[2010] JMCA Civ 29

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 23/2009

BEFORE: THE HON. MR. JUSTICE HARRISON J.A.
THE HON. MR. JUSTICE DUKHARAN J.A.
THE HON. MRS. JUSTICE McINTOSH J.A. (Ag)

BETWEEN	ROBERT FRATER	1ST APPELLANT
AND	PAMELLA FRATER	2ND APPELLANT
AND	TROY WEDDERBURN	RESPONDENT

Leonard Green & George Duncan, instructed by Chen, Green & Company for the appellants

Lambert Johnson for the respondent

17 March and 9July 2010.

HARRISON, J.A.

[1] I have read in draft the judgment of my sister McIntosh, J.A. (Ag). I agree with her reasoning and the conclusion arrived at, and I have nothing further to add.

DUKHARAN, J.A.

[2] I too agree with the reasoning and conclusion of my sister McIntosh, J.A. (Ag), and have nothing to add.

McINTOSH, J. A. (Ag.)

Introduction

[3] The respondent is the occupant of most of the first floor of a two storey commercial building situated at 6 Saint James Street, Montego Bay, in the parish of Saint James. He became a tenant of the appellants' father, Mr Clive Frater, who, according to his evidence, entered into a ten year lease agreement with him, commencing on 9 August 2004. However, on the death of Mr Frater, the appellants assumed control over the premises, as beneficiaries, with no apparent knowledge of the existence of the lease agreement. The respondent thereafter paid rent to the appellants and continued to operate three businesses on the premises, namely, a bar, a tavern which includes rooms "rented on a short term basis or for the whole night", and a record shop.

[4] On 22 July 2008, the appellants served a notice to quit on the respondent, requiring him to quit and deliver up possession of the premises "on the 31st of August, 2008 or on such day as your tenancy shall next expire after one (1) month from the date hereof". The reason given for

the notice was that the "premises requires urgent structural repairs". After the expiration of the notice period, the respondent remained in possession and the appellants then made a claim for recovery of possession of the premises, in the Resident Magistrate's Court for the parish of Saint James.

[5] The particulars of claim filed in the action states simply that:

> "The Plaintiff claims to recover from the Defendant possession of premises situated at Shop 3 and 4, 2nd Floor, 6 Saint James, Montego Bay, Saint James, upon whom Notice to Quit in writing has been served and inspite (sic) thereof, the defendant has failed to quit and vacate the said premises."

[6] The respondent's defence was equally simple and brief stating that:

> "The Defendant has a ten (10) year lease and only four (4) years on that lease has (sic) gone so far. Additionally, the reason given for the notice – the premises need urgent structural repairs – is an invalid one. The building is not in need of any urgent repair that would necessitate my client's removal from the premises."

[7] The trial commenced before Her Honour, Mrs V. Harris, acting Senior Resident Magistrate for the parish, on 27 January 2009 and concluded on 24 July 2009, when judgment was given to the respondent with costs of $15,001.00. The learned Resident Magistrate also ordered the respondent to repair, at his own expense, faulty floor boards detected on the premises occupied by him and further ordered that repairs which were to be done to the roof and the wall of the premises be done in such a way

that the defendant's business operations were minimally affected. This decision is the subject of the appeal now before the court.

The Evidence

[8] The second appellant, Miss Pamella Frater, gave evidence on their behalf. She described the building as very old and in bad condition with a large open crack in the wall and a tree growing on a ledge to the front of the building. It was her opinion that if the crack should break, that section of the building would hit the road. The first floor ceiling is falling out and the tenants on the ground floor have been complaining that the ceiling is leaking. She had served the notice to quit on the respondent so that "I can repair the section that the defendant is in". She said she plans to replace the roof first then the flooring of the first floor and to demolish and rebuild the section of the building occupied by the respondent.

[9] In cross examination Miss Frater stated that other tenants had not been given notices to quit. It was her evidence that at one point the ground floor tenants had been given notice because the rent was increased and they did not want to pay the increase (but it appears that their attitude must have changed as they are still in occupation). She said the respondent pays his rent and is an "OK tenant" but when the place is repaired she does not intend to rent for "that sort of business anymore" though she denied knowing that he rents rooms on short term bases to

men and women and that his business is operated at nights. The repairs would be done in the day, she said.

[10] Not only was she unaware of the existence of the lease but when it was produced and shown to her, she challenged the signature purported to be that of her father. She had no knowledge that the respondent had given money to her father to repair the roof and that the repairs had been done.

