LANDLORD & TENANT. NOTICE TO QUIT. RE COMMERCIAL PREMISES — APPLICATION OF SS. 25 & 26, RENT RESTRICTION ACT.

JAMAICA

IN THE COURT OF APPEAL

COPY 1

S.M. CIVIL APPEAL NO: 13/89

Reported JLR 26 p. 493

BEFORE: The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.
The Hon. Mr. Justice Downer, J.A.

BETWEEN	MARCUS DABDOUB T/A MARC's	DEFENDANT/APPELLANT
AND	ELI SABA & CAROLE SABA	PLAINTIFF/RESPONDENT

Allan Wood for Appellant

G. McBean of Dunn, Cox & Orrett for Respondent

September 26, 27, 28 & December 11, 1989

CAMPBELL, J.A.

The present appeal centres on the construction of Sections 25 and 26 of the Rent Restriction Act. In particular it requires a determination on whether section 26 in providing landlords of public and commercial premises with a procedure alternative to that of section 25 of the said Act for recovery of possession, excludes them from proceeding under section 25. And if not excluded, whether they must give a twelve months notice to quit when proceeding under that section.

The appellant was for many years the tenant of the respondents in respect of premises situate at 90 Orange Street in the parish of Kingston, The premises are admitted by the parties to be commercial premises. On October 24, 1988 Messrs. Dunn, Cox and Orrett acting on behalf of the respondents served a one month notice to quit dated October 21, 1988 on the appellant requiring him to deliver up possession of the premises.

The reason given for serving the notice to quit was that the respondents required the premises "for use in their business, trade or professional purposes."

The appellant failed and or neglected to vacate the premises. The respondents thereupon commenced proceedings on or about March, 1989 for recovery of possession.

The appellant at the hearing of the plaint by the learned Resident Magistrate submitted as his defence that firstly the Notice to Quit was invalid because it was not a twelve months notice to which he was entitled, and secondly, that the respondent did not genuinely require the premises for the purpose stated.

The learned Resident Magistrate made an order for the appellant to vacate the premises on or before December 31, 1989.

In doing so he gave detailed consideration to the issues raised which he identified under the rubric of (a) validity of the notice, (b) genuineness of the reason stated in the notice, and (c) the question of greater hardship.

The appellant appeals and in three of his grounds of appeal he contends that the learned Resident Magistrate erred in law -

(i) in concluding that a Notice to Quit which did not comply with section 26 (2) (a) of the Rent Restriction Act was "effective to terminate the tenancy for the purposes of the Act and so to allow an Order for recovery of possession to be made,"

(ii) in failing to appreciate that section 25 (1) of the Act dealt only with preconditions to be satisfied before an order for recovery could be made and not with the termination of the tenancy by notice and so was of no assistance in the determination of whether adequate or proper notice was given to terminate the tenancy of commercial premises falling within the ambit of the Act.

(iii) in relying on the judgment of Carberry J.A. in the case of Golden Star Manufacturing Co. Ltd v. Jamaica Frozen Foods Ltd C.A. 13/86 dd 31. 10. 1986 which laid down as a proposition that a Notice to Quit Commercial premises which did not comply with section 26 (2) of the Act may nevertheless be effective to terminate the contract of tenancy for the purposes of section 25 (1) of the Act.

By his fourth ground of appeal, the appellant complains that the learned Resident Magistrate in finding that greater hardship would be caused by failing to grant the order for recovery of possession than by refusing the grant took into account irrelevant matters and considered extraneous materials which were not in evidence and could not be inferred from the evidence which was before him.

Dealing with this latter ground first, Mr. Wood submitted that there was no evidence that the "modus operandi" of the appellant reflected a preference for renting rather than purchasing premises from which he operated which contrasted with the approach of the respondents. This finding of the learned Resident Magistrate, Mr. Wood submitted, must have influenced his final conclusion on the balance of hardship. Mr. Wood further submitted that there was no evidence to support the finding of the learned Resident Magistrate that the monthly market force rental was $3,000.00 to $4,000.00 as compared with $950.00 that the appellant was paying.

I think that these findings of the learned Resident Magistrate constitute reasonable inferences from evidence which was before him. The appellant in his evidence stated that he was a tenant of the premises from 1973. He did not at any time appear interested in purchasing the premises from his former landlord nor after the latter's death from the estate. Some

eight years later in 1985 the respondents purchased the said property. In any case, the learned Resident Magistrate did not rely on these matters. He specifically found on the evidence that the respondents genuinely required the building for expansion and that it was ideal for such expansion being adjacent to No. 66 Orange Street already owned by them from which they carried on business. He found that the nature of the appellant's business was not such that it had to be located in downtown Kingston. The appellant did say his business constituted a "downtown trade," consisting in selling fabric and accessories for upholstery to a clientele of mainly "small upholstery people who repair cars both from Kingston and islandwide." But the learned Resident Magistrate found that a relocation of this business uptown to premises which the respondents were prepared to let to the appellant, would, contrary to reducing the clientele of the appellant, increase the same by including more clients from the country who would find it more convenient to shop uptown.

