THE JAMAICA LAW REPORTS

VOLUME 23

THE JAMAICAN BAR ASSOCIATION
in association with
THE CARIBBEAN LAW PUBLISHING COMPANY LIMITED
under the auspices of the USAID/Jamaican Bar Association
Sustainable Justice Reform Project

KINGSTON

1996

GOLDEN STAR MANUFACTURING COMPANY LTD. *v.* JAMAICA FROZEN FOODS LTD.

[COURT OF APPEAL (Kerr, P. (Ag.), Carberry and Wright JJ. A.) June 17 and October 31, 1986]

Landlord and Tenant—Section 31 of Rent Restriction Act not applicable to notices to quit under s. 26—Landlord giving notice under s. 26 not obliged to give reasons stipulated under s. 25 of Act—Rent Restriction Act ss. 26, 26, 31.

The appellant was the tenant of a third party who sold the premises occupied by the appellant to the respondent. Shortly after signing the agreement but before transfer, the Attorneys-at-Law acting on behalf of the third party and the respondent served a notice to quit on the appellant under s. 25 of the Rent Restriction Act, thus giving 12 month's notice. After the expiration of the notice the appellant refused to leave and the respondents who were by this time the owners of the premises, brought an action for recovery of possession. The learned resident magistrate ruled in favour of the respondent. The appellant appealed on the ground that at the time the notice was served neither the third party nor the respondent was competent to give it, the former because they were not in a position to say as required by s. 31 that they wanted the premises for their own use or occupation under s. 25(1)(e) and the latter because they were not then the owners.

Held: Under the Rent Restriction Act, a landlord of commercial premises wishing to terminate the tenancy agreement has two options. He may proceed under s. 25 whereby he is obligated to give 3 months notice and one or more of the stipulated reasons as to why the premises is needed or he may choose to go by way of s. 26 where 12 month's notice is necessary but there is no obligation to tender a reason as to why the tenancy agreement should end. S. 31 of the Act which stipulates that reasons must be stated in any notice as a condition for its validity does not apply to notices issued pursuant to s. 26. In the instant case, the third party, the then landlord gave a valid notice to quit under s. 26 of the Act. This notice has expired and the respondent, the present landlord and for whose benefit the notice was given is entitled to recover possession.

Appeal dismissed.

Cases referred to:

(1) *Graham v. M'Ilwaine* [1918] 2 I.R. 352
(2) *Thompson v. McCullough* [1947] K.B. 447; [1947] 1 All E.R. 264; 91 Sol. Jo. 147
(3) *Freeman v. Hambrook* [1947] V.L.R. 70; A.L.R. 152
(4) *McQuick v. L. & V. Realties* (1982) 19 J.L.R.
(5) *Wright v. Walford* [1955] 1 Q.B. 363; [1955] 2 W.L.R. 198; [1955] 1 All E.R. 207
(6) *Emberson v. Robinson* [1963] 1 W.L.R. 1129; [1953] 2 All E.R. 755; 97 Sol. Jol. 571
(7) *Canadian Perfect Garment Co. v. Bell* [1948] 4 D.L.R. 816; O.W.N. 749
(8) *Barrett v. Marshall* [1945] K.B. 562; 61 T.L.R. 533; [1946] 1 All E.R. 146
(9) *McMillan v. Chapman & S. S. Kresge Co.* [1953] 2 D.L.R. 671; [1953] O.W.N. 291; [1953] O.R. 399
(10) *A.D. Wimbush & Son Ltd. v. Franmills Properties Ltd. and Others* [1961] Ch. 419; [1961] 2 W.L.R. 498; [1961] 2 All E.R. 197
(11) *X.L. Fisheries Ltd. v. Leeds Corp.* [1955] 2 Q.B. 636; [1955] 3 W.L.R. 393; [1955] 2 All E.R. 875

(12) *Matthey v. Curling* [1922] A.C. 180; [1922] All E.R. rep. 1; 127 L.T. 247
(13) *Cricklewood Property and Investment Trust Limited v. Leighton's Investment Trust Ltd.* [1945] A.C. 221 [1945] 1 All E.R. 252; 114 L.J.K.B. 110
(14) *Re Knight and Hubbard's Underlease Hubbard v. Highton* [1923] 1 Ch. 130; 92 L.J. Ch. 130; 128 L.T. 503
(15) *Cairns v. Piper* [1954] 2 Q.B. 210; [1954] 3 W.L.R. 249; [1954] 2 All E.R. 611

Appeal from the judgment of the Resident Magistrate's Court (St. Andrew) for an order recovery of possession against the appellant.

M. Hylton for the appellant.

B. Warren for the respondent.

KERR, P. (Ag.): This is an appeal from a judgment of the Resident Magistrate for the parish of St. Andrew whereby judgment was entered for the Respondent with an order against the Appellant for possession on or before March 31, 1986 or certain demised premises.

The premises known as No. 5 First Street, Newport West are commercial premises and it is agreed by all that they are "controlled premises" and subject to the provisions of the Rent Restriction Act.

