

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO: 8/90

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Forte, J.A.
The Hon. Miss Justice Morgan, J.A.

BETWEEN DATA KEY PROCESSING DEFENDANT/APPELLANT
JAMAICA LIMITED

A N D OFFICE & SECRETARIAL PLAINTIFF/RESPONDENT
HOLDINGS LIMITED

Mrs. Angella Hudson-Phillips & Gresford Jones
instructed by Miss Sonia Jones for Appellant

Gordon Robinson instructed by Jeffrey Mordecai
of Nunes Scholfield DeLeon & Co for Respondent

7th March & 5th April, 1990

FORTE, J.A.

This is an appeal from an Order for recovery of possession made by His Honour Mr. A.S. Huntley sitting in the Resident Magistrate's Court for the parish of Kingston (Civil Division).

The appellant is the tenant of the respondents, under a lease made between the appellant and predecessors in title of the respondent on the 1st March, 1979 for a period of five years, at a monthly rental of \$2,250.00. The lease related to the subject matter of this order i.e. the 4th floor of premises known as No. 4 Duke Street in the parish of Kingston. The appellant apparently enjoyed undisturbed tenancy, until the 10th April, 1989, when it received a letter of even

date from the respondent purporting to increase the rental to approximately \$21,000.00 per month. On its refusal to pay, a notice dated 28th April, 1989 was served on the appellant, requiring the appellant to quit and deliver up the premises on or before the 31st May, 1989. It is the appellant's refusal to act in accordance with the notice, which caused the respondent to bring this action for recovery of possession as a result of which the learned Resident Magistrate made the order which is the subject of this appeal.

The evidence revealed that the premises No. 4 Duke Street, became the subject of a Certificate of Exemption from the provisions of the Rent Restriction Act - such certificate having been granted on the 12th March, 1985.

This certificate was however granted to the respondent's predecessor in title pursuant to an application made on the 20th July, 1983; and at a time when No. 4 Duke Street was registered under one title at Volume 452 Folio 947 of the Register Book of Titles. Subsequently, i.e. in 1988, separate titles were obtained for each floor of the building pursuant to the Registration (Strata Titles) Act, and the 4th Floor, the subject of this Appeal, was thereafter purchased by the respondents who then became the registered proprietor.

The Grounds of Appeal and arguments in support thereof raised the question of the validity and the effect of the Certificate of Exemption on two grounds -

1. The Certificate having been applied for, outside the prescribed period required by Section 30 of the Rent Restriction (Amendment) Act 1983 (Act 2/83), was null and void; and in the alternative

2. The Certificate having been issued in respect of the whole building and at a time prior to the division into Strata Titles, it cannot now apply to the portion of the building containing 6000 square feet comprised in Certificate of Title Volume 1210 Folios 570 and 571 in respect of which there is no evidence that it is of such a valuation to warrant its being let at \$6.00 per square foot.

1. Is Certificate of Exemption valid

Originally, all public and commercial buildings were subject to the provisions of the Rent Restriction Act. Then by amendment in 1958, commercial buildings which were subject to rental agreements entered into after the 1st January, 1959 were exempted (See Rent Restriction (Amendment) Act 1958). In 1976, the section was again amended to exempt only those commercial buildings which were let for the first time on or after the 1st January, 1975. [See Section 3 of Act 29/76 - Rent Restriction (Amendment) Act 1976].

However, in 1978, by section 2 of Act 2/78, the Rent Restriction (Amendment) Act 1978, section 3 of the principal Act was again amended as follows:

"Section 3 of the principal Act is hereby amended by deleting para (e) of the proviso to subsection (1) and substituting therefor the following:

(e) a public or commercial building which -

(i) exceeds 1,000 square feet in area and is designed to be used primarily as a warehouse; or

(ii) is rented at a rate of not less than \$2.50 per square foot per annum or, if not rented, is, in the opinion of a Valuation Officer of the Board, so located and designed as to be likely to attract a rent of not less than that rate."

Up until the coming into effect of the Rent Restriction (Amendment) Act 1983 (Act 2/83) commercial premises were only exempted if they fell within those two categories. Of significance is the fact that in relation to the second category, the criteria related to the already fixed rental, or a likelihood of a capacity for such rental in the opinion of a Valuation Officer.

In 1983, the principal Act was again amended by the Rent Restriction (Amendment) Act 1983 - Act 2/83 which deleted the above provisions and substituted therefor new provisions which forms part of the proviso to section 3. For clarity the relevant portions of section 3 are set out hereunder with particular reference to the amended section 3 (1) (e).