I am of the view that there was ample evidence entitling the learned Resident Magistrate to come to the conclusion to which he came and that accordingly this ground of appeal fails.

Turning to the other 3 grounds of appeal which can conveniently be considered together, the question posed is whether the landlord of commercial premises may at his option seek recovery of possession either under section 25 or under section 26 of the Act, and if he opts for section 25 whether he is still required to give a 12 months notice as is required if he is proceeding under section 26.

Section 25 of the Act by its express terms covers dwelling houses and public or commercial buildings which all come within the definition of controlled premises. This section in substance states that notwithstanding the lawful determination of the contractual tenancy of controlled premises by a notice to quit appropriate to the contractual terms of the tenancy in the case of periodic tenancies, or the expiry of the lease of similar premises by the effluxion of time, or the determination of the tenancy by other means not constituting a breach of contract, the landlord may not recover possession except by an order or judgment of the appropriate court, after proof by him of one or more of the circumstances stated in the section on the basis of which he is seeking recovery of possession. Further, the landlord even after satisfactory proof of such circumstance has to overcome a further hurdle namely proof that if the order or judgment for recovery of possession was not made or given in his favour, he would suffer greater hardship than that which would be suffered by the tenant if the order was made or judgment given against the latter. Pausing here, it is clear that section 25 is imposing restrictions on the common law right of a landlord of controlled premises to recover possession thereof after he has lawfully terminated the tenacy or after the lease has lawfully been determined. The section is not however concerned with and does not state the criteria for the validity of a Notice to Quit e.g. the length of notice required to lawfully determine the tenancy nor with the criteria by which to judge whether a lease is at an end. The validity of the notice to quit, or the validity of the determination of the lease is clearly left to be determined as a matter of contract or by rules of the common law. If the tenancy is lawfully determined in terms of the contract or by the rules of

common law the erstwhile contractual tenant becomes a statutory tenant under section 26 and section 25 applies.

Section 31 (1) of the Act reinforces the importance attached to the need for justifiable circumstances as prescribed in section 25 as a condition precedent to recovery of possession after the contractual tenancy or lease is at an end. It provides that no notice to quit given to determine the tenancy of controlled premises shall be valid to determine the tenancy unless it states therein the reason why recovery of possession is sought. This statutory provision unambiguously covers all notices to quit, and since section 26 (1) to which I shall return, and section 25 deal with notices to quit, the need for stating the reason why recovery of possession is sought is a condition precedent to the validity of a notice to quit whether given for purposes of proceedings under section 25 or pursuant to the procedure prescribed by section 26. The Privy Council in Crampad International Marketing Company Limited et al v. Val Benjamin Thomas, Privy Council Appeal No: 37 of 1989 (hereafter referred to as "Crampad") held that section 31 (1) is complied with only where the reason stated in the notice to quit falls within those circumstances enumerated in section 25. However, this aspect of the matter is not relevant to the present issue because the notice to quit given by the respondents in the instant case gave a reason which satisfied section 25.

Returning to section 25, there can be no doubt that if there had not been the opening words "subject to section 26," it would apply to all landlords, and that such landlords would be entitled to commence proceedings for recovery of possession immediately after the expiry of a notice to quit which complied with section 31 and was otherwise valid according to the tenancy agreement and/or by the rules established by the common law.

Does section 26, to which section 25 is made subject, establish an independent alternative procedure for recovery of possession available to a landlord of a public or commercial building? Does it additionally modify section 25 by imposing a requirement on a landlord of such premises to give a twelve months notice to quit in cases where he seeks to recover the premises under section 25?

The learned Resident Magistrate in dealing with the validity of the notice considered the submission of Mr. Wood that a twelve months notice to quit was required in every case where a public or commercial building is concerned. He considered Sydney Yap-Young v. Alton Rennals R.M.C.A. 10/84 dated January 29, 1985 (hereafter referred to as the Yap Young case) on which Mr. Wood relied in support of his submission. The learned Resident Magistrate also referred to the judgment of Carberry J.A. in Golden Star Manufacturing Company Limited v. Jamaica Frozen Foods Ltd R.M.C.A. 13/85 dated October 31, 1986 (unreported) hereafter referred to as (Golden Star case). He concluded that a twelve months notice to quit was not required by a landlord who was proceeding under section 25.

In my view the Yap Young case is not authority for the submission of Mr. Wood. That case involved a lease for a fixed term. This did not require any notice to quit if the proceeding is under section 25. The landlord could have commenced proceeding for recovery under section 25 immediately the term expired. Thus the landlord's letter dated August 10, 1982 reminding the lessee that the lease would expire on February 1, 1983, i[illegible]s to be construed as a notice to quit, had to be treated as a notice to quit under section 26 (2) (B). This subsection however provides that any such notice must be given "not more than twelve months" before the date of

expiration of the lease. The subjection does not specify any minimum length of notice, though by implication it could not be less than three months. The notice given was thus valid under section 26 (2) (b) and the tenant not having availed himself of the provisions of section 26 (3), the court on the application of the landlord after the expiry of the lease, was bound to order recovery of possession. The facts of that case did not require any consideration of whether a landlord of public or commercial building who was proceeding under section 25 had to give a twelve months notice to quit.