These premises were purchased by the Respondent company for $420,000 pursuant to an Agreement entered into with the owners about July 1983 and by registered transfer in September 1983. The purchase was subject to the existing tenancy held by the Appellant Company. Shortly after the signing of the agreement and before transfer Mr. Selwyn Campbell, Managing Director of the Respondent advised Mr. Chuck, his counterpart in the appellant Company, of the transaction and his company's urgent need for the premises in connection with it's business. Mr. Chuck was unmoved by friendly persuasion. He demanded one year's notice. In response to this demand a notice in the following form was served on the Appellant:-

"August 31, 1983
JAMAICA S.S.

Notice To Quit

To: Golden Star Manufacturing Co. Ltd.
5 First Street
Newport West
Kingston 13

Re: 5 First Street, Newport West
Kingston 13
Volume 1016 Folio 54, and Volume 1016 Folio 39

We act for Mrs. and Mrs. Yap Mann Fung from whom you leased the above premises. We also act for Jamaica Frozen Foods Limited, Purchaser of the premises.

On behalf of the Lessors and on their instructions, we hereby give you one year's notice terminating your tenancy of the above premises. Accordingly, you are requested to quit and deliver up the said premises by midnight of August 31, 1984.

This notice enured for the benefit of the Purchaser who will assume the ownership upon completion and will be entitled to exercise all the rights and benefits of ownership at that time.

The reason for the giving of this notice is that the premises have been sold and the Purchaser requires it for its own use for business and trading purposes.

Rattray, Patterson, Rattray
Per:
Attorneys-at-law for and on behalf of Mr. and Mrs. Yap Mann Fung"

During the running period of the notice there were correspondence between Respondent and Appellant in which the Respondent advised that they had located a place which the Appellant could use, adverted attention to advertised premises, and reiterated the urgent need for the premises. In turn the Appellant replied in effect that the suggested places were unsuitable, their efforts to obtain suitable accommodation were unsuccessful and expressed the hope "that you will bear with us and allow us some additional time". In the end the Respondent offered to sell to the appellant the premises at the same purchase price that the Respondent had paid. The offer was declined; the appellant was apparently unwilling to give up the premises, for which the rental of $900 per month was far below what was obtainable in the open market (nor were they willing to buy it as their own).

Patience exhausted the Respondent on August 14, 1985 brought an action for Recovery of Possession in the Resident Magistrate's Court. The action was heard and determined on February 28, 1986.

While the action was pending the premises were destroyed by fire yet the Appellant remained unmoved.

At the hearing the defence rested on submissions challenging the validity of the notice.

In his reasons for judgment the learned Resident Magistrate in dealing with this question stated:-

"The Court found that having entered the agreement for sale the Plaintiff became a beneficial owner of the premises and satisfied the definition of 'Landlord' and was therefore entitled to give the notice to quit.

The Court construed Exhibit 1 as a valid notice to quit which was given on behalf of the Plaintiff and complied with Section 25 of the Rent Restriction Act.

"On the evidence which was adduced the Court considered that less hardship would be caused by making the order than by refusing to make it and that in all the circumstances it was reasonable so to do".

Before this Court the Appellant maintained his stand and the following grounds were argued:-

"The learned Resident Magistrate erred in law in holding that having entered into an agreement for sale the plaintiff/respondent was entitled to give a Notice to Quit, despite the fact that it was not entitled to possession of the premises and the sale had not yet been completed.

The learned trial judge erred in construing the Notice to Quit as having been given on behalf of the plaintiff/respondent".

In support, Mr. Hylton for the appellant argued that for a purchaser to be entitled to give a notice, there must be legal title in him prior to giving of the notice or the purchaser must be then entitled to possession pursuant to the terms of the agreement. A purchaser, under an incomplete agreement for sale is not entitled to give a notice to quit. He referred to passages in Woodfall Landlord and Tenant—24th Edition at p. 964; Halsbury—4th Edition Volume 27 paragraph 193 and the following cases: *Graham v. M'Ilwaine* [1918] 2 I.R. 353; *Thompson v. McCullough* [1947] K.B. 447; [1947] 1 All E.R. 265 and Freeman *v. Hambrook* [1947] V.L.R. 70, as reported in English and Empire Digest [1973] Volume 31 paragraph 2169.

Further, on the authority of the unreported case—R.M. Civil appeal No. 13/82—*McQuick v. L. & V. Realties* (post) a notice given on behalf of a vendor for the purpose of giving possession on sale of the premises is invalid because that reason is not one recognized by the Rent Restriction Act.

In reply Miss Warren submitted that a person can become a landlord by purchase of the demised premised [*Wright v. Walford* [1955] 1 All E.R. 207]; that the definition of landlord in the Rent Restriction Act is in keeping with the decision in *Emberson v. Robinson* (post) and the phrase therein "deriving title" covers the present situation and that the respondent is therefore a landlord within the meaning of the Act; that on a proper construction of the notice it was given on behalf of the respondent. She sought support for this contention in dicta from the *McQuick* case.

