in succession, they would have acted as *executors de son tort* of Victor

Myers' estate despite the absence of letters of administration. In the forgoing circumstances, the learned Judge of the Parish Court's finding that the periodic tenancy which existed during Victor Myers' lifetime, had continued subsequent to his death, cannot be faulted as no new tenancy was created.

[57] The appellant entered the subject property by lawful title. He continued in possession after Victor Myers' death with the knowledge and agreement of the potential personal representatives/beneficiaries and he continued to pay rent. He continued fulfilling his covenant as a tenant, namely by paying rent for the subject property. It is my view, therefore, that a tenancy by attornment had been established between himself and the respondent, who was functioning in the capacity of an *executor de son tort* on behalf of Victor Myers' estate. By tacitly acknowledging that state of affairs, the appellant was estopped from denying it.

Issue 2- whether if a tenancy existed, by disclaiming the existence of same, the appellant repudiated the tenancy, and forfeited his status as a tenant

[58] Phase three commenced when the appellant refused to pay the increased rent and resiled from paying any rent at all for his continued occupation of the subject property. The question is, what was his status thereafter? The learned Judge of the Parish Court found that the appellant's discontinuation of the rental payments did not correspondingly indicate a discontinuation of the tenancy, notably because he remained in occupation of the subject property. However, this begs the question, if indeed a tenancy existed after 2003 as per the finding of the learned Judge of the Parish Court, what would the nature of that tenancy be?

[59] The common law year-to-year lease or periodic tenancy that existed at the beginning at phase three in 2003, was one which was determinable, by either party from year to year. If the lease was not determined by notice on either side it is deemed to have continued. Up to 2003, there had been no indication, by word or deed, that either the appellant or the respondent had terminated the tenancy.

[60] Whilst the lease is in effect, however, the tenant is obliged to observe all the usual covenants, including paying rent. The tenant's covenant to pay rent is a covenant that was said in **Hill v Booth** [1930] 1 KB 381 to "touch and concern" the land; therefore, the rent is paid for the use of the land. The contract of tenancy confers on the tenant a legal estate in the land and such legal estate gives rise to rights and obligations as there is, between the landlord and the tenant, privity of estate. In circumstances where the appellant had refused to pay rent, he would be in breach of a fundamental obligation which is one of the hallmarks of a tenancy agreement.

[61] A tenant may incur a forfeiture of his lease by breaching a covenant, such as the obligation to pay rent. Where such a breach occurs, a landlord's right of re-entry accrues and, by virtue of said breach, the lease is rendered voidable at the landlord's option. The right of re-entry though, is subject to the Limitation of Actions Act, and will be lost to the landlord after the lapse of 12 years, or by waiver. If a landlord wishes to forfeit the lease he must take positive steps to show unequivocally that he intends to terminate the lease, such as bringing an action of ejectment (recovery of possession). The issue and service of writ (a plaint and summons) for possession, is a conclusive indication that the landlord has irrevocably decided to treat the breach of covenant as giving rise to a forfeiture. The lease is notionally forfeited at the date the writ is served. In the case of **Canas Property Co Ltd v KL Television Services** [1970] 2 All ER 794, at pages 798-799 Lord Denning MR said:

> "My conclusion is that where a tenant has been guilty of a breach which has not been waived, then, in order to effect a forfeiture, the lessor must actually re-enter, or do what is equivalent to re-entry, namely issue and serve a writ for possession on the lessee or assignee, as the case may be... The lease is determined as from the date on which the writ is served. The rent is payable up to the date of service. Mesne profits are payable after the date of service."

[62] In the case at bar, there had been no payment of rent for 10 years at the time the plaint for recovery of possession was filed in 2013. In the intervening years since 2003, the respondent had repeatedly made demands to recover possession of the subject

property. This was not only on account of the accumulating rental arrears, but also because of her discovery that the appellant was simultaneously paying the taxes for the subject property which she suspected was a bid to court adverse possession. Despite the several notices to quit served upon him, and despite his refusal to pay the rent, the appellant was nonetheless enjoying the use of the subject property. In the circumstances, his refusal to pay rent for a prolonged period of time can be regarded as evidence of a breach of covenant by a tenant, one which is serious enough to amount to a repudiation of the terms of the contract embodied in the lease. If the appellant's actions amounted to a repudiation of the tenancy, and I am of the view that it did, this would have entitled the respondent to treat the lease as forfeited. In the result, there would be no obligation on the respondent to serve the appellant a notice to quit.

