IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2010 HCV 00820

IN CHAMBERS

BETWEEN	DAVID FARQUHARSON	1ST CLAIMANT/ 1ST ANCILLARY DEFENDANT
AND	NICOLA FARQUHARSON	2ND CLAIMANT/ 2ND ANCILLARY DEFENDANT
AND	EVERGLADES FARMS LIMITED	DEFENDANT/ ANCILLARY CLAIMANT

Mr Crafton Miller and Miss Celia Barclay instructed by Crafton S. Miller and Co. for the Claimants/Ancillary Defendants.

Mr Lackston Robinson and Miss Deidre Pinnock instructed by The Director of State Proceedings for the Defendant/Ancillary Claimant.

Civil Procedure – Injunction – Claim to prevent defendant ejecting claimants from real property which is their home – Claimants are husband and wife – Property occupied by them by virtue of the employment of the husband – Property previously belonging to employer but sold by employer's receiver –Receiver's action being challenged in court by employer - Defendant is a lessee of the new owner – Status of claimants on the property - Whether claimants entitled to retain possession pending the resolution of the employer's claim

30 November, 1 December, 2010 and 14 January 2011

BROOKS, J.

The Claimants, Mr David Farquharson and his wife, Nicola, occupy the great house on a sugar estate known as Hampden Estate. The estate and the great house have been in the possession of the Farquharson family since the 1850's. The property was, however, at least since 1965, owned by a company named Hampden Estates Limited. Mr Farquharson was employed

to the company as its managing director and one of the perquisites of his employment was the right to use the great house as his residence. Mr Farquharson has asserted that he is still the managing director of the company, despite the appointment of a receiver for the company.

The receiver was appointed by creditors, including mortgagees of property belonging to the company. This was because the company has had financial challenges. The receiver sold the property to a government controlled entity known as SCJ Holdings Limited (SCJ). SCJ, in turn, sold a portion and leased another portion of the property, including the great house, to the defendant, Everglades Farms Limited. Everglades was granted possession pursuant to the lease and issued a notice to the Farquharsons to quit and deliver up, to it, possession of the great house.

The Farquharsons have brought the present fixed date claim in which they challenge Everglades' right to issue them a notice to quit; they challenge the validity of the notice to quit; they challenge the period allowed to them by the notice to quit; and they seek an injunction preventing Everglades from interfering with their use and occupation of the property, pending the resolution of the company's court action, challenging the receiver's sale of the property to SCJ.

Everglades has filed an ancillary claim, in which it seeks an order for possession of the great house.

The issues which are to be decided are broadly, the effect of the sale on the status of the Farquharsons on the property and secondly, whether Everglades has taken the proper steps to have the Farquharsons removed therefrom. I shall treat with them in turn.

The effect of the sale on the status of the Farquharsons

The Law

It has been established that where a person is employed and while employed, is entitled to occupy, rent-free, a house belonging to his employer, this occupation is by way of a licence (see *Ivory v Palmer* [1975] I.C.R. 340; 119 Sol. J 405, *Norris v Checksfield* [1991] 4 All ER 327). The licence is deemed ancillary to the contract. *Ivory v Palmer* is also authority for the principle that where a contract of employment has been terminated, whether or not in breach of contract, the right to occupy the accommodation, provided by the employer, is also terminated.

In *Crane v Morris* [1965] 3 All ER 77, the English Court of Appeal (by majority) arrived at a similar conclusion. Lord Denning, at page 79 A of the report of that case, characterised such a licence as follows:

> "Once [the employee] ceased to be in that employment, he could be turned out, being given, of course, a reasonable time to go. **It is not necessary to give a licensee notice to quit, any more than it is a tenant at will**. A demand is sufficient: and a writ claiming possession is itself a sufficient demand; see *Martinali v Ramuz* [[1953] 2 All ER 892]." (Emphasis supplied)

The fact that an employee, allowed to occupy property rent-free, and his family living with him, are but licensees, was impliedly recognized by our Court of Appeal in *Harris v Johnson* (1971) 12 JLR 375. In that case, an employee, occupying in such circumstances, died. His family resisted recovery of the possession by the holder of the paper title, on the basis that they had acquired a title by adverse possession. In ruling in favour of the holder of the paper title, Edun JA stated at page 380 I:

> "Whether or not it was through compassion that [the employee] was allowed to remain on the land or in the cottage, **the [family] in their own rights had ceased** [on the employee becoming ill and unable to work any more] **to be licensees** because to the knowledge of the [holder of the paper title] they were occupying the cottage and/or land rent free and from the time when [the employee] was no longer in permissive occupation." (Emphasis supplied)

The fact that the employee has been granted exclusive possession of the accommodation does not affect his status as licensee. Exclusive possession, although one of the indicia of a tenancy, is not, by itself, conclusive of a tenancy. In *Ramnarace v Lutchman* (2001) 59 WIR 511, their Lordships in Privy Council, in giving judgment on an appeal from the Republic of Trinidad and Tobago, stated at paragraph 16:

> "An occupier who enjoys exclusive possession is not necessarily a tenant. He may be the freehold owner, a trespasser, a mortgagee in possession an object of charity or a service occupier. Exclusive possession of land may be referable to a legal relationship other than a tenancy or to the absence of any legal relationship at all."

The position of third parties with respect to licensees has, however, been the subject of differences in legal opinion. A purchaser of land from a

person who had granted a bare licence to another person, need not have concerned himself with the licence, even if he had bought with express notice of it (see *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54). Where, however, the licence is contractual, the authorities are less clear. Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, said at page 1252 of the report, "the legal position of contractual licensees, as regards 'purchasers' is very far from clear".

At common law a contractual licence could be revoked upon reasonable notice (see *Wood v Leadbitter* (1845) 13 M & W 838; 153 ER 351). *Hurst v Picture Theatres Ltd* [1915] 1 KB 1 recognized that the fusion of the jurisdictions of the common law and of equity had altered that position. Thereafter the rules of equity prevail. Decisions since that time, such as *Errington v Errington and Woods* [1952] 1 KB 290, *National Provincial Bank Ltd v Ainsworth* (cited above) and the *obiter dicta* in *Ashburn Anstalt v Arnold* [1989] Ch 1, have left the legal picture quite fuzzy indeed. Lord Denning in *Errington* ruled that "neither a licensor nor anyone else who claims through him can disregard the contract except a purchaser for value without notice" (see page 299). In *Ashburn Anstalt*, Fox LJ criticised the wide basis on which Lord Denning grounded his decision in *Errington*. In analysing the development of the relevant law down to the

decision in *Errington*, Fox LJ said at page 15 of the report in *Ashburn Anstalt:*

> "Down to this point we do not think that there is any serious doubt as to the law. A mere contractual licence to occupy land is not binding on a purchaser of the land even though he has notice of the licence."

After reviewing the decision in *Errington* and contrasting it with other decisions, Fox LJ stated at page 22:

> "Before *Errington* the law appears to have been clear and well understood. It rested on an important and intelligible distinction between contractual obligations which gave rise to no estate or interest in the land and proprietary rights which, by definition, did. The far-reaching statement of principle in *Errington* was not supported by authority, not necessary for the decision of the case and *per incuriam* in the sense that it was made without reference to authorities which, if they would not have compelled, would surely have persuaded the court to adopt a different ratio."

Ashburn Anstalt was overruled, although on a different point, by the decision of the House of Lords in *Prudential Assurance Co Ltd v London Residuary Body and others* [1992] 3 All ER 504. In light of the facts of the instant case, where there is no attempt to state that the licence was irrevocable, I find that there in no need to attempt to resolve that issue in this judgment. I would, however, be inclined to the view of Fox LJ on the point.

One other principle to be examined is the status of a mortgagor of real property, who remains in occupation thereof, after the completion of a sale of that property, by the mortgagee, under the powers of sale contained in the mortgage. Section 108 of the Registration of Titles Act (ROTA) stipulates that, upon the registration of the transfer, the estate and interest of

the mortgagor passes to the purchaser of that property. Section 108 also stipulates that the only leases which bind such a purchaser are those which predated the mortgage or to which the mortgagee had thereafter consented.

Section 106 of the ROTA makes it clear that upon the exercise of the power of sale by a mortgagee, the person, who is adversely affected by even an improper or irregular exercise of the power of sale, shall be entitled to a "remedy only in damages".

The mortgagor, upon registration of the transfer, therefore has no right to occupy the property. He has no interest therein; he is not a tenant at will and he is not a licensee. There is authority at common law that, at best, the mortgagor, even when not in default, was a "tenant by sufferance only". In *Doe d. Roby v Maisey* (1828) 8 B. & C. 767; 108 ER 1228, Tenterton CJ said, at pages 767- 768:

> "The mortgagor is not in the situation of tenant at all, or at all events, he is not more than tenant at sufferance; but in a peculiar character, and **liable to be treated as tenant or as trespasser at the option of the mortgagee**." (Emphasis supplied)

The mortgagor's tenants could be at similar peril, at common law. In *Doe d. Higginbotham v Barton* (1840) 11 Ad & El 307; 113 ER 432, Denman CJ said at page 314-315:

> "The tenant, therefore, may be said to satisfy the rule [that a tenant shall not dispute his landlord's title], when he admits that, at the time when he was let into possession, the person who so let him in was mortgagor in possession, not treated as a trespasser, and so had title to confer on him, the tenant, the legal possession; and yet may go on to shew that **subsequently he has been treated as trespasser,**

> **whereby his (the mortgagor's) title, and the tenant's rightful possession under him, have been determined.**" (Emphasis supplied)

It is true that the ROTA alters the position of a mortgagor prior to the execution of powers of sale contained in the mortgage. It seems to me, however, that, thereafter, he may be treated, by the purchaser as a trespasser. The purchaser, or any person with his authority, may, upon completion of the purchase, seek recovery of possession from the mortgagor. On the authority of *Doe d. Higginbotham v Barton*, cited above, the mortgagor's tenant could also, at the election of the purchaser, be treated as a trespasser. The fact that the sale is effected by a receiver appointed by a mortgagee, does not, in my view, improve the status of the mortgagor. It seems, however, that a tenant would be in a different position.

Where the person in possession is not the mortgagor, other considerations apply. There is authority that where a person, other than the mortgagor, is in occupation of the property at the time of execution of the contract to purchase, a purchaser may be fixed with notice of that person's interest (see *Life of Jamaica Ltd v Broadway Import and Export Ltd and another* (1997) 34 JLR 526).

Out of completeness, it should be noted, that section 68 of the Registration of Titles Act, bestows on the registered proprietor an indefeasible title. The title is "conclusive evidence [in all courts, but subject

to the statutes of limitation] that the person named in such certificate as the proprietor of or having any estate or interest in…the land therein described, is seised or possessed of such estate or interest…".

Mr Farquharson's status

Mr Farquharson, in his first affidavit filed in support of the fixed date claim, deposed that he occupied the great house as the managing director of the company. At paragraph 11 he stated:

> "…I, along with my wife and children, occupy the said Great House with the consent and authorization of its lawful owner, the said Hampden Estates Limited…"

He went on at paragraph 12 to state that his position had other perquisites:

> "As a term and condition of the occupation of the Great House by its Managing Director, Hampden Estates Limited has knowingly consented and agreed to the said Great House being provided with an uninterrupted supply of electricity for its operation from Hampden Estates and with a similar uninterrupted supply of untreated water from a well on its said property."

These statements indicate that Mr Farquharson was not a tenant of the company. He has not indicated that he paid any rental or that his occupation had any of the other indicia of a tenancy, other than, perhaps, exclusive possession. On that evidence, Mr Farquharson occupied the great house as a licensee. As mentioned before, there has been no attempt to state that the licence was irrevocable. I shall, hereafter, refer in this context, to Mr

Farquharson alone, as his family's occupation of the property is dependent on his position.

The question for me to determine, is what effect, if any, did the sale of the property by the company (albeit through the receiver), have on Mr Farquharson's licence.

In my view, Mr Farquharson's status cannot be improved by virtue of the sale. At best, he retains his status as licensee; at worst he assumes the status of the company and is a trespasser. In the absence of clear authority, I am more inclined to the former position on the basis that SCJ and its lessee, Everglades, are both fixed with notice of his status. Neither position, however, assists Mr Farquharson in this claim. He is, at best, only entitled to reasonable time to vacate the premises.

SCJ is registered as the proprietor of the fee simple of the great house lands. It, and therefore its lessee, is entitled to possession of the great house. It must, however, give Mr Farquharson reasonable time to leave.

I now examine whether reasonable time was given.

Has Everglades taken the proper steps to have the Farquharsons removed?

In light of the fact that, on my finding, he is not a tenant but a licensee, Mr Farquaharson's complaint that the notice is defective, because it sought to categorize him as a tenant, is without merit (see *Harewood v*

Brathwaite (1993) 47 WIR 67). He is only entitled to reasonable time to leave. Similarly without merit, are his complaints that the notice was served on a Sunday, served a day before it was dated, and served on a house-guest. The important factor is that the notice should be brought to his attention (see *McQuilkin v Duprey* (1963) 6 WIR 122). That was clearly done.

On the question of the length of time afforded him to leave, Mr Farquharson asserted, that given the length of time that his family has been in occupation of the great house, a month's notice was too short. He also pointed to the fact that Everglades, in its agreement to purchase another portion of the lands, had agreed to allow the occupants of the great house more than a month, to vacate same. The agreement stipulated "that the current occupiers of Hampden Great House will be allowed a period of six months from the Date of Possession to vacate the said Hampden Great House" (see clause 8.21.4 of the Agreement for Sale and Purchase).

Although he was not a party to that agreement, Mr Farquharson asserted that the clause "will be allowed a period of six months", meant that he should have been given six months **notice**. I do not accept that he is entitled to such an interpretation; it is not his contract. Everglades did wait six months before it gave him notice to quit; it can therefore say to SCJ, that it did perform this element of the agreement. One month's notice may, in the absence of any earlier indication that he should leave, however, be

considered short in the circumstances. That defect may be corrected by this court. I bear in mind, however, that almost a year has passed since then.

The other existing claim

I should deal with one further aspect before concluding this judgment. A part of Mr Farquharson's claim was that Everglades should be prevented from recovering possession of the property until his employer's claim against the SCJ and the receiver has been resolved. I reject that position as untenable. The concept of granting an injunction, in these circumstances, flies in the face of the indefeasibility of SCJ's title. Such an injunction would also contradict a ruling, given in this court in that claim, that no injunction would be granted against SCJ in respect of dealing with the property and that there would be no stay of execution pending appeal. The fact that that judgment, handed down by Campbell J in Claim 2009 HCV 1239 on 10 July 2009, is the subject of an appeal, is of no consequence; it is a judgment of this court and must be obeyed until stayed, set aside or varied.

Conclusion

SCJ, being the registered proprietor of the great house lands, is entitled to grant a lease of those lands. Its tenant, Everglades, is entitled to give a notice to the occupant of the great house to vacate the property. That occupant, being a licensee by virtue of the fact that his occupation was as a

consequence of his employment to the previous owner of the great house, was only entitled to reasonable time to leave the property.

I find that Everglades, having given Mr Farquharson notice to leave the property, is entitled to an order for possession. The period of one month which it gave was too short in the circumstances. Bearing in mind, that almost a year has elapsed since the notice was given, a period of two months, from the date of this judgment, will be sufficient time for him to vacate the great house.

It is therefore, ordered that:

1. Judgment for the Defendant on both the claim and the ancillary claim;

2. The Claimant shall quit and deliver up to the Defendant, on or before 15 March 2011, all that parcel of land with buildings thereon known as the Hampden Estate Great House, being the land situated at Hampden Estates in the parish of Trelawny and being part of the land comprised in Certificate of Title registered at Volume 1026 Folio 290 of the Register Book of Titles;

3. Costs to the Defendant on both the Claim and the Counterclaim, which costs are to be taxed if not agreed.