JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 33 OF 1983

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE ROSS, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)

BETWEEN	RUBY CHAI CHONG	PLAINTIFF/APPELLANT
AND	MICHAEL KWOK WOOMING	DEFENDANT/RESPONDENT

Mr. Carl Rattray, Q.C., and Miss Chin-Quee for the Appellant.
Mrs. A. Hudson-Phillips for the Respondent.

December 16, 1983; February 29, 1984

CAMPBELL, J.A. (AG.):

The appellant is the registered proprietor of commercial premises situated at 55 Old Hope Road in the parish of Saint Andrew. The respondent as tenant of the appellant has been carrying on a grocery business in the premises since 1978. He bought the grocery business from one Warren Chong and thereafter attorned tenant to the appellant. The rent originally was $200.00 per month. On 6th December, 1979 the respondent was given three months notice to quit and deliver up possession of the premises. The reason given for the notice to quit was stated thus:

> "I intend to do extensive repairs which would prove very inconvenient if the premises is occupied during these operations. I have personal plans for using the premises after the repairs are completed."

This notice, which in any event, was invalid for non compliance with section 26 (2) (a) of the Rent Restriction Act, was cancelled on June 10, 1980 by one "M. Chai" acting for and on behalf of the appellant. Thereafter the respondent began paying rent at the rate of $350.00 per month in addition to 20 per centum of the water bill chargeable to another tenant.

In or about December, 1981 the appellant presented to the respondent a lease document for signature thereby offering him a

lease of the premises for two years at a rent of $1,000.00 per month. The respondent declined to execute the lease even though he appeared to have been willing to accept a lease for five years at the rent of $1,000.00 per month.

On 30th March, 1982 the appellant served a notice to quit on the respondent stating as the reasons therefor the following:

> "(1) Some rent lawfully due to your landlord from yourself is in arrears for a period in excess of thirty days; and
>
> (2) That the premises are reasonably required by your landlord for her own use."

The respondent having failed and/or neglected to vacate the premises, the appellant brought action for recovery of possession. The respondent in his defence, denied that a legal notice to quit had been served on him or at all, and further denied that any ground under the Rent Restriction Act existed which would give the landlord right to possession.

The claim that some rent was in arrears do not appear to have been pursued by the appellant. With regard to her claim that the premises are reasonably required for her own use, she gave evidence, so far as is relevant, as hereunder:

> "I want place for myself. I have no place. Get it back use it maybe something - grocery. I don't own any other place I could use to do grocery business. Have done grocery business before. Long time now since. Stop carrying on grocery business about 15 years. I am 72 years old. I want to carry on a grocery business. Year before last I decide I want to do grocery business again - 1981. Don't want to 'cotch.' True I want to do business. I want my own place. I don't want to lease I want my place. When I get place sons and daughters-in-law will help me."

The respondent gave evidence that he became a tenant in 1978. About the end of 1979, the appellant came to him and intimated that she wanted more rent. They did not reach agreement on an increase in rent. He was served with a notice to quit. He reported the matter to the Rent Board but later withdrew the application in return for the cancellation of the notice to quit in June 1980. He thereafter

started paying $350.00 per month instead of the original $200.00. About October 1981, the appellant through her son commenced negotiations for an increase in the rent. They agreed to a rent in the sum of $1,000.00 per month but could not agree to the duration of the lease. The appellant offered a two year lease while he was insisting on a five year lease. Lease document offering a two year lease was taken to him by the appellant for his signature which he declined to sign. He was soon thereafter served with a notice to quit dated 30th March, 1982.

He gave further evidence which I think it better to set out verbatim. It runs thus:

> "Have tried to find other suitable accommodation, I have entered contract to purchase 74 Lady Musgrave Road, Shop premises. Have not yet got title or possession. Tenant in premises now doing business. Would take not less than two years to get possession. I anticipate moving in 2 yrs. It would be very hard to move now and move again - customers - dislocation and workers. Would cost about $2000.00 to move. Entered agreement about March, 1983 to purchase Lady Musgrave Road. I paid all the purchase money to my lawyer about May. I have not served notice to quit on tenant. $2000.00 for transportation alone. Might have to pay some amount to move. Married, 3 children. Family live in Jamaica. Have grand-aunt living with me about 66 years old, I look after. Sometimes give money to grandmother - not living with me."

The learned Resident Magistrate refused to make the order for recovery of possession and the appeal from his refusal is taken before us.