It seems to me that a starting point for an understanding of the inter-relationship between section 25 and section 26 is the recognition of the fact that section 25 contemplates that recovery of possession of controlled premises may be obtained without any prior "notice to quit" because it refers to "notice to quit given" or "proceedings commenced." "Proceedings commenced" for recovery of possession would cover inter alia determination by effluxion of time or exercise of a break clause provision in the case of a lease, or breach of covenant and forfeiture in tenancy agreements or leases.

In these latter cases, once the right to re-possess has arisen the landlord could commence proceedings. By the common law he was not required to give any notice to quit. The breach of a covenant e.g. to repair could well require immediate remedial action if the building is not to suffer irreparable damage. In such a case the legislature could not have intended that a landlord by the mere fact that he was a landlord of a commercial building should remain helpless for twelve months awaiting the expiry of an obligatory twelve

months notice to quit against a tenant not minded to remedy his breach, before seeking recovery of possession.

If such a landlord was to be deprived of his right to "commence proceedings" immediately there is an unremedied breach of covenant, or after determination of a contractual notice to quit, one would expect the legislature to use express words to that effect. Thus in my view, he could seek recovery of possession under section 25 in cases of breach of covenant to repair either without serving any notice to quit if urgent, or if so minded, after serving a contractual notice to quit the length of which, not being inordinatley long, would not during its currency, seriously accelerate existing damage, but prima facie he would not be required under that section to serve a twelve months notice to quit.

. Section 26 by its express provisions, permissively provides an alternative procedure for recovery of possession to that of section 25. It provides in my view that a landlord of a public or commercial building instead of serving a contractual notice and thereafter commencing proceeding for recovery of possession under section 25, or commencing proceedings under that section without notice to quit e.g. on the expiration of a lease for a fixed term, may serve a statutory notice in writing under section 26 terminating the tenancy after the expiration of twelve months from the date of service, provided that the stated expiry date of this statutory notice is later than the date on which the tenancy could otherwise be lawfully terminated pursuant to its contractual terms and or the rules of common law. The section says you may invoke its provisions. You are not bound to do so, but if you do, the notice must be as provided in section 26 (2).

This section when invoked by the landlord shifts the onus on to the tenant to satisfy the conditions specified therein as a condition precedent to securing an extension of the expiry date of the statutory notice, which extension cannot, however in any case, be greater than twelve months from the original expiry date stated in the statutory notice to quit. The section thus provides a special alternative regime for the recovery of possession by a landlord of a public or commercial building. But it neither expressly, nor by necessary implication precludes him from seeking recovery of possession under section 25 whereunder the onus is shouldered by him to establish his claim. Had the legislature intended to exclude landlords from proceeding under section 25, it would certainly have deleted the words "public or commercial building" from section 25 or used words modifying the meaning of "controlled premises" as mentioned in that section. Therefore the right of a landlord of a public or commercial building to proceed under section 25 has not been taken away.

Returning to the question of the minimum length of notice to quit required to be given in respect of a public or commercial building by a landlord who is proceeding under section 25, I am of the further opinion that had the legislature intended to impose on such a landlord, the obligation to give a twelve months notice to quit, it would have expressly provided for this by a proviso in section 25. This in my view would be necessary because, as earlier stated, section 25 recognises that recovery of possession of controlled premises is not in all cases required to be preceded by a notice to quit. It would thus be necessary to provide expressly that in the case of a public or commercial building mentioned in that section, no proceeding for recovery of possession could be commenced except

after a notice to quit had been given and that such notice must be a twelve months notice. Section 31 which was inserted subsequent to section 26 by referring only to instances where a notice to quit is served, still recognized the right of a landlord of controlled premises to "commence proceedings" without any notice to quit. "Commence proceedings" however is, as earlier, stated peculiarly related to section 25.

Further, if a twelve months notice to quit was required for a public or commercial building when a landlord is proceeding under section 25, the legislature in the course of increasing the section 25 restrictions of landlords of controlled premises as it did by section 31 would in my view have taken the opportunity to make provision therefor in the latter section.

Thus in my opinion, the opening words of section 25 namely "Subject to section 26" was not intended to incorporate in section 25 the requirements for a twelve months notice for the determination of the tenancy of a public or commercial building. It was designed to draw attention to the fact that there is an alternative provision applicable to a landlord of a public or commercial building which is complete in itself and is independent of section 25 and that except where the landlord was invoking this special alternative method for recovery of possession, no recovery of possession of controlled premises could be obtained other than in terms of the provisions of section 25.

I am therefore in agreement with the view expressed by Carberry J.A. in the Golden Star case (supra) that a landlord of commercial premises may still proceed "under section 25 simpliciter for any of the reasons set out there."

