IN THE COURT OF APPEAL

R. M. CIVIL APPEAL NO. 55/69

BEFORE: The Hon. Mr. Justice Shelley - Presiding
The Hon. Mr. Justice Eccleston
The Hon. Mr. Justice Edun

B E T W E E N LINDA CORCHO & CATHERINE FERGUSON } DEFENDANTS/APPELLANTS

A N D CHARLES CAMPBELL PLAINTIFF/RESPONDENT

Mr. H. G. Edwards, Q. C., for Defendants/Appellants
Mr. C. Rattray, Q. C., and Mr. L. Cowan for Plaintiff/Respondent.

20th - 22nd May, 1970 and 11th December, 1970

SHELLEY, J. A.:

Stenton DaCosta was the owner of certain lands at Verdun in the parish of St. Mary. In October, 1963, he entered into certain arrangements with the plaintiff, Charles Campbell, after the Flora rains had damaged a piece of the land. According to the plaintiff the arrangement was that the plaintiff should overlook this piece of two acres and three squares and cultivate a portion of it in bananas, reap them, give one-third to DaCosta and the plaintiff himself to keep two-thirds. In addition, the plaintiff was at liberty to grow undercrops solely for himself. This arrangement was to continue for seven years. The plaintiff was also to pay taxes, run a wire fence and rent an old shop there on the land, giving the rent to DaCosta. The plaintiff agreed and in 1964 bought suckers and cultivated the land in bananas.

In February, 1966, DaCosta sold the area comprising two acres and three square chains for £500 to the first-named defendant/appellant, Linda Corcho. All went well between Campbell and DaCosta until February, 1966, when Linda Corcho and her husband took over the land. On the 21st March, 1966, DaCosta and the Corchos went

to the land and DaCosta told the Corchos in the plaintiff's presence and hearing that they must arrest the plaintiff if he came on the land and cut bananas or picked coconuts or breadfruit. The plaintiff then said he would like to be paid for the bananas, and he continued to go on the land to reap the undercrops which were his.

The second-named defendant/appellant, Catherine Ferguson, is the mother of Linda Corcho. Catherine Ferguson reaped all the bananas as they became fit, seventy-one stems in all, amounting to £62.12/- in value.

Stenton DaCosta gave evidence for the defence. He said that his arrangement with Campbell was that Campbell should plant undercrops and reap them for his own benefit but whatever else was reaped should go to him, DaCosta. DaCosta denied that he had authorized Campbell to establish a banana cultivation. In fact he said that he had specifically told him that he was going to sell his land at any time and he must not plant any staple crops. He said that Campbell had permission to sell the bananas that were there but the money was to come to him, DaCosta. Both Corcho and Ferguson admitted that Ferguson had reaped bananas but the number of stems reaped was in dispute.

The learned resident magistrate found the following facts proved:

1. Plaintiff put in possession to cultivate bananas for seven years on two-thirds/one-third basis.
2. Plaintiff planted (banana) suckers in 1964.
3. The second-named defendant reaped them in 1966, 71 stems, costing £62.12/-.
4. First-named defendant in pulling down the old building dug up forty roots of the plaintiff's bananas.

The resident magistrate's reasons for judgment include the following paragraph:

> "I held that a licence for value had been created between DaCosta and the plaintiff and at the material time had not been determined by a reasonable notice from DaCosta to which the plaintiff was entitled. (As there was nothing in writing the Agricultural Small Holding Law Cap. 8 did not apply). That being so, plaintiff was lawfully in possession then and thus entitled to maintain trespass for any damage done to his bananas. Winfield on Tort, page 386, Winter Garden Theatre vs. Millenium 1947, 2 A.E.R. 331, 335, 344; Knight vs. Pratt, 5 J. L. R. 57, 61; Waite vs. Scott, Cl. p. 285, 287."

He gave judgment for the plaintiff for £62.12/- less one-third, £20.17.4d, plus valuator's fee, 5 guineas and general damages, £20, amounting to £66.19.8d with costs to be agreed or taxed.