[11] Their witness, Mr Jason Jemmison, described himself as a building contractor. He testified that he went to the building at the request of the second appellant and had given her an estimate for refurbishing and reconstructing the building. He had made the following observations:

i) a crack to the side of the building which needs to be cut out and a column put in;

ii) the ceiling needs to be changed in that "the boards are opening up and falling apart. Maybe the laths behind it are damaged. I am not able to say";

iii) the flooring boards need to be changed "as they are getting soft. Whenever you step on them they feel as if they are sinking";

iv) the rafters that make the roof need changing as they are rotting.

[12] He said that the work which has to be done will affect persons downstairs as well and nothing can be done while the building is occupied. In cross examination he said that the work could take from

three weeks to one month. He had no information that the roof was leaking. He had gone on top of the roof to take some measurements but he did not know if the roof was bad or if in its present condition, it can last a few more years. He testified that the strength of the building is in the corner where the building is joined. He could not say if the crack at the side was there for a very long time. He had observed it in June/July 2008 and saw it again about some six/eight months later, (January/February, 2009) at which time it appeared to him that the crack had gotten bigger. Mr. Jemmison said that the owners of the building had requested that the floor and the roof be replaced and those were "structured repairs".

[13] At the conclusion of his cross examination the court felt moved to seek some clarification of his evidence on the condition of the roof and floor, no doubt because these were the areas said to require "structured repairs". However, Mr Jemmison was not able to provide the clarification sought as he said he could not give any definite answer on the condition of the roof or the floor as he had not inspected them. The roof could be inspected with the tenant in occupation but not the floor. He said "Based on what I saw of the ceiling and the floor, they are leaking". He added that it was his opinion that the building was not safe as it was falling apart.

[14] The respondent, Mr Troy Wedderburn, testified that he knew the building since 1983 and has been a tenant there since 2002, first

downstairs and then upstairs. He was given possession of the upstairs section of the premises in 2003 but took up occupation in 2004 as it was in a terrible condition inside and needed to be repaired. He had not actually done the repairs himself but had given money to Mr Frater for the repairs to be done. The bathroom fixtures were gone and he had to replace them and he also reinforced the floor. Some painting was also done. The zinc was bad and the roof was leaking and he had re-zinced the entire roof. All of this was done in 2004.

[15] In cross examination he said he had complained about fixing the building at his expense and, after he gave Mr Frater sixty thousand dollars ($60,000.00) to fix the roof, Mr Frater agreed to give him and subsequently did give him a lease for ten years. They both signed the lease in August 2004, in the presence of another man, although this man did not sign as witness to their signatures. When he first saw the document there was already a signature on it. He did not tell the appellants about the lease when he got the notice because he did not get a chance to talk to them.

[16] According to the terms of the lease, which has another six years to run, he is responsible for repairs to the interior of the premises and he will repair the sections of the floor that are sinking. He said that there are two

cracks to the sides of the building; that "the crack" was there since 1980 (although it is not clear how he was able to say this since he did not know the building until three years later) and that it has not gotten worse since he first saw it. It was also his evidence that he has had no problem with the roof since he repaired it and it has survived two hurricanes.

[17] Mr Wedderburn told the court that he could remain in the building and continue to conduct his business if the repairs to the roof and the flooring were done in parts. If repairs were to be done to the wall, only the bar would be affected. His other business operations could continue

[18] His witness, Mr Rupert Irving, declared himself to know every corner and crevice of the building as he had lived there for a number of years. He had been brought there to live, rent free, by Mr Clive Frater whom he had known for over thirty years.

[19] He knew the crack to the left side of the building for at least 28 years. He had painted the building about two years after he moved there and the crack was there then. It had not gotten any bigger. He knew all about Mr Frater's business and knew that after a while, a lease was drawn up with the respondent. That was not at the same time that the place was rented to the respondent but after the place was repaired and painted.

Summary of the Learned Resident Magistrate's Findings

[20] It is sufficient for the purpose of this appeal to confine this summary of the learned Resident Magistrate's findings to those areas to which the court's attention was particularly drawn.

[21] After outlining the defects which the appellants described and the possible remedial action to be taken, the learned Resident Magistrate found that no evidence was given as to how urgently all the intended repairs were required and the reasons, if any, for the urgency.

[22] She looked at the contrasting contentions of the appellants and the respondent, the former contending that "to thoroughly inspect and repair the floor and the roof of the building as well as to repair the crack in the wall the defendant who occupies the upper floor of the building could not remain in possession/occupation" and the latter contending that the repairs to the wall, the roof and the floor could be done in such a way as to allow him to remain in occupation.

[23] Then the learned Resident Magistrate referred to the evidence of Mr. Irving, outlining its effect as follows:

> "1. The crack up to now has not affected the integrity of the building and as a result did not pose any danger to the occupants or third parties.