By "simpliciter" I understand Carberry J.A. as meaning proceeding under section 25 without incorporating the requirement as to the length of notice required under section 26 which is special to the procedure under that section.

I also find support for the view herein expressed in the words of Lord Oliver in delivering the judgment of the Privy Council in the Crampad case (supra). In that judgment, he said with reference to sections 25 and 26 as follows:

> "It is true that section 26 contains separate provisions specifically relating to business tenants (which must include corporate tenants) and permits them a certain limited security of tenure. It is also true that section 25, which contains the restrictions upon the making of orders for possession and from which the tenant's ability to remain as a statutory tenant stems, is prefaced by the words "Subject to section 26." The inter-relationship between these two sections is not immediately apparent and it is not necessary, for present purposes, to consider it in any detail. What is clear from paragraphs (e), (f) and (h) is that, at least in cases to which section 26 does not apply - where for instance, the landlord gives a notice complying with section 31 (1) but not complying with the time limits laid down in section 26 (1) - The tenant of business premises has the same protection or, to put it another way, the same statutory tenancy as the tenant of residential premises. He or it retains possession by virtue of the Act." (emphasis supplied)

Three inferences inter alia emerge from the above opinion of the Privy Council. Firstly the giving by a landlord of commercial premises of a notice to quit which is less than twelve months in length, albeit invalid for purposes of section 26 is not invalid for all purposes of the Act. It may validly determine the contractual tenancy and convert the tenant into a statutory tenant as defined in section 28. Secondly, once the

status of statutory tenancy has arisen, the only statutory provision which exists by which recovery of possession from the tenant can be obtained is section 25. And thirdly, a landlord who has given a notice to quit which is not appropriate for the procedure under section 26, may nonetheless recover possession under section 25 by satisfying those provisions and those of section 31, provided always that the notice given, is sufficient to determine the contractual tenancy.

The notice in the instant case was not challenged on the basis that it did not validly determine the contractual tenancy. What was submitted before the learned Resident Magistrate and before us is that on a true construction of sections 25 and 26 no notice to quit of commercial premises can be valid for any purpose under the Act unless it was a twelve months notice as prescribed in section 26 (2) (a). Accordingly the learned Resident Magistrate, it is submitted by Mr. Wood did not have jurisdiction to entertain the plaint, much less to make the order for recovery of possession.

For the reasons stated herein I agree with the learned Resident Magistrate that he had jurisdiction to entertain the plaint and as his conclusion on the other aspects of the case cannot in my view be faulted, the appeal ought to be dismissed. I would accordingly dismiss the appeal, confirm the order of the learned Resident Magistrate, and award costs of the appeal to the respondent to be taxed if not agreed.

FORTE, J.A.

I have had the opportunity of reading in draft, the judgment of Campbell, J.A. and agree with the conclusions therein. However, I add a few words of my own.

The main issue for resolution in this appeal is whether a landlord of commercial premises in pursuit of an order for recovery of possession of the tenanted property has an option to proceed either by virtue of section 25 or section 26 of the Rent Restriction Act or must proceed under the provisions of section 26.

It is conceded on both sides that prior to the judgment of Carberry J.A. in the case of Golden Star Manufacturing Company Limited v. Jamaica Frozen Foods Ltd R.M.C.A. 13/86, the Act was interpreted as giving no option and that such a landlord was compelled to give his tenant 12 months notice and to proceed under section 26.

In the cited case, Carberry J.A. while not dealing with facts which in my view necessitated such a finding nevertheless examined the provisions of both sections and concluded thus:

> "However, the Act still contains two sections dealing with the recovery of possession of controlled premises, Section 25 dealing with recovery of possession generally, and section 26 dealing specifically with the termination of tenancies of public and commercial buildings.
> Section 25 sets out various reasons or circumstances that must exist to give the court jurisdiction to make possession orders; the new section 31 clearly applies there, and requires that notices given must state the reason for the requirement to quit.
> Section 25 opens with the words 'subject to section 26' which appear in this context to mean 'apart from section 26' or 'except for section 26,' the following will apply.

> "Section 26 on the face of it requires no such reason, it continues to provide a special mode for the termination of tenancies of public or commercial buildings by the giving of the appropriate notice - generally one year - and if the landlord gives the appropriate length of notice required by this section, then the particular tenancy may properly be terminated by a court giving a possession order without the necessity of further examining whether any of the section 25 requirements have been met.
> Section 26 then is a specific provision of a special mode of terminating public or commercial tenancies, and it seems clear that the requirement in section 31 (1) requiring reasons to be stated in any notice as a condition for its validity does not apply. This is borne out by the phrase in section 31 (3) 'other than a notice under section 26 (1)'. If a notice under section 26 had to contain a reason complying with those in section 25, section 26 would appear to be otiose and unnecessary for all applications for possession orders would have to be made under section 25 and the words 'subject to section 26' would seem unnecessary. Had the position been reversed, and section 26 had commenced with the words 'Subject to section 25' then it would have been easier to argue that a section 26 notice must comply with and set out one of the section 25 reasons."