From that judgment the defendants have appealed. Learned counsel for the appellants contended that DaCosta as owner in fee simple granted a licence to Charles Campbell; that such a licence was a personal contract between the licensor and the licensee, merely giving the licensee a right of action for breach of contract against the licensor, but (a) the licensee could not enforce his contract with the licensor against anyone other than the licensor as there was no privity of contract with any other person; (b) that the licensee has no interest or estate in land and cannot bring an action for trespass. He further contended that irrespective of the terms of the agreement, a licensor can terminate a licence at any time but as against him the court will accept the fact of termination but will grant damages for breach of contract if the termination period is not in keeping with the terms of the agreement, and where no such period is agreed on if the period insisted on is not reasonable. Applying that principle to the instant case, he contends that the licence was in the terms set out by DaCosta until he sold the place. Corcho was at the time of action the fee simple owner of the premises. There was no relationship of licensor and licensee between Corcho and Campbell, therefore no privity of contract between them. Campbell, therefore, could not enforce his licence against Corcho, the only means of enforcement of a licence being in contract. Campbell being a licensee, he says, had no right to possession against Corcho, the fee simple owner, and, therefore, could not bring and succeed in an

action for trespass against Corcho. His cause of action, if any, would be against DaCosta. Mr. Edwards cited in support of his contention, Clore v. Theatrical Properties, Ltd. & Westby and Co. Ltd. (1936) 3 A. E. R., 483.

He contended further that the resident magistrate has in effect found in law that the notice given by DaCosta to the plaintiff did not specify or stipulate a reasonable time in which the plaintiff should leave the land if it were not a reasonable notice and inferentially invalid and so the plaintiff still had a right to remain on the land. He argues that whether reasonable notice is given, is separate and apart from the fact of termination, but that the court will not allow the licensor to treat the licensee as a trespasser during the period. In support of his contention he cited The Minister of Health v. Bellotti (1944) 1 A. E. R., 238.

Mr. Rattray has argued contra, that Mr. Edwards has ignored the licensee who is entitled to possession, a development of the law that in Errington v. Errington (1952) 1 A. E. R. 149, Denning, L. J., as he then was, created a licensee who was entitled to possession; that is, a licensee who by virtue of agreement with the licensor, and by virtue of doing something on the land which he did as a result of arrangement with the licensor, acquired an equity in the land giving him exclusive possession, and, he submitted, allowing him to maintain an action in trespass. Mr. Rattray further submitted that when two persons got together, one the owner-licensor, and there is agreement that one shall plant crops to be sold, part to go to the owner and part to be kept by the person planting, once there is such an arrangement the nature of the licence created gives the licensee an equity in the land. If that were not so, then he could have no protection at all in regard to the crops. He maintained that in this case the plaintiff was a licensee having a permissive occupation short of a tenancy but with a contractural right or, at any rate, an equitable right to remain for seven years, or so long as he carried out his part of the obligation to pay to the licensor one-third the proceeds of the banana sales.

The distinction between Errington's case and the instant case is, whereas in Errington's case the equitable right could grow into an equitable title because of the arrangement, in this case the equitable right would determine on effluxion of time or failure of the licensee to perform. The equity created in the inst nt case, he contended, is one which runs with the land and from which no one can escape save a bona fide purchaser for value without notice. He contended that when a person in the position of the plaintiff in this case brings an action in trespass, he, against whom such action is brought if he is the bona fide purchaser for value without notice, has the onus to set up that defence. He submitted that in the instant case that defence was never set up. The defence that was set up was merely: I am owner of the property. That defence, Mr. Rattray contended, is not available, however, since the defendant went there and saw what the position was. Corcho, therefore, is a purchaser with notice. Such notice, he contended, would either be actual or constructive because the plaintiff was in possession and the fact of the plaintiff's possession places an intending purchaser on his enquiry as to the capacity in which the plaintiff was on the land. Indeed, he said, such enquiry is required by the provisions of the Conveyancing Law, cap. 73, section 5, sub-section 1, paragraph (A). His contention was that the purchaser of property in Jamaica has a duty to go to the property being purchased so as to be put on his enquiry in relation to what is taking place on the property and if persons have acquired equities, even although they are not registerable or registered, then the purchaser has notice by reason of being put on his enquiry.

The arguments arising out of the principle enunciated in Errington v. Errington were most illuminating, no doubt inspired by the presence in Jamaica of the Rt. Honourable Lord Denning, M. R., himself, and in fact for a short period the Master of the Rolls was present sitting in court with us.