[63] I further note that the respondent testified that "one year I allowed someone (a friend) to use the property to put his cows" because "Mr Bowen wasn't following up paying the rent, after numerous verbal notices". She, therefore, admitted that, during the time that the appellant was in occupation of the subject property, she had allowed another person to enter upon the subject property and pasture his cattle thereon. To my mind, it appears that the respondent by this action also was signalling a change in the appellant's tenancy status, as her action would have been inconsistent with the exclusive possession to which a lawful tenant would have been entitled. In **Ramnarace v Lutchman** [2001] 1 WLR 1651 at page 1656, Lord Millett, following Lord Templeman in **Street v Mountford** [1985] AC 809, opined that "[t]here can be no tenancy unless the occupier enjoys exclusive possession…".

[64] Separate and apart from the breach of covenant to pay rent for the subject property, and the inferential forfeiture of the lease, the appellant had also challenged his landlord's title. He had averred that he had dispossessed Victor Myers, the respondent and the whole Myers family. He was therefore claiming title for himself.

[65] During the course of the proceedings in the Parish Court, the appellant had filed a defence of adverse possession, a position which is wholly inconsistent with a tenancy as

the former requires no permission or agreement, whereas the latter is founded upon agreement and consent of the title holder or person then in possession of the subject property. In setting up the defence of adverse possession, it is my opinion that the appellant had sought to impugn his landlord's title.

[66] The appellant's repudiation of the respondent as landlord and his assertion that he had acquired title by adverse possession, was conduct which would have resulted in a change of his status. He could be regarded as having forfeited the tenancy, an inference strengthened by his refusal to pay rent over a number of years. There is implied in every lease agreement a condition that the tenant is not to do anything that may prejudice the landlord's title and, if this occurs, the landlord may re-enter for breach of this implied condition (see **Warner v Sampson** [1959] 1 QB 297 at 30 -317; 1959 1 All ER 120 at 122-126, per Lord Denning).

[67] According to an extract from Halsbury's Laws of England (fourth edition reissue, volume 27(1) at para. 504):

> "[t]here is implied in every lease a condition that the tenant is not to do anything that may prejudice the landlord's title, and that, if this is done, the landlord may re-enter for breach of this implied condition. Thus it is a cause of forfeiture if the tenant denies the landlord's title by alleging in writing, or, in the case of a tenancy from year to year, either in writing or orally, that the title to the land is in himself or another, or if he assists a third person to set up an adverse title…In the case of a tenancy from year to year, the effect of such a denial of title is that the tenancy may be forthwith determined by the landlord without notice to quit. It is however, a question of fact what intention underlies the tenant's words or actions, whether in fact he is definitely asserting a title adverse to the landlord, … Thus it is not sufficient that the tenant pays rent to a third person, or does not at once acknowledge the landlord's title, or refuses to give up possession at a time when the landlord has no right to claim it. A denial in a pleading does not now give rise to forfeiture **unless the denial amounts to the setting up of a title of a rival claimant or a claim of ownership on the part of the tenant**." (Emphasis added)

[68] It is pellucid that the appellant, when he filed his special defence, was definitely asserting a title adverse to that of not only the respondent but also the deceased title holder Mr Victor Myers. In cross-examination of the respondent by the appellant's counsel, it was suggested to the respondent that the appellant had dispossessed her and her family, that since her father had stopped "keeping cows on the land" (since the 1970s), neither the father nor the respondent had been in possession of the subject property. It was further suggested to the respondent that the appellant had never rented the subject property "from your father, mother, sister, brother or you" and had "never paid any rent to any of you". Having regard to his conduct qua the respondent and the subject property, the appellant had not only repudiated the obligation to pay rent but had denied the existence of a tenancy agreement and more egregiously had set up a rival claim of ownership/title obtained by adverse possession and so had prejudiced the tenancy agreement and his landlord's title.