2. The roof was repaired in 2004, it does not leak and neither was it in as bad a shape as the plaintiffs are making it out to be.

3. The lease was authentic."

[24] The third effect, the learned Resident Magistrate said, was of some importance as the second appellant's evidence was that she did not recognize the signature on the lease agreement as being her father's. She also noted the indications from the second appellant that, after the building was repaired and refurbished, she would not be renting any part of it as a tavern.

The Issue Identified by the Resident Magistrate

[25] The learned Resident Magistrate identified the authenticity of the lease as the main issue to be determined. She stated that the question of the genuineness of the lease was a question of fact and if it was found to be valid, the appellants, as beneficiaries of their father's estate, were bound by its terms.

[26] She questioned whether a lease such as in the instant case (for a term of ten years) could be terminated by a notice to quit under section 25 of the Rent Restriction Act (the Act). If the answer was in the affirmative, she said, then the court would need to address the genuineness of the reason given for the notice and determine where the greater hardship would lie.

[27] However, she expressed doubt as to the genuineness of the reason given, especially in circumstances where the respondent seemed to have been singled out for notice and the rent of the other tenants, without notice, had been significantly increased as compared to his low rent.

[28] She found on the evidence and on a balance of probabilities that the lease was valid and stated that it could only be terminated before the end of the term "if the tenant has been in breach of a condition in the lease, or the lease contains a forfeiture clause and the tenant has committed a breach of covenant which entitles the landlord to forfeit the lease." She found that this lease contained no forfeiture clause.

[29] The learned Resident Magistrate considered clause one of the lease which states that:

> "In consideration of the lease the Landlord hereby agrees to lease the tenant rooms and bar for a period of ten (10) years effective August 9, 2004 in which repairs and interior works will be done at tenant's expense."

In her judgment, the respondent was obligated to carry out repairs and interior works at his own expense, by virtue of this clause. The respondent would be required not only to keep the premises in good order and condition, she said, but also to ensure that the premises were kept in a tenantable state of repair and that reasonable standards of maintenance were also observed.

[30] She found that the appellants had brought no evidence which satisfied her that they were entitled to forfeit the lease. She then summarized her findings in this way:

> "I find on a balance of probabilities that the defendant holds a valid lease for the first floor of the premises for a fixed period of ten (10) years and the plaintiffs are bound by this lease. Further, no evidence has been elicited to show that the plaintiffs can forfeit the lease because the defendant has breached the condition of the lease which obligates him to carry out repairs and interior works at his expense. The plaintiff's claim therefore fails."

[31] She further found that the building was not in need of urgent structural repairs and it was her view that this action was an attempt to dispossess a tenant who enjoys the protection of a lease which favours him with a relatively low monthly rent.

The Arguments on Appeal

[32] The appellants' argument is posited as follows:

(a) The findings of the learned Resident Magistrate are confusing and inconsistent in that she seemed to have viewed the case entirely in terms of the genuineness of the lease, yet made findings on issues relating to whether the appellants had adduced satisfactory evidence entitling them to forfeit the lease for breach of the respondent's obligation to repair as a result of which "immediate remedial action was required if the building was not to suffer irreparable damage".

(b) Having found that:

(i) a landlord can terminate for breach of a covenant to repair;

(ii) the building was in need of repair;
(see orders 2 and 3 of her findings at page 9) and

(iii) the respondent was obligated to repair pursuant to the condition in the lease;

she failed to draw the unavoidable inference that the respondent was in breach of his duty to keep the premises in good and tenantable repair.

[33] It was submitted that the respondent would also be in breach of section 95 of the Registration of Titles Act, which implies a covenant that the lessee will keep the premises in good and tenantable repair. When the learned Resident Magistrate came to the conclusion that the building was not in need of urgent structural repairs and referred to breach resulting in irreparable damage that was to raise the standard higher than was contemplated by the statutory duty to keep the premises in good and tenantable repairs.

[34] The main reason given by the Resident Magistrate for her decision was that the appellants had not shown that there was a breach of the covenant to repair but she went on to say that she doubted that there was any need for urgent structural repairs. Mr Green argued that while she had correctly identified that the real question for determination was whether the respondent was in breach and whether the breach was such

as to entitle the landlord to possession by way of forfeiture of the lease, her approach to the question and her analysis of the evidence was faulty.

[35] Counsel pointed out that the case did not start with considerations of breach of covenant and forfeiture but had evolved in that way with the introduction of the lease. The action was brought under the Act but when the respondent introduced the lease the case took a different turn. According to his submission, "the Resident Magistrate was the one who went on the lease route". The case never proceeded on the basis that the appellants were challenging the lease, he submitted.