Section 3 (1)

"This Act shall apply, subject to the provisions of section 8 to all land which is building land at the commencement of this Act or becomes building land thereafter, and to all dwelling-houses and public or commercial buildings whether in existence or let at the commencement of this Act or erected or let thereafter and whether let furnished or unfurnished:

Provided that this Act shall not apply to:

(a) - (d)

(e) a public or commercial building which, pursuant to an application by a landlord for a certificate of exemption, an Assessment Officer certifies -

(i) exceeds one thousand square feet in area and is, for the time being, designed to be used primarily as a warehouse; or

- " (ii) is of such a valuation at the prescribed date as to warrant being let at such standard rent (exclusive of any amount payable for service) as the Minister may, by order, prescribe; or
- (iii) is constructed after 31st August, 1980, or having been in construction before that date, is completed thereafter;
- (iv) is constructed prior to the 31st August, 1980 and purchased, in a transaction at arm's length, by another person after that date but not later than the 31st October, 1982."

This amendment for the first time introduced the concept of an Assessment Officer, whose certification became necessary for the enjoyment of exemption from the provisions of the Act. [Also, new categories were introduced, relating to the time of construction of the house i.e. at 31st August, 1980]. Of great relevance to the instant case, is the new requirement for the Assessment Officer's certificate, and the power given to the Minister to determine by Order the standard rental. This, the Minister did by virtue of the Rent Restriction (Public and Commercial Buildings Exemption) Order which reads as follows: (see section 2 of the Appendix to the Order)

"Any public or commercial building which an Assessment Officer certifies would have been of such a valuation at the 31st day of August, 1980, as to warrant being let at that date at a rent of -

- (a) \$6.00 or more per square foot, where such building is in the Urban and Suburban Districts of the Corporate Area (as defined in the Second Schedule to the Kingston and St. Andrew Corporation Act); or

" (b) \$4.00 or more per square foot, where such building is in any area outside the Urban and Suburban Districts of the Corporate Area as so defined:

as exempt from the provisions of the Act."

In those circumstances, it followed that at the commencement of the Amending Act (i.e. Act 2/83), no commercial building could be exempted until the Assessment Officer had made the required determination i.e. in relation to the descriptions of the buildings covered in section 3 (1) (e) (i) - (iv), the second of which is relevant to this appeal. As this obviously would require time for determination, the consequence would be that buildings which would qualify for exemption could not be immediately ascertained and in the result would be deprived until the Certificate was issued, of a right of exemption, to which they were in fact entitled under the Act. However, the Rent Restriction (Amendment) Act 1983 (Act 2/83) by transitional provisions (in section 30) prescribed a time within which such applications ought to be made, and it is those provisions which formed the basis of the first issue joined in this Appeal. That section states as follows:

"Section 30 (1)

The Minister may, by order published in the Gazette, require the owners of public or commercial buildings to apply within such time as may be specified in the order, to an Assessment Officer for a determination as to whether or not, having regard to the provisions of section 3 (1) of the principal Act as amended by this Act, the building is one to which the principal Act does not apply."

In pursuance of section 30 (1), the Minister by section 2 of the Rent Restriction (Public and Commercial Buildings) (Application for Determination of Exemption) Order 1983 made the following order:

"Every owner of a public or Commercial Building shall within 90 days from the coming into operation of the Act apply to an Assessment officer for the area in which the building is situated for a determination as to whether or not the building is one to which the Act as amended by the Rent Restriction (Amendment) Act 1983, applies."

The provisions of section 30 (1) are however followed by section 30 (2), which achieves some importance as to the effect of section 30 (1). It reads as follows:

"(2) If, as respects any building, any person required to make an application pursuant to subsection (1) fails to do so within prescribed time, it shall be presumed, until the contrary is proved, that the building is one to which the principal Act as amended by this Act applies."

The question therefore is whether the failure by an owner to make an application under the provisions of section 30 (1) and the consequent Order of the Minister i.e. within 90 days of the coming into effect of Act 2/83, excludes such an owner from making such an application thereafter to the extent that any certificate of exemption granted in respect of an application made outside of the prescribed period, would be null and void.