Counsel for the appellants criticised that decision, pointed out that of the numerous cases cited in the case, Clore's

case and others were not mentioned. He drew to our attention the criticisms of Professor Wade in the 1952, 68 L. Q.R., and another criticism by Mr. R. E. Megarry, as he then was, at page 379 of the same Review. Later decisions counsel for the appellants contended have accepted Errington and Errington as decided on its own particular facts as stated by Professor Wade in his criticism of the case. It was said that it was an attempt to create a new species of interest that no other judge has supported. Whatever criticisms have been levelled at Errington v. Errington, it must be observed that it has not been reversed.

This has not been an easy matter to resolve. The findings of the learned resident magistrate undoubtedly placed the plaintiff/respondent in a strong position so far as his rights to the crops go. On the other hand, is his position really as strong, or, perhaps I could use the word 'similar' to that of the occupiers of the house in Errington v. Errington and, similarly, the occupiers in the other case, in Inwards et al v. Baker (1965) 1 A. E. R. 446 which was also cited by Mr. Rattray? The following is the summary of the facts in Errington v. Errington: In 1936 a father bought a house for his son and daughter-in law; he paid £250 in cash and borrowed £500 from a building society on the security of the house, the loan being repayable with interest by instalments of 15/- a week. The house was in the father's name and he was responsible to the building society for the payment of the instalments. He told the daughter-in-law that the £250 was a present to her and her husband and handed the building society book to her and said that if and when she and her husband paid all the instalments the house would be their property. From that date onwards the daughter-in-law paid the instalments as they fell due out of money given her by her husband. In 1945 the father died and by his will left the house to his widow. Shortly afterwards the son left his wife. In an action by the widow against the daughter-in-law for possession, it was held that the occupation of the house by the son and daughter-in-law was not determinable by the widow on demand since they were entitled to

remain in possession so long as they paid the instalments to the building society and therefore they were not tenants at will of the premises. It was also held that the daughter-in-law and her husband were licensees having a permissive occupation short of a tenancy but with a contractural or equitable right to remain in possession so long as they paid the instalments which would grow to a good equitable title to the house when all the instalments were paid, and therefore the widow was not entitled to an order for possession.

In Inwards v. Baker the facts are summarized as follows:

> "In 1931, the defendant was considering the building of a bungalow on land which he would have to purchase. His father, who owned some land suggested that the defendant should build the bungalow on his land and make it a little bigger. The defendant accepted that suggestion and built the bungalow himself, with some financial assistance from his father, part of which he had repaid. He had lived in the bungalow ever since. In 1951, the father died. The trustees of his will who in fact visited the defendant at the bungalow, took no steps to get him out of the bungalow until 1963, when they claimed possession of it on the ground that, at the most, the defendant had a licence to be there which had been revoked.
>
> Held: since the defendant had been induced by his father to build the bungalow on his father's land and had expended money for that purpose in the expectation of being allowed to remain there, equity would not allow the expectation so created to be defeated, and accordingly the defendant was entitled to remain in occupation of the bungalow as against the trustees."

The plaintiff's interest in the instant case is really in the crops that he cultivated. He does not pretend to have the sort of interest in the land which the parties having, what I would call, residential occupation in the two cases cited above possessed. Theirs, in my view, was an interest created by their expenditure, on the one hand, and by the assurances they had received on the other hand, and their interests, it seems to me, were of a far more permanent nature than the interests of the plaintiff in the instant case in the crops which he cultivated. I think it is of some significance that when the plaintiff was told of the sale of the

property, the only dispute, if one may call it that, which arose was as to the reaping of the banana crop. It is common knowledge that bananas do not mature overnight, or as quickly as the undercrops do, and therefore it is not surprising that some difficulty should arise over what may have turned out to be a prolonged reaping or, rather, a reaping over a prolonged period of time. In my view, the right acquired by the plaintiff in the instant case is not of the same nature as the rights of the parties in the Errington case and the Inwards v. Baker case. Indeed, I do not think that the plaintiff in this case has ever contended for any such rights. True enough, his action was brought by his lawyers for trespass, it appears, to land and also to crops but that is a matter which probably arose out of the lawyer's mind. Clearly, what the plaintiff wanted was his bananas or, rather, his share of the proceeds of the bananas. Let me say here and now that I do not think that the learned resident magistrate's finding of fact as to the arrangement under which he acquired his right to a share in the proceeds of the bananas can be disturbed.