In the instant case, the appellants were served with one month's notice to quit specifying as the reason for recovery that the respondents required the premises for business, trade or professional purposes. The process was therefore clearly brought under the provisions of section 25 of the Act, and a conclusion by this Court that that is not an option open to such a landlord would result in the notice to quit being invalid, and the consequent success of this appeal.

The appellant contends that both sections must be read together and that since section 25 is expressly made "subject to section 26", a landlord of commercial premises seeking recovery of possession of his property must abide by the provisions of section 26 which provides the method by which he may do so and this, to the exclusion of section 25.

The provisions of section 25 restricts the granting of an order for possession unless one of several reasons for requiring the premises and which are set out therein, is proved to the satisfaction of the Court. These provisions however are prefaced by the words "subject to section 26."

The latter does not merely provide for a statutory notice [section 26 (1)], but in my view sets out a total process by which commercial premises may be recovered by a landlord; and in so doing is significantly silent as to grounds being proven in order to obtain an order for possession.

The words "subject to section 26" in the context in which it is used, in my view must be construed as "subject to the provisions of section 26" i.e. "subject to proceeding under section 26."

This view, to my mind is supported by the fact that section 25 even after the introduction of the provisions of section 26 to the Act (by amendment) still retains specific provisions dealing with commercial premises. These are disclosed in section 25 (1) (e) (f) (h) and (k) which states as follows:

> "(1) Subject to section 26, no order or judgment for the recovery of possession of any controlled premises, or for the ejectment of a tenant therefrom, shall, whether in respect of a notice to quit given or proceedings commenced before or after the commencement of this Act, be made or given unless -

(a) .....
(b)
(c)
(d)
(e) the premises being a dwelling-house or a public or commercial building, are reasonably required by the landlord for -

(i) Occupation as a residence for himself or for some person wholly dependent upon him, or for any person bona fide residing or to reside with him, or for some person in his whole-time employment; or

(ii) use by him for business, trade or professional purposes; or

(iii) a combination of the purposes in sub-paragraphs (i) and (ii) or

(f) the premises, being building land, are reasonably required by the landlord for -

(i) the erection of a building to be used for any of the purposes specified in paragraph (e); or

(ii) use by him for business, trade or professional purposes not involving the erection of a building; or

(iii) a combination of such purposes; or

(g).....

(h) the premises, being a dwelling-house or a public or commercial building, are required for the purpose of being repaired, improved, or rebuilt; or

(i)
(j)
(k) the dwelling-house, or the public or commercial building, or the building erected by the tenant on building land, as the case may be, is required by law to be demolished."

If the restrictions on obtaining an order for recovery which are enumerated in section 25 are "subject to" the provisions of section 26 which in turn does not contain such restrictions then it follows logically that in a case brought under section 26, there will be no restriction on the Resident Magistrate's powers to order recovery of possession except as is contained in section 26 itself. This is made clear by the fact that it is section 25 which is subject to section 26, and not vice versa - for if it was intended that a landlord who proceeds under section 26 should be compelled to prove one of the grounds listed in section 25, the legislature would then have made section 26 "subject to" the provisions of section 25.

Instead, section 26 sets out a process which requires a tenant who has been served a notice in compliance with section 26 (2) to take the initiative of bringing the matter to Court, by applying to the Court by way of complaint, for an extension of time. In such a case, it would appear that the Resident Magistrate on being satisfied that the notice is valid, would have no power to refuse an order for recovery of possession, his only power being to grant the tenant, an extension for not more than 12 months from the date of termination of the tenancy - or of course, to refuse the application for extension. On the contrary, in respect of an action brought under the provisions of section 25, the Resident Magistrate could refuse to make an order for recovery of possession if the landlord fails to establish one of the requirements set out in that section.

In my opinion, the legislature by the introduction of the provisions of section 26 created an alternative method by which a landlord of commercial premises could get an order for recovery of possession of his property. If, however, he wished

to proceed under that section, a statutory notice of twelve months must be served upon the tenant, thereby commencing the process detailed therein. This did not deprive the landlord of the right to proceed under section 25 by giving a notice to quit consistent with the tenancy agreement, and establishing in Court the grounds for seeking recovery of possession.

In the passage from the judgment of Carberry J.A. referred to earlier, he made the following statement which is repeated herewith for easy reference:-

> "Section 26 then is a specific provision of a special mode of terminating public or commercial tenancies, and it seems clear that the requirement in section 31 (1) requiring reasons to be stated in any notice as a condition for its validity does not apply."

It is with respect to the reference to section 31 (1) that some comment is necessary. The section states as follows:

> "31. (1) No notice given by a landlord to quit any controlled premises shall be valid unless it states the reason for the requirement to quit."

This opinion of Carberry, J.A. did not find favour with the Judicial Committee of the Privy Council in the case of Crampad Investment Marketing Co. Ltd and Clover Brown v. Val Benjamin Thomas Privy Council Appeal No: 37/87.