[69] The lack of obligation on the part of a landlord to give a notice to quit towards an erstwhile tenant who conducts himself in a manner such as the appellant had done, is highlighted by numerous decisions relating to an action of ejectment, which is the forerunner of the modern action of recovery of possession proceedings. In **Throgmorton v Whelpdale**, (1769) Bul N P 96, it was held that "… If a tenant holds from year to year, the landlord cannot maintain an ejectment against him without giving six months previous notice **unless the tenant have attorned to some other person, or done some other act disclaiming to hold as tenant to the landlord, and in that case no notice is necessary**" (emphasis added). This principle has been recognised in various cases including **Williams v Pasquali** (1793) Peak NPC 259. In that case, it was held that "…a notice to quit is only requisite where a tenancy is admitted on both sides and if the lessee denies the tenancy there can be no necessity for a notice to end that which he says has no existence". In **Saunders v Freeman 1817** (cited in The Law Journal Reports, Volume 3, page 222) it was held that any act of the lessee, by which he disaffirms or impugns the title of his lessor, occasions a forfeiture of his lease, for every

lease the law tacitly annexes a condition that, if the lessee does anything that may affect the interest of his lessor, the title shall be void and the lessor may re-enter.

[70] The foregoing rule was recognised by Lord Redesdale, in delivering judgment in **Hovenden v Lord Annesley** (1806) 2 Sch & Lef 607, in which he treated the betraying of the possession by a tenant-for-years as a ground for forfeiture of the lease. He opined that evidence of a notice to quit is dispensed with where the tenancy is forfeited and no longer in existence, because the party disclaiming it, is no longer a tenant.

[71] In the case of **Ellerbrock and Others v Flynn** (1834) 1 CM & R 136, in an ejectment suit, the tenant had colluded with another to make a claim hostile to that of the landlord. This was regarded as a disclaimer of the landlord's title, by betraying the possession, as to create a forfeiture of the lease. The court, at pages 140 -141, held that:

> "It may be admitted as a general rule, that, whenever a tenant claims or assumes to himself more than is granted to him by the landlord, in derogation of the title of the latter, that is a forfeiture.
>
> … In order to create a forfeiture, there must be some clear, precise, and unequivocal act of disclaimer."

Lord Lyndhurst CB at page 141, enunciated that:

> "If the tenant sets up a title hostile to that of his landlord, it is a forfeiture of his term; and it is the same if he assists another person to set up such a claim. Whether he does the act himself, or only colludes with another to do it, it is equally a forfeiture."

[72] The significant points of evidence that the learned Judge of the Parish Court had to contend with were that the appellant, on the one hand, had (a) discontinued the payment of rent; (b) disavowed the respondent to be his landlord; and (c) set up his special defence of adverse possession. On the other hand, the respondent had repeatedly made demands for the appellant to pay rent or quit the subject property and had further allowed another person to use the subject property for pasturing of cattle during the appellant's occupancy and thereby breaching the tenant's right to exclusive possession.

So even though a tenancy existed in 2003, the subsequent actions of not only the appellant but also of the respondent up to 2010, I think, were inconsistent with the continuance of such a tenancy. The refusal to pay rent for over 10 years and the setting up of a claim of ownership/title by way of adverse possession by the appellant in the instant case, clearly are acts that affected the interest of the lessor. The appellant had in fact set up a title hostile to that of his landlord and, in my view, his actions amounted to a disclaimer and repudiation of the tenancy relationship.

[73] I am of the view that the appellant's status during phase three underwent a significant transformation and morphed into that of a squatter, certainly by the year 2010.

[74] Although the appellant had filed his special defence of adverse possession, during the course of the trial, he neither testified nor elicited any evidence to substantiate this claim. He chose to rest on his no-case submission. The learned Judge of the Parish Court highlighted that the only evidence before her for consideration was that given by the respondent who had vehemently denied all the suggestions put to her in cross-examination relative to the appellant's defence. She referred to the case of **Zephania Blake et al v Almondo Haunt** [2014] JMCA Civ 25, as representing the law on adverse possession and identified the principles giving rise to same. Having accepted the evidence of the respondent, including the meagre evidence which disputed the appellant's assertion, the learned Judge of the Parish Court found that there was no adverse possession and Victor Myers' estate had not been dispossessed. I see no reason to disagree with her finding in this regard.

Issue 3- whether the respondent was obliged to serve on the appellant, a notice to quit before she filed her plaint for recovery of possession on 18 July 2013.