Mr. Rattray, Q.C., for the appellant, in making his submission, proceeded from the standpoint that the learned Resident Magistrate had found that the appellant reasonably required the premises for use by her for trading. Thus he concentrated on grounds 2, 3, 4 and 5 of the appeal which together complained that the learned Resident Magistrate in refusing the order on the ground that "greater hardship would be on the defendant if the order was made than on the plaintiff if it was refused" erred in law and on the facts in the exercise by him of his discretion under section 25 (1) (e) of the Rent Restriction Act. His submission succinctly stated was that on the evidence what the appellant wanted was to start business in order

to be independent. On the other hand, the respondent had bought alternative business premises. He had not said he could not find alternative accommodation pending completion of his purchase. The hardship which he mentioned was solely on account of the expense and trouble of having to move to new rented premises and subsequently having again to move to his own premises when he obtained title and possession.

In this state of the evidence, says Mr. Rattray, the learned Resident Magistrate could not find, and ought not to have found, that greater hardship would be on the respondent if the order was made than on the appellant if it was refused. Alternatively, even if the learned Resident Magistrate was entitled to find as he did, that greater hardship would be on the respondent if the order was made, he could and should have granted the order and suspended it for a period which he thought reasonable and fit, having regard to the fact that any hardship on the respondent was essentially temporary.

Mrs. Hudson-Phillips for the respondent in her submission disputed "in limine" what she said was the assumption of Mr. Rattray, namely, that the learned Resident Magistrate had made a specific finding that the appellant reasonably required the premises for her own trading. She submitted that the learned Resident Magistrate could not and did not make such a finding because the evidence of the appellant did not establish that she had a "genuine present need" for the premises to do business which was a precondition of section 25 (1) (e) (ii) of the Rent Restriction Act. She relied on Douglas v. Pereira 11 W.I.R. p. 20 in support of her submission on how the words "reasonably required" ought to be interpreted. She further relied on Epsom Grand Stand Association Ltd. v. E. J. Clarke (1919) 35 T.L.R. 525 in support of her submission that a finding of bona fides in the appellant, and/or that she genuinely desired the premises was insufficient to satisfy the statutory pre-condition which is that the premises must be "reasonably required."

I agree that a mere bona fide "desire" to have premises is not synonymous with "reasonably requiring" the same for the appropriate purpose specified in section 25 (1) of the Rent Restrictio

Act. I also entirely agree with her that the learned Resident Magistrate did not specifically find that the appellant reasonably required the premises for her own business. Excerpts from the learned Resident Magistrate's reasons for judgment, taken together read as follows:

> "I believed the plaintiff that she wanted premises to do her own business as she wanted to be independent and not rely on her children. People of her age usually have this wish to be independent and not be a burden to their children. There is no evidence that her children regarded her as a burden or did not treat her well or that she was in financial hardship. The relationship between herself and her children appeared to be good. She stated that they would help in the shop. She is 72 years old and has not done business for 15 years."

I do not agree with Mr. Rattray that the above excerpts read together constituted a clear finding that the appellant reasonably required the premises for her own business. The first two sentences of the above excerpts, in my view, amounted to no more than a finding of "a genuine desire" by the appellant to do her own business for the reason stated in the said sentences. In the succeeding sentences, the learned Resident Magistrate adverted to facts such as age of the appellant, her long retirement from the grocery business, her freedom from financial hardship, the significance of which, in my view, was to show that as distinct from her genuine desire to be independent, there was no genuine present need for her to return to the grocery business and thus there was no genuine present need for the premises. In this context, it must be remembered that the learned Resident Magistrate had evidence before him which reasonably construed showed that the appellant gave the notice to quit only because the lease negotiations collapsed. This was substantially confirmed by appellant's counsel in his closing address to the learned Resident Magistrate.

I am equally not persuaded by the submission of Mr. Rattray that since the consideration of hardship is the last stage in the judicial process, the learned Resident Magistrate must have found that the appellant reasonably required the premises for her own business otherwise he would have refused the orders then and there

without embarking on any consideration of hardship. The learned Resident Magistrate appears to have considered the question of hardship solely as an added factor for completeness of his reasoning. The concluding words of his reasons for judgment showed that had he expressed the said words not at the end of his judgment but at the end of the paragraph in which he dealt with the age of the appellant and her freedom from financial hardship, to which paragraph the said words were most apposite, there could be no doubt as to what he in fact was saying, namely, that the appellant did not reasonably require the premises in the sense that she had a genuine present need for the same. She wanted to do business only to satisfy her pride. Thus the learned Resident Magistrate after considering the circumstances of the respondent concluded his judgment as hereunder:

> "Although I did not doubt the bona fides of the plaintiff I was of the opinion that greater hardship would be on the defendant if the order was made, than on the plaintiff if it was refused. The plaintiff wanted (the premises) to do business to satisfy her pride, the defendant to make a living."