In delivering the judgment of the Board Lord Oliver of Alymerton stated at page 11:

> "For instance the notice given to 'terminate the tenancy' which is referred to in section 26 (1) is described in ss (3) of the same section as 'notice to quit.' It is furthermore quite clear that such a notice is a notice to which section 31 (1) applies, for section 31 (3) refers to 'any notice referred to in subsection (1) other than a notice under section 26 (1)."

It is clear then, that in respect of a notice to quit given under section 26, the reason for requiring the property must be stated if the notice is to be valid.

If this is so, what reason would a landlord proceeding under section 26 be required to state in the notice to quit? In the Crampad case, where the Board was dealing with a notice to quit in respect of the tenancy of a dwelling house and one consequently brought under section 25 Lord Oliver stated thus:

> "Section 31 (1) does not in terms limit the reasons which may be given in a notice in order to comply with its provisions, but sub-section (2) provides some support for the view that the 'reason' which the legislature had in mind were those reasons which are enumerated in section 25 as reasons which can be relied upon by a landlord in seeking an order for possession. It does not, for instance, make any real sense that a notice which states that the reason is breach of the repairing covenant should still be a valid notice for the purposes of the Act even though the landlord in fact seeks possession on the ground that he requires to occupy the premises himself. 'The reason' is not the same as 'a reason'. The clear purpose of section 31 is to put the tenant on notice of the ground upon which possession is going to be sought against him so that he can either rectify the breach, if breach there be, or at least can prepare to meet the case which the landlord is going to make at the hearing; and the provision makes no real sense unless 'the reason' is construed as meaning not only a genuine reason but a relevant reason."

This conclusion in respect of proceedings under section 25 is indeed a logical and irresistible conclusion - for it follows that if certain reasons are prerequisites to the granting of an order, then a notice to quit must state upon which of those reasons the landlord intends to rely in seeking recovery of possession of his property.

In my view however, the dicta of Lord Oliver must be taken to be conclusive only in respect of the particular section of the law which came up for consideration i.e. a case brought under section 25, and may not be applicable to the provisions of section 26, as there are no provisions in section 26 which require proof of any reasons for recovery of possession. Indeed the very nature of the mode set out in that section suggests that an order could be made, in the absence of an application by the tenant, merely on proof of the notice to quit, and in the event of an application by the tenant, the only question for the Court would be the granting or not of an extension of time. However, if the notice is not consistent with the duration of time required by that section, or fails to give the reason for requiring the premises, then it would be invalid and therefore inoperative. But in so far as the reasons stated in section 25 are concerned, that section being subject to provisions of section 26, cannot affect the special mode enacted to acquire an order for possession.

The reference by Lord Oliver to the purpose of section 31 and in particular to the fact that the tenant can "prepare to meet the case which the landlord is going to make at the hearing" would not in my opinion be applicable to a case under section 26, as it would be the tenant who would have the burden of attacking the notice or establishing his case for an extension of time - and not as in section 25 where the landlord has to prove the reason.

In the event then, I am of the view that the landlord of commercial or public premises may proceed either under section 25 or section 26 for an order for recovery of possession of his property. If it were not so, a landlord who had urgent

and valid reasons for terminating the tenancy would be put in detriment if he was compelled to give 12 months notice. What if for example the tenant is in breach of an implied covenant as in paragraph (c) of Part II of the First Schedule in which it is agreed that he "keeps the premises in a sanitary condition and refrain from any conduct which is a nuisance or annoyance to adjoining occupiers."

In my view it could not have been the intention of the legislature that the landlord in those circumstances would have to serve a notice of 12 months duration. The same could be said of the reason given in section 25 (i) (h) where the building may be in such urgent need of repair that it is dangerous or may cause serious financial loss to the landlord if it is not repaired urgently. See also section 25 (1) (k) where the reason is that it is required by law that the building be demolished.

Lastly, I take comfort in the words of Lord Oliver in the Crampad case at page 13 where in making reference to the two sections, he appeared to have been of the opinion that the landlord indeed had an option. He stated thus:

> "The inter-relationship between these two sections is not immediately apparent and it is not necessary, for present purposes, to consider it in any detail. What is clear from paragraphs (e), (f) and (h) is that, at least in cases to which section 26 does not apply - where, for instance, the landlord gives a notice complying with section 31 (1) but not complying with the time limits laid down in section 26 (1) - the tenant of business premises has the same protection or, to put it another way, the same statutory tenancy as the tenant of residential premises. He or it retains possession by virtue of the Act and the terms imported into the statutory tenancy by section 28 equally apply. Similarly, a tenant of building land whether an individual

> "or a corporation, is entitled to the same protection as the tenant of a dwelling house. Their Lordships can, therefore, find no context, if corporate tenants are, as they clearly are, entitled to the protection of section 25 in respect of business premises and building land, for excluding that protection in the case of a corporate tenancy of property that is used for residential purposes." (emphasis supplied)

I would therefore dismiss the appeal.

DOWNER, J.A.:

The issue in this appeal is whether the Resident Magistrate, His Honour Mr. A.S. Huntley, exercising civil jurisdiction in the parish of Kingston made the correct order in upholding the claim of Eli and Carole Saba for recovery of possession of a shop at 90 Orange Street.