[75] Having found that the appellant was a squatter from 2010, the validity, or otherwise, of the relevant notice to quit served on the appellant on 29 January 2013 is irrelevant. The singular purpose it would serve in the circumstances of this case, would be as indisputable evidence that the respondent, upon obtaining the requisite *locus standi*

to act on the estate's behalf did in fact demand possession of the subject property. The respondent's action of serving a notice is simpliciter with no requisite period for its validity since as a squatter, the appellant was not entitled to any formal notice to quit. Section 89 of the Judicature (Parish Court) Act, which deals with squatters, noticeably does not mention any prerequisite notice. What that section envisages is that the court should be satisfied with the proof of the title of the plaintiff, that the defendant is still in possession of the relevant property and neglects or refuses to give up the premises and that there has been service of the summons. The defendant is then permitted to show good cause, within the remit of the statute, why he is still in possession of the property. The express intention on the part of the respondent, to end the appellant's occupation, would have been evident by the institution of legal proceedings by the respondent to recover possession of the subject property. The respondent also executed acts of termination of the tenancy by permitting another person to graze cattle on the subject property while the appellant was still in occupation. This was consistent with her wish, as the personal representative of Victor Myers' estate, to recover possession of the subject property.

[76] In addressing the complaint on this appeal, the validity of the notice to quit would only be pertinent if there was an agreement with the learned Judge of the Parish Court's finding that the appellant was a tenant at the time of the service of the relevant notice to quit. It is undisputed that the relevant notice to quit conformed to the prescribed form. It also stated the following reasons: (i) the landlord needs the premises for her own use and purpose; and (ii) non-payment of rent. If the common law tenancy subsisted, as pointed out in **Golden Star Manufacturing Company Ltd v Jamaica Frozen Foods Ltd** (1986) 23 JLR 444, the termination of a contract of tenancy would still be governed by the common law rules, and termination of the tenancy would still have to be proved.

[77] A yearly tenancy would require six months' notice, as correctly indicated in the relevant notice to quit, and the expiration date, therefore, would be the effective date on which the cause of action would arise. The appellant, if indeed he was a tenant, would have been entitled to the service of a valid notice to quit, which would have to expire before the respondent could properly file her plaint and summon him before the court.

The plaint was filed on 18 July 2013, and the six-month period for the relevant notice to quit would have expired on 29 July 2013. The argument that the notice was short-served cannot be impugned. While it could be said that raising the issue for the first time on appeal is akin to retrying the matter and that issue should have properly been raised in the court below, that argument, in the face of my determination that the appellant was not a tenant at the time of the service of the notice to quit, is now otiose.

Conclusion

[78] In disposing of this appeal, I conclude that the learned Judge of the Parish Court was correct in finding that a lease agreement existed between the intestate, Victor Myers and the appellant and, therefore, there had been a relationship of landlord and tenant. I also agree with her finding that the relationship of landlord and tenant had existed between the appellant and the respondent, albeit not by succession but one which arose by virtue of the respondent intermeddling in her father's estate and alternatively by attornment. After 2009, the appellant's interest in the subject property was no longer subjected to any agreement expressed or implied deriving from his tenancy with Victor Myers, and, subsequent to the abdication of his obligations as a tenant under the tenancy agreement, his status would have undoubtedly morphed to that of a "squatter".

[79] Ultimately, my reasoning is contrary to that of the learned Judge of the Parish Court, on one aspect of the case, and, to my mind, she erred in finding that at the time when the plaint was filed in 2013, a tenancy existed between the parties and that the relevant notice to quit was valid. Notwithstanding, the order of the learned Judge of the Parish Court cannot be successfully challenged since I have arrived at the same conclusion, which is that the respondent was entitled to recover possession of the subject property, from the appellant. In the circumstances, an application of the proviso contained in section 251 of the Judicature (Parish Court) Act, is appropriate, that:

> "provided always, that no judgment, decree, or order of a Court shall be altered, reversed, or remitted, where the effect of the judgment shall be to do substantial justice between the parties to the cause."

[80] It is my view that, although the learned Judge of the Parish Court arrived at her decision by way of reasoning that differs from mine, no injustice was occasioned to the appellant and her order made on 28 March 2017, for recovery of possession, should stand.

[81] For all of the foregoing reasons, I would propose that the appeal be dismissed and the order of the learned Judge of the Parish Court for recovery of possession be affirmed, with costs to the respondent in the sum of $60,000.00.

STRAW JA

ORDER

1. The appeal is dismissed.

2. The order of Judge of the Parish Court, Her Honour Ms Winsome Henry, made on 28 March 2017, is affirmed.

3. Costs to the respondent in the sum of $60,000.00.