A determination of this question must have as its reference point, the fact that section 30 of Act 2/83, was a transitional section which determined what effect the new section 3 (1) (e) would have during the period between the coming into effect of the Act, and the prescribed period which, through the order of the Minister, it gave to owners to initiate the process for a determination as to whether their buildings would fall outside of the provisions of the principal Act. These provisions being transitional were of no relevance after the ninety day period had passed and consequently disappeared from

the principal Act after that time. It is noteworthy that section 30 of Act 2/83 did not amend any section of the principal Act and is not printed as part of the Rent Restriction Act as amended by Act 2/83. Nevertheless, by the provisions of section 3 (1) (e) a landlord may still make an application for a certificate of exemption. At this time, there is no restriction in the time within which he can do so. It appears then that a landlord, who owned premises even in 1983, and who had failed at that time to apply for a certificate, may still do so by virtue of section 3 (1) (e).

If that is so, what then was the purpose of section 30 (1)? The fact that by virtue of section 3 (1) (e) applications may still be made, demonstrates that section 30 (1) could not have been intended to shut out all applications made after the prescribed 90 days. It is to be remembered, that up until these new provisions were enacted commercial buildings rented at a rate of \$2.50 per square foot or more, or likely to be so rented in the opinion of a valuation officer, were outside the provisions of the principal Act.

As these new provisions would have brought into the scheme of the Act buildings which were hitherto outside of it, some method had to be applied in order to determine whether a particular building was caught by the new provisions. This method was provided for by section 3 (1) (e) which required the Assessment Officer to issue a certificate to that effect. As this process would, as already stated, require some time to be accomplished, a transitional period would have been necessary, during which time this determination would be made. In my view it would follow that during the transitional period, the Act did not apply, that is to say, the status quo would remain during that period with the presumption that the Act did not apply. The owners then had as it were a "moratorium" during which time they

would continue to enjoy exemption from the Act while they made their applications for Assessment. Having applied within the 90 days, such buildings would continue to enjoy the exemption until the assessment was made and a certificate issued. However, after the expiration of the 90 days and in the absence of an application, the presumption changed, and the buildings were then presumed to come within the provisions of the Act "until the contrary is proved" [section 30 (2)].

In this case, it is conceded that the application was made outside of the prescribed period. It is my view that there was nothing irregular about the application, which was within the provisions of section 3 (1) (e) (ii) of the Act, and that the consequent granting of the exemption was made in accordance with the provisions of the Act. Accordingly, I find no merit in this ground of appeal, and conclude that the certificate of exemption is valid.

2. Is Certificate of Exemption applicable to Strata

Title

The appellants contend that the Certificate of Exemption having been granted prior to the building being subdivided into several titles it cannot now apply to a separate entity in respect of which there has been no specific valuation.

The respondents maintain that the Certificate applies to the entire building and not to the owners or the Titles, and urge that the certificate issued for the whole building is valid in respect of each part, even though the building was divided into multiple legal entities and separate titles were obtained for them subsequently. In addition, counsel for the respondents submitted that there has been no change in the circumstances of the building either in respect of design or use, and consequently the certificate already issued must be taken to continue to apply to the building of which each floor is a part.

The Act permits landlords to apply for a certificate of exemption. The evidence reveals that at the time the certificate was granted, the appellants were in fact tenants of the respondents' predecessor in title, who were therefore entitled to make the application either as owner, under section 30 of Act 2/83 (during the transitional period) or subsequently, by virtue of section 3 (1) (e) (ii) either as landlord or as owner. The definition of 'landlord' in section 2 (1) of the Act clearly includes an owner: viz,

" any person who is, or would but for the provisions of this Act be entitled to the possession of the premises."

The Certificate (Ex. 1) indicates that the building No. 4 Duke Street at the time of the assessment was of such a valuation as would bring it within the terms of section 3 (1) (e) (ii). The evidence speaks to the fact that the appellants continue to occupy the 4th floor and are engaged in the same occupation as at the time of the Assessment. Apart from the division of the title, there is no evidence of any change in the structure of the building or the nature of its use.

Once a Certificate is issued in respect of a building, it cannot be expected that in the absence of any such change, a person purchasing that building from an owner who has already obtained a certificate, would himself have again to apply for a new Certificate. The Certificate in such circumstances, would in my view be valid to the purchaser. Nor does it matter that the building has subsequently become the subject of more than one title, as the assessment relates to the rental capability of the whole building of which each floor though existing in separate titles and differently owned, is in fact a part. I would therefore conclude that the Certificate issued at the time when the building was registered under one title, remains good

and applicable to each floor, though now separately registered.

Other grounds of appeal were filed, dealing with the validity of the notice to quit, served on the appellants, but having regard to my conclusions in respect of the Certificate, it becomes unnecessary to consider them.

I would dismiss the appeal and order that the appellants pay the costs to the respondents.

ROWE, P:

I agree.

MORGAN, J.A.:

I agree.