The court invited counsel to consider whether or not the learned resident magistrate's judgment was one for trespass to goods - that is, bananas- and, if so, whether it was open to him to give such a judgment. Mr. Edwards contended that he did not find trespass to goods and that it was not open to him so to find. He said that what the learned resident magistrate was saying was that the licence in the land continued, so that plaintiff was lawfully in possession of the land because of the licence, and thus entitled to maintain trespass - that is, trespass to land. The resident magistrate, he said, never directed his mind to the distinction between the position of DaCosta and the position of Corcho. Corcho bought the fee simple absolute therefore he bought all the crops growing on the land, unless DaCosta reserved them; there is no evidence of the date of the purchase, so that the resident magistrate could not hold that Corcho was not a bona fide purchaser for value without notice, because the test is the state of mind of the purchaser at the time of the purchase. He distinguished Kilbourne v. Caymanas Estates Ltd., 4 W.I.R., 461, and Ramsay v. Walker, 4 W. I. R. 539 (both relied on

by Mr. Pattray) in the following way: He says that the ratio in those cases, certainly in Kilbourne v. Caymanas, is that the defendant had acquiesced in the plaintiff's ownership of the crop and they had made him a licensee by giving him permission to reap. They paid him for crops they had destroyed before, and having admitted his ownership of the crops for such a length of time, they could not then say at that late stage that he was not the owner of what they had reaped, and he pointed out that in both Kilbourne v. Caymanas and Ramsay v. Walker the parties to the action were the parties to the licence agreement.

Mr. Rattray took the view that the learned resident magistrate's words "and thus entitled to maintain trespass for any damage done to his bananas", seems to indicate that the resident magistrate was considering trespass to goods and the question therefore would arise as to whether plants cultivated, like bananas, would form part of the realty, or would be goods. That point was decided, he said, in Kilbourne v. Caymanas per Jackson, J. A., at page 465. He argued that that case establishes that fructus industriales like bananas in the instant case are goods, the possession of which vests in the person who plants them and the owner of the land had no right to remove and sell them. The same principle, said Mr. Rattray, is stated in Ramsay v. Walker, mentioned above.

I think that the resident magistrate's judgment was a judgment of trespass to goods, namely, the bananas. I must confess that I reached this conclusion not without some difficulty. I am not sure what the learned resident magistrate meant by his phrase, "that being so, the plaintiff was lawfully in possession then." Perhaps it does mean that what he was saying was that since the licence had not been determined by a reasonable notice from DaCosta, to which the plaintiff was entitled, then the plaintiff was lawfully in possession. Be that as it may, his later remarks seem to indicate fairly clearly that he was awarding damages for trespass to the bananas. His statement is: "and thus entitled to maintain trespass for any damage done to his bananas." It is noteworthy that the resident magistrate considered, before giving his final

judgment, the cases of Knight v. Pratt, 5 J. L. R. 57 at page 61. At the top of that page there appears this statement from the judgment of Hearne, C. J.:

> "It, therefore, becomes necessary to consider what is the position of a licensee who is granted a licence to enter upon land, sow food crops and reap them."

Then the learned Chief Justice dealt with the question of reasonable time to quit and remove any property which the licensee had put on the land on the faith of the licence, and further down the page the learned Chief Justice made the observation that had the action been founded in contract and not in tort the appellant would have been entitled to succeed, then went on to show that under what was then section 195 of the Resident Magistrate's Law Cap. 432, now section 190 of Cap. 179, the resident magistrate who tried the case could have made the amendments necessary for the purpose of determining the real question in controversy between the parties, and went on to give a finding that the appellant as the licensee was entitled by reason of the premature breach of the licence to damages commensurate with the loss he had wrongfully sustained; this, of course, in spite of the fact that his action was wrongly brought.