Mr. Hylton countered by saying that the term "deriving title" does not cover a person in the process of doing so. The purchaser must be entitled to possession; that the respondent became a landlord in September 1983 when the transfer was effected but that the power to give a notice thereafter on behalf of the respondent was not in question [see *Canadian Perfect Garment Co. v. Bell* [1948] 4 D.L.R. 816].

In *Thompson v. McCullough* (supra) the involved facts are set out in the All England Report headnote thus:

"In Sept., 1942, K., the owner of a freehold dwelling-house, granted a weekly tenancy thereof, unfurnished, to the defendant. In Feb., 1945, the defendant sub-let the house furnished to the plaintiff on a weekly tenancy. On April 1 1946 the plaintiff verbally agreed with K. to purchase the fee simple of the house for 110, and he paid 5 as a deposit. On April 5, 1946, the defendant gave the plaintiff notice to quit expiring on May 4. On Apr. 10 the defendant sent a further notice to the plaintiff to quit the premises on Apr. 20, and on the same day K. executed a conveyance to the plaintiff who paid a further 29 on account of the purchase money. On Apr. 12 the plaintiff gave the defendant notice to quit. The balance of the purchase money was not paid to K. by the plaintiff until June 21."

In his judgment Morton, L.J., said at p. 267:

" . . . it seems to me the natural inference would be that, if the deed was delivered at all on Apr. 10, it was delivered as escrow."

And later at p. 268:

"I turn to the second point in the argument of counsel for the plaintiff that, even if that is so, the delivery relates back so as to make his notice to quit given on Apr. 12 an effective notice. Apart from authority that would seem to me a very startling proposition. It involves this, that a man can effectively give a notice as landlord to a tenant at a time when it is uncertain whether he will ever be the landlord in fact. On Apr. 12 it was uncertain whether the plaintiff would ever pay the balance of the purchase money. He did not pay the balance of the purchase monthly until long after the notice to quit had expired. If relation back is to have such an effect as this, it seems to me to render the position of a tenant intolerable. On Apr. 20, if plaintiff's counsel is right, the defendant would not know whether or not the notice which he had received was a valid notice to quit. Apart from authority, I should have thought that the ultimate payment of the purchase money could not have the effect of validating a notice given at a time when the fee simple was not effectively vested in the giver of the notice."

And still later a p. 268:

"The result is that the notice to quit given by the plaintiff to the defendant was not effective, and the contractual tenancy of the defendant at a rental of 7s. a week is still subsisting".

Freeman v. Hambrook is noted int he (1973) English and Empire Digest Volume 31 - Note 2163 thus:

"Apart from estoppel or some circumstances creating the relationship of landlord and tenant, a notice to quit, given to the lessee of premises, must be given by the person in whom the legal reversion is vested and may not validly be given by an equitable owner".

And *Graham v. Milwaine* in the same publication at Note 2169 thus:

"A purchaser who between the payment of the purchase-money and the execution of the conveyance, serves in his own name a notice to quit on a tenant of the lands purchased, cannot by such notice validly determine the tenancy. In such circumstances the notice to quit, to be valid, should be signed by both the vendor and purchaser or at all events by the purchaser as the expressly authorised agent of the vendor".

The case of *Emberson v. Robinson* [1953] 1 W.L.R. 1129 would seem to be on the other side of the line. The facts are summarised in the headnote thus:

"For the purposes of section 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the court shall, by Sch. I to that Act, give judgment for the recovery of possession of a dwelling-house to which the Rent Restrictions Acts apply without proof of alternative accommodation where the court considers it reasonable so to do, if '(h) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after September, 1939), for occupation as a residence for—(i) himself . . .' In June, 1939, the plaintiff entered into an agreement with the then owners of a newly built dwelling-house to purchase the house. He signed as purchaser, and paid a deposit. Shortly afterwards he was called up for war service, and was not demobilized until 1945, when he completed the purchase, paying the balance of the purchase price. In the interval the vendors had let the premises to the defendant, from whom the plaintiff in the present action claimed possession. The defendant contended that the plaintiff had become landlord by purchase after September 1, 1939, and was therefore not entitled to possession without proof of alternative accommodation".

Somervell, L,J., in his judgment identified the pertinent points in the appeal thus at p. 1131:

"First, was the completion in 1945 a completion of the contract entered into in June, 1939, or should it be regarded as a new contract, and secondly, whether "having regard to the circumstances, the landlord purchased in 1939, at the date of the agreement, or 1945, at the date of completion?".

And answered the question thus:

"Assume a case where a binding contract was signed before September 1, 1939, and everything proceeded with the speed which was contemplated and the completion took place after September 1, 1939. Would the purchaser have become a landlord by purchasing after September 1? I think he would not. The relevant date in applying the exception to these facts would be the date when he signed the binding contract. I derive support for that conclusion from a case in the Irish courts, which does not, of course, bind us, of *Barrett v. Marshall* [1945] K.B. 562; 61 T.L.R. 533; [1946] 1 All E.R. 146]. In that case the same point arose and Dodd, J., held 'that the purchaser became landlord, and the vendor ceased to be landlord, when the contract of sale was signed on May 3, 1920. What remained