[36] The learned Resident Magistrate had visited the building and made her own observations of its condition (including the size of the crack which she said was a shade larger than the width of a hairpin). It was counsel's submission that having gone to the premises and recognized that it was old and in need of repairs the Resident Magistrate ought properly to have applied the test as to whether the building was being kept in a reasonably good condition for a building of that age (see **Lurcott v Wakely & Wheeler** [1911] 1 KB 905) and in failing to apply that test the Resident Magistrate wrongly concluded that the lease had not been forfeited by the conduct of the respondent and that the appellants were not entitled to possession.

[37] Mr Lambert Johnson's arguments in response are based on the case as advanced by the appellants. He argued that the issue to be

proved by them must of necessity have been that the building was in need of urgent structural repairs. That was the only reason given for the notice to quit and structural repairs require expert assessment. The appellants did not provide any evidence which definitively stated that structural repairs were needed. Mr. Jemmison's evidence never managed to take the appellants' case to that level and that failing went to the very heart of their case.

[38] Counsel referred to the alternative measures suggested in cross examination which did not require the respondent to vacate the premises. He said that the appellants had admitted that those alternative measures could be employed but expressed the view that they would only be of temporary benefit. Nothing was said however about what temporary meant. Further, counsel questioned the urgency of the need to repair and the nature of the repairs identified in light of the fact that only the respondent received notice to quit.

[39] He was of the view that although it could be argued that the learned Resident Magistrate lost her focus in bringing to bear issues other than those involved with the notice and the reason for it, she nevertheless made findings which dealt effectively with the case which the appellants had presented. For this submission he relied on the last paragraph of the Resident Magistrate's findings at page 8 when she stated thus:

> "Although I need not consider the genuineness of the reason given for the notice nor the question of the greater hardship, based on the reason I have given for my decision, I nonetheless wish to add that based on the totality of the evidence I am also not convinced that the building needs urgent structural repairs and it is my view that this action was an attempt by the plaintiffs to dispossess a tenant who enjoys the protection of a lease which favours him with a relatively low monthly rent."

[40] It was his contention that all of the learned Resident Magistrate's findings which were outside of what was necessary for a determination of the case as advanced by the appellants may be regarded as obiter. What the respondent was saying was that he has a lease and if repairs are to be done they can be done while he remains in occupation. The appellants having challenged the lease, the Resident Magistrate was obliged to make findings pertaining to it.

Analysis and Conclusion

[41] It is important, in my view, not to lose sight of the appellants' case. They maintained their position from the inception of the matter right up to its conclusion. It was stated in their particulars of claim and repeated in closing submissions before the learned Resident Magistrate that "the plaintiff is seeking to recover under section 25(1) (h) of the Rent Restriction Act". The reason given in the notice to quit was repeated and the areas needing repairs were itemized as crack in the wall and flooring and roof in need of change. Reference was made to complaints received from other

tenants about the condition of the building and counsel submitted that, in those circumstances, "under the Rent Restriction Act the plaintiff has proved her case and should recover to effect the structure (sic) repairs that are required. The building is very old". That was the appellants' case which the learned Resident Magistrate had for her determination and she had to consider it along with the respondent's defence.

[42] Although Mr Green submitted that the appellants' case was not conducted on the basis of a challenge to the lease, the record of the proceedings reveals that it was challenged, even if not vigorously so. That is why they urged the learned Resident Magistrate to accept the appellants' evidence that the signature on the document was not their father's and why they also pointed out that the signature was not witnessed.

[43] Furthermore, I accept that all parties recognized the need for a determination of the status of the lease. The appellants' attorney-at-law had stated in submissions that the authenticity of the lease was in question and that without the lease what remained was a monthly tenancy in which event they were entitled to an order for possession by virtue of section 25(1) (h) of the Act. The respondent's attorney-at-law also regarded the authenticity of the lease as critical to the defence. Under the lease he was entitled to remain in possession for a further period of six

years. If that defence availed the respondent then the appellants' case would have failed. He asked the court to look at its terms and in the absence of any forfeiture/termination clause he urged the court to take account of the common law, the evidence in the case and the conduct of the parties in making a determination on the "forfeiture issue". The learned Resident Magistrate was therefore obliged to address her mind to the impact of the lease on the appellants' case.

[44] Section 25(1) (h) of the Act, upon which they relied, provides as follows:

> "25 (1) no order or judgment for the recovery of possession of any controlled premises, or for the ejectment of a tenant therefrom shall ... be made or given unless-
>
> ...
>
> (h) the premises' being a dwelling-house or a public or commercial building, are required for the purpose of being repaired, improved or rebuilt; ...
>
> 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-

(1) ...