Then the learned resident magistrate in the instant case went on to consider, or certainly noted next, Waite v. Scott, Cl. pp. 285 to 287. That was a case in which the plaintiff claimed damages from the defendant for trespassing on his cultivated land at Old England and reaping therefrom a quantity of escallions and of thyme. That action was brought by the licensee who was allowed to cultivate on land belonging to one Mrs. Francis - on land belonging to the licensor - in lieu of wages for services as a rent collector but the action was brought against the purchaser from the licensor. The court said in his judgment delivered by Adrian Clark, J., if the plaintiff's version be fully accepted, then he had not made out that he had in the land any greater interest than that of a tenant at will whose tenancy was co-terminus with his services as rent collector, and that his services and tenancy were determined on such and such a date, not by the defendant but by Mrs. Francis

(the licensor) who had bought the property, bought the fee simple free from encumbrances. I now quote from what Adrian Clark, J., said:

> "The plaintiff therefore can have no right of action for trespass to land against the defendant who took possession after the tenancy had been determined by Mrs. Francis. What other rights if any he may possess and against whom and by what procedure they might be enforced it is not for this Court to declare upon the hearing of this appeal."

The point I wish to emphasize here is that the learned resident magistrate in the instant case had in mind a decision in a case in which the facts were not very different from the instant case, where the court held that the plaintiff would have no right of action for trespass to land. With that case in mind, it seems not unlikely that what the resident magistrate was awarding damages for in the instant case, was trespass to the crops. Then he immediately proceeded to give judgment for the price of the bananas which were cut and sold by the defendants, less one-third of that price together with valuator's fees and an award for general damages.

Now, was it open to the learned resident magistrate to make such a finding? I think the crucial point in the answer to that question must be: was Corcho a purchaser of the fee simple for value without notice of the plaintiff's right to the bananas? The learned resident magistrate made no specific finding on this point. The plaintiff's evidence on the point is:

> "I learned so [that the place was sold] when that lady's husband took charge of it in February of 1966. In February, 1966, Mr. Corcho came and took over the land. I spoke to him. He left. DaCosta came to my house the Sunday [presumably the Sunday following]. DaCosta told me something when he came the Sunday. As a result I went to my lawyers and got certain advice. On the 21st of March DaCosta came back to me with the first-named defendant and her husband. DaCosta said to them both in my presence that if I cut a banana or picked a breadfruit or coconuts off the land they must arrest me and send me to prison. It came to a contention and they left the yard. I told DaCosta that I wanted pay for the bananas. I still went on the land and I still reaped undercrops. The second-named defendant cut all the bananas as they became fit."

One gathers from that evidence that Mr. Corcho first appeared on the scene some time in February, no doubt acting for his

wife, and DaCosta first notified the plaintiff of his sale to the Corchos on the 21st of March. No doubt, then, the termination of the licence would have taken place on the date of this confrontation - that is the 21st March, 1966 - and the period of reasonable notice would necessarily operate as from that date. Clearly, the Corchos were aware that the plaintiff had some rights on the property. They accepted that he had a right to the undercrops and they acquiesced in his reaping those undercrops. The clear inference is that they had knowledge of the plaintiff's rights, certainly to the undercrops, before they purchased. The plaintiff's evidence is that Mr. Corcho came to the land in February, 1966, and the defendants say that the visit with DaCosta, accompanied by Mr. and Mrs. Corcho, took place in May. From the way the case was conducted, it is clear that anything that came to Mr. Corcho's knowledge on the occasion of his visit in May, must be imputed to his wife also. There is no evidence of the specific date in February when he went there, or of the specific date on which he bought, but it seems to me an irresistible inference that he went there to look at what he was about to buy. I am unable to conceive anybody purchasing land in this country in that fashion without first inspecting it. On that occasion the plaintiff spoke with him; I think it is a further irresistible inference that he must have known what the plaintiff was claiming.

It is my view, and I so hold, that the defendant, Corcho, went into this transaction well knowing what the plaintiff was claiming, as the learned resident magistrate found, was the agreement between himself and DaCosta, namely, that the plaintiff was not only entitled to undercrops but was also entitled to two-thirds of the value of the fruit from the bananas. The defendants having cut those bananas and sold them have, in my view, committed trespass against the goods of the plaintiff, and I agree with the resident magistrate's finding that the plaintiff was entitled to recover the portion of the proceeds which he would have received had he sold them

himself. I take the view that the learned resident magistrate did substantial justice between the parties and I would dismiss this appeal with costs of appeal to the respondent, $50.

ECCLESTON, J. A.: I agree.

EDUN, J. A.: I agree with the dismissal.