Dealing with Mr. Rattray's submission that the learned Resident Magistrate erroneously determined the question of hardship, Mrs. Hudson-Phillips submitted as principles of law applicable in these cases that:

(i) The onus of proving that less hardship will be caused to the tenant if the order is made than will be caused to the landlord if the order is refused is on the landlord. The position under the proviso to section 25 (ii) (e) of our Act which uses the words "less hardship" is thus different from that under the Rent and Mortgage Restriction (Amendment) Act 1933 (U.K. Legislation) due to the use of the words "greater hardship" in the comparable proviso to section 3 and Schedule 1 (b) of the United Kingdom legislation. The significance of this difference in the incidence of the onus of proof is that if, when all the evidence of hardship is considered, the issue remains "in medio"

it must be resolved in favour of the tenantsince under our Act it would be the landlord and not the tenant who has failed to discharge the evidentary burden of proof.

(ii) It is permissible to consider in addition to the existence or absence of alternative accommodation such matters as the financial implications of the making or refusal of the order as well as hardships on dependents and others who are in such proximity to the landlord or the tenant that their hardships could fairly be taken as hardships of the respective parties themselves.

(iii) The question as to where lies the balance of hardship is one of fact for the trial judge and unless the trial judge misdirected himself, or has based his judgment on some finding of fact of which there is no evidence, an appellate court ought not to interfere.

With regard to the onus of proof and the implications flowing therefrom, Mrs. Hudson-Phillips relied on Quinlan v. Philips (1965) 9 W.I.R. 269. Mr. Rattray frankly and properly conceded that he was aware of West Indian decisions which did not follow cases such as Sims v. Wilson (1946) 2 All E.R. 261 which placed the onus of proving hardship on the tenant due to the change in language of our Rent Restriction legislation.

In my view, Mrs. Hudson-Phillips is correct that the wording of the proviso to section 25 (1) (e) of the Rent Restriction Act clearly reveals on a proper construction that the onus of proof of hardship must be on the landlord. Under the United Kingdom legislation the proviso read thus:

> "Provided that an order or judgment shall not be made or given on any ground specified in paragraph (h) of the foregoing provisions of this schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it."

Placing of the onus of proof on the tenant under the above proviso is both logical and reasonable, because in the ordinary course of things, it would be illogical to expect the landlord to adduce evidence to destroy his case by showing that if the order sought by him was granted it would cause greater hardship to the tenant. To the contrary he would logically be expected to adduce evidence showing that the granting of the order would cause less hardship to the tenant than would be caused to himself if the order was refused. Thus, while the onus of showing greater hardship to himself if the order for possession is granted to the landlord is on the tenant under the phraseology of the United Kingdom Act, under our Act, with a converse phraseology, using the words "less hardship," the onus must be on the landlord to show that less hardship will be caused to the tenant if the order for possession is made in favour of him, the landlord, than would be suffered by him if the order was refused.

Applying the proviso as interpreted to the facts in the present case, Mrs. Hudson-Phillips submitted that the appellant had failed to discharge the onus of proof on her because she had adduced no evidence of any hardship she would suffer if the order was refused. There was thus no evidence of hardship to her for balancing against the evidence of hardship adduced by the respondent. In this regard, the evidence adduced by the respondent of the hardship which his dependents would inevitably suffer were the order for possession to be made, as also hardship flowing from the financial implications to him arising from transportation expenses and loss of customers were proper for the learned Resident Magistrate to consider, on the issue of hardship. See Kelley v. Goodwin (1947) 1 All E.R. 810; Rhodes v. Cornford (1947) 2 All E.R. 601 and Harte v. Frampton (1947) 2 All E.R. 604.

Finally, Mrs. Hudson-Phillips submitted that unless it could be said that the learned Resident Magistrate misdirected himself in drawing the inference as to where the balance of hardship rested or based his judgment on some finding of fact of which there was no evidence, we ought not to disturb his judgment. To the contrary, Mr. Rattray relied on the view expressed by Scott, L.J.,

in Chandler v. Strevett (1947) 1 All E.R. p. 165, namely, that though the finding of specific facts on contentious and contradictory evidence relative to hardship was indisputably for the trial judge, the question "where lies the balance of hardship" is a matter of fact and law, because it is a matter of inference regarding the incidence of hardship. It is thus open to review on appeal.