Marcus Dabdoub, the appellant, has been a tenant of this shop since 1978. He sells retail fabrics and accessories for upholstery. The Sabas, the respondents on appeal, purchased the premises some time during the second quarter of 1985. They sought to increase the rental from $265.00 to $4,000.00 per month but failed because of the intervention of the Rent Board. The current rental is stated to be $950.00 per month. The Sabas are also in business. They sell pound goods, yard goods and an assortment of materials. They are organised as a limited company - SABA LIMITED - and they wish to expand now that their daughter has come to join the family business. In the light of this they gave Marcus Dabdoub notice to quit 90 Orange Street and it is pertinent to quote it in full since much turns on it. It reads:

"NOTICE TO QUIT

TO: MARC'S LIMITED
90 Orange Street
KINGSTON.

We, the undersigned, as Attorneys-at-Law for ELI SABA and CAROLE SABA hereby give you notice to quit and deliver up to them or to whom they may appoint possession of part of premises known as 90 Orange Street in the parish of Kingston which you hold of them as tenant thereof on the 30th day of November, 1986 or at the end of the month of your tenancy which will expire next after

"the end of one month from the service of this notice.

The reason for the requirement to quit is that the premises are required by the Landlords for use in their business trade or professional purposes.

DATED the 21st day of October 1988

DUNN, COX & ORRETT

Per:
For ELI SABA and CAROLE SABA - LANDLORDS"

Although the notice was addressed to Marc's Limited, nothing now turns on that misdescription.

Was this a valid notice in terms of Section 25 of the Rent Restriction Act?

The relevant sections of Section 25 of the Act read as follows:

"25.—(1) Subject to section 26, no order or judgment for the recovery of possession of any controlled premises, or for the ejectment of a tenant therefrom, shall, whether in respect of a notice to quit given or proceedings commenced before or after the commencement of this Act, be made or given unless—

(a) some rent lawfully due from the tenant has not been paid for at least thirty days after it became due; or

.....

(e) the premises being a dwelling-house or a public or commercial building, are reasonably required by the landlord for—

"(i) occupation as a residence for himself or for some person wholly dependent upon him, or for any person bona fide residing or to reside with him, or for some person in his whole-time employment; or

(ii) use by him for business, trade or professional purposes; or

(iii) a combination of the purposes in sub-paragraphs (i) and (ii); or

.....

(h) the premises, being a dwelling-house or a public or commercial building, are required for the purpose of being repaired, improved, or rebuilt; or ..."

[emphasis supplied]

As the issue in this case is a commercial building, it is appropriate to set out the definition in Section 2(1) of the Act:

"2.—(1) In this Act—

.....

'public or commercial building' means a building, or a part of a building separately let, which at the material date was or is used mainly for the public service or for business, trade or professional purposes, and includes land occupied therewith under the tenancy but does not include a building, part of a building or room when let with agricultural land;"

The first point to note is that the opening clause of Section 25(1) reads "Subject to Section 26" which indicates that Section 26 covers part of the subject matter of Section 25. For Section 26 to have any effect, in the natural course there would be different conditions governing a landlord's right to recover his public or commercial buildings. What then are the necessary conditions in relation to this case if there can be reliance on Section 25 to recover possession as the judge below found.

There must be a valid notice. The section makes no mention of the type of notice permissible so a notice at common law would still be effective. There is no dispute that the premises is controlled and that the tenancy in issue was a monthly one, so that a notice dated 21st October, 1988 and served on 24th October, 1988, which requires "delivery of the premises on 30th November, 1988 or at the end of one month from the service of this notice", was effective. The second aspect of the notice is that it states specifically the reason for serving the notice. It reads:

> "The reason for the requirement to quit is that the premises are required by the landlords for use in their business trade or professional purposes."

Be it noted that Section 25 also gives the court a discretion in determining whether to grant recovery to the landlord. The relevant subsection reads -

> "....
>
> and unless in addition, in any such case as aforesaid, the court asked to make the order or give the judgment considers it reasonable to make such order or give such judgment:
>
> Provided that an order or judgment shall not be made or given on any ground specified in paragraph (e), (f) or (h) unless the court is also satisfied that, having regard to all the circumstances of the case, less hardship would be caused by granting the order or judgment than by refusing to grant it; and such circumstances are hereby declared to include—
>
> (i) when the application is on a ground specified in paragraph (e) or (f), the question of whether other accommodation is available for the landlord or the tenant;

"(ii) when the application is on a ground specified in paragraph (h), the question of whether other accommodation is available for the tenant."

[emphasis supplied]

In the fourth ground of appeal, the appellant criticized the Resident Magistrate for exercising his discretion wrongly in deciding that less hardship would be caused by granting the order than by refusing to grant it. The judge took into account the legitimate plans of the Sabas to expand their enterprise, the fact that it would be expansion to adjoining premises, the fact that the defendant has bought a lot at 53 Orange Street and could build thereon and the fact that alternative accommodation was offered to the appellant at the Clock Tower - these were the factors taken into account in deciding that there would be less hardship caused by granting the order than by refusing it. I see no reason to disturb the judge's discretion and this ground of appeal, therefore, fails.