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

[45] It is immediately to be noted that the Act does not speak of "structural repairs". It was the appellants who had not only introduced the term in their notice to quit but depended upon it as the reason for their entitlement to recover possession and the learned Resident Magistrate could not but speak to whether or not, on their case, she was satisfied that there was any such need for structural repairs, resulting in any entitlement to recover possession of the premises. It was the appellants who had raised the standard and not the court as Mr Green had submitted. After hearing the evidence and making her own observations of the building, she was convinced that it was not in need of "urgent structural repairs".

[46] The learned Resident Magistrate did find, however, that repairs were needed and the question on the appellants' case then became whether the respondent had to vacate the premises for the repairs to be done. Her view on this was evident from page 9 of her findings when she ordered that the repairs should be undertaken without dispossessing him. There was evidence even from the appellants' witness, Mr Jemmison that if the

repairs were done in stages the respondent could remain in occupation and from his evidence, the respondent is quite prepared for that.

[47] It seems to me that the misgivings expressed by the learned Resident Magistrate, concerning the reason for the notice, are based on sound considerations and her conclusion that the action for recovery of possession was "an attempt... to dispossess a tenant who enjoys the protection of a lease which favours him with a relatively low monthly rent" is not at all unreasonable. In other words, she agreed with the respondent that the reason for the notice was invalid and this would successfully defeat the appellants' claim.

[48] However, instead of concluding the matter at that point, the learned Resident Magistrate went on to look at the condition contained in the lease by virtue of which the respondent was responsible for repairing his section of the premises and to consider whether there was a breach of that condition which would entitle the appellants to forfeit the lease. As I understand her reasoning, she took this route because she was of the view that the Act could still apply to the appellants' claim if they were able to establish that the respondent had breached a condition in the lease. But, such a course was inconsistent with the appellants' case. They had made it clear, in the conduct of their case, that they would have nothing to do with the lease.

[49] That position notwithstanding, they seek now to benefit from these extraneous findings. They complain that since the learned Resident Magistrate took it upon herself to consider the lease and the question of forfeiture, she ought to have found on the evidence that the respondent breached his obligation to keep the premises in a good and tenantable condition as she found that the building was in need of repairs. However, in failing to embrace the lease and to make use of the opportunity it presented to show that the respondent was in breach of his obligation to repair (even though that was not how their case was originally pitched), the learned Resident Magistrate would have had no evidential basis upon which to conclude that the appellants had shown that they could forfeit the lease for the respondent's breach of the condition to carry out repairs and interior works at his expense. Their denial of the lease also meant that the provisions of section 95 of the Registration of Titles Act could not avail them.

[50] In any event, the finding that repairs were needed did not lead inevitably to a finding that the respondent was in breach of his obligation under the lease. Apart from the loose floor boards which he acknowledged as his responsibility and which he said he had not yet had the time to address, there was nothing said about the interior works which could give rise to a finding that he was in breach of his obligation to

repair. The learned Resident Magistrate clearly accepted that the crack in the wall was a feature of the building long before the respondent ever occupied it. He said he was having no problem with the roof when it rained since he last repaired it and the appellants were unable to successfully challenge that as even their own witness, called to attest to the condition of the building, was not able to say conclusively if the roof was bad or if it was leaking. In fact, it was the respondent's unchallenged evidence that the habitable condition of his section of the building was the result of his own efforts. These were the circumstances which the learned Resident Magistrate considered and which clearly informed her conclusion that there was no satisfactory evidence that the respondent was in breach of his obligation under the lease. This too would result in a decision in favour of the respondent.

[51] So, in the final analysis, while the learned Resident Magistrate stated that her decision was based on the failure of the appellants to elicit evidence to show their entitlement to forfeit the lease for breach of the condition to repair (which was never their case), she also made a finding that "based on the totality of the evidence", the reason given in the notice to quit failed to convince her that it was genuine. This was so especially in light of their failure to require all tenants to vacate the premises and because the circumstances led her to ascribe other motives to the appellants for their efforts to dispossess the respondent. That, in my,

view, was sufficient to dispose of their claim under the Act and the learned Resident Magistrate was entitled to find that the appellants had failed to prove their entitlement to recover possession of the premises.

[52] Accordingly, I would dismiss the appeal with costs to the respondent in the sum of $15,000.00.

ORDER

HARRISON, J.A.

Appeal dismissed with costs to the respondent in the sum of $15,000.00.