The extent of appellate review in these cases, in my view, was correctly stated by Somervell, L.J., in Smith v. Penny (1946) 2 All E.R. 673 in these words:

> "It is necessary for the tenant to show that the county court judge misdirected himself or that he based his judgment on some finding of fact of which there was no evidence."

This statement was expressly adopted in Kelley v. Goodwin (1947) 1 All E.R. 810. Lynskey, J., after expressly adopting the above statement of law by Somervell, L.J., concluded his judgment thus at page 813:

> "In my view, there was ample evidence from which the county court judge could draw the inference that he did. We ought not to interfere unless we can say there was no evidence from which he could draw that inference or that he misread the evidence in some way in drawing the inference that he sought to do and therefore the appeal should be dismissed."

Cohen, L.J., at p. 813 said this:

> "I agree and I only desire to add one word. Counsel for the tenant suggested that the function of this court in cases of this kind was rather wider than that defined in the passage in the judgment of Somervell L.J., which Lynskey J, has read. He relied on some philosophical observations of Scott L.J., in Chandler v. Strevett which might have a wider import than, I think Scott L.J., intended. I do not think he (Scott L.J.) was in any way dissenting from the principle stated by Somervell L.J., in Smith v. Penny a principle which I think has been for many years accepted in this court."

In my view, Mrs. Hudson-Phillips' submissions are all well founded. The learned Resident Magistrate did not make any specific finding that the appellant reasonably required the premises for her business. To the contrary, the irresistible inference to be drawn from his reasons for judgment is that the appellant had failed to

satisfy him that she reasonably required the premises. Further, to the extent that the learned Resident Magistrate proceeded thereafter to consider the question of hardship, the appellant failed to discharge the burden of proof which rested on her to show that she would suffer hardship if the order was refused and/or that greater hardship would be suffered by her if the order was refused than would be suffered by the respondent if the order was made. Finally, I approve and adopt as correct the principle of law applicable to the function of appellate courts in appeals of this kind as stated by Somervell, L.J., in Smith v. Penny (supra). Since there was evidence adduced by the respondent from which the learned Resident Magistrate could properly infer that the respondent would suffer hardship and that in the absence of competing evidence from the appellant the balance of hardship was on him and there was no misdirection on the part of the learned Resident Magistrate, we ought not to disturb his finding on the balance of hardship.

Mr. Rattray finally submitted that the learned Resident Magistrate erred in not making the order and suspending the same for a period of time instead of refusing the order outright. Mrs. Hudson-Phillips submitted that this was not a ground of appeal and that in any event, it would be undesirable and inappropriate for us to make such an order. She relied, by analogy, on the dictum of Evershed, L.J., in Rhodes v. Cornford (supra) when invited on an appeal to make an order for possession. He said this at page 605:

> "We were invited to make an order for possession in favour of the landlord, but it is not right for us to do so. The question of hardship and reasonableness in the case involve issues of fact and the balance of numerous considerations some favourable to the one party and some to the other, matters peculiarly appropriate to a trial judge and by the scheme of the Act assigned to the judges of the County Court."

I am of the view that similar considerations as those expressed by Evershed, L.J., should make us eschew the invitation to vary the order of the learned Resident Magistrate by substituting for the refusal of the order one in the nature of a suspended order.

Even if such a suspended order would otherwise have been appropriate (which is not the case here since the appellant has not established that she reasonably required the premises), Mr. Rattray has himself pointed to the difficulty which would face us of determining what period of suspension would in the absence of further evidence be reasonable. He himself submitted that the period of two years by which time the respondent would hopefully have obtained both title and possession of his own premises may be too long and that a shorter period could well suffice. The learned Resident Magistrate in such cases would be pre-eminently suited to deal with the matter after hearing evidence directed to determining the period of suspension which in all the circumstances would be reasonable.

For the reasons given above, I would dismiss the appeal.

ROSS, J.A.:

I agree.

KERR, J.A.:

I am in agreement with the reasoning and conclusion of Campbell, J.A. (Ag.), in his full and careful judgment dealing with all the questions of law raised in the appeal. Accordingly, the appeal is dismissed with costs to the respondent fixed at $50.00.