Is Section 26 of the Act of direct relevance in this case?

In Crampad International Marketing Co. Ltd. and Clover Brown v. Val. Benjamin Thomas Privy Council Appeal No. 37/87 delivered 25th January, 1989, Lord Oliver had this to say about the relationship between Section 25 and 26 of the Act. Page 13 reads::

"The inter-relationship between these two sections is not immediately apparent and it is not necessary, for present purposes, to consider it in any detail."

As the matter has been raised both in the Court below and on appeal, it is necessary to consider some aspects of the

relationship in this case, especially since the appellant claimed that he is entitled to a notice of a year's duration and also entitled to rely on a counter-notice which are the outstanding features of Section 26. That section reads:

> "26.—(1) Subject to the provisions of this section, the landlord of any public or commercial building may terminate the tenancy by notice in writing given to the tenant specifying the date at which the tenancy is to come to an end (hereinafter referred to as 'the date of termination').
>
> (2) A notice under subsection (1) shall not have effect for the purposes of this Act unless it is given—
>
> (a) not less than twelve months before the date of termination specified therein; and
>
> (b) in the case of premises leased to the tenant for a fixed term of years, not more than twelve months before the date of expiration of the lease." [emphasis supplied]

In contrast to Section 25, a notice at common law is not sufficient for the purposes of this Section. It must be given "not less than twelve months before the date of termination specified therein" and "in the case of premises leased to the tenant for a fixed term of years, not more than twelve months before the date of expiration of the lease." The underlined words make Section 31(1) otiose.

The reasonable interpretation of this section is that there are special alternative provisions pertaining to the termination of tenancy of public or commercial buildings and a significant feature is that because of the specific provisions regarding length of notice, no reasons are required of the landlord in seeking to recover possession. Moreover, there is further protection for the tenant in the provisions for counter-notice and the power of the court to extend time. Carberry, J.A., in the important case of

Golden Star Manufacturing Co. Ltd. v. Jamaica Frozen Foods Ltd. (unreported) R.M. Civil Appeal NO. 13/86 delivered October 31, 1986, emphasised this and said at page 22:

> "Pausing here, the effect of this provision appears to be that the landlord of commercial premises, rented for example on a monthly tenancy, may by giving the specified years notice terminate that tenancy quite independently of section 25."

In that case the subject matter was a business tenancy and resort could have been either to Section 25 or 26 of the Act as the notice gave the reason for requiring the termination of the tenancy and also the time given in the notice - one year. These features satisfied the requirement of both sections of the Act. In effect, although Carberry, J.A., relied in his judgment on Section 26 of the Act, he recognised that the correct decision could also be reached by resorting to Section 25 of the Act. Kerr, J.A., based his judgment to Section 25 of the Act and this is what Carberry, J.A., had to say of his brother's judgment at page 39:

> "Since writing the above I have had the opportunity of reading the judgment of Kerr P. (Ag.) and I agree with it. All two judgments have arrived at the same result by somewhat different routes."

Wright, J.A., on the same page who agreed with the decision said:

> "I have had the benefit of reading the judgments in draft of my brothers Kerr P. (Ag.) and Carberry J.A. and agree with the decision that the appeal should be dismissed. There is therefore nothing that I can usefully add."

Further support for the contention that Sections 25 and 26 are alternative routes, comes from Lord Oliver in Crampad. At page 13 he stated that he did not consider it

necessary to consider the relationship between Sections 25 and 26 of the Act in detail but he adverted to the distinguishing features of Section 26 at page 8 thus

> "Section 26 contains provisions which are specifically referable only to public or commercial buildings and enables the landlords of such buildings to terminate the tenancy by notice in writing given to the tenant specifying a date for the termination of the tenancy and given not less than twelve months before the specified date of termination or in the case of premises leased for a fixed term of years not more than twelve months before the date of expiry of the lease. The effect of that is that the tenant is entitled within nine months of the giving of notice to apply to the court for an order substituting a new date of termination at which the tenancy is to come to an end and the court then has power to fix a substituted date of termination not more than twelve months after the date of termination specified in the notice and such an order operates as an order for the recovery of possession of the premises on the substituted date of termination. Again the making of such an order is discretionary and the court is required to be satisfied that less hardship will be caused by the making of the order than by refusing to make it."

These are the benefits which the appellant claims. Since Lord Oliver made this comment immediately after considering the effect of Section 25 of the Act, the inference is that it was evident to his Lordship that Sections 25 and 26 of the Act were alternative means of recovering a business premises although in the circumstances of that case, there was no need to consider the difference between the alternative means in detail. That his Lordship was aware of the detailed differences was evident as he quoted Section 31 of the Act on page 9 thus -

> "Section 31 provides, so far as material, as follows:-
>
> (1) No notice given by the landlord to quit any controlled premises shall be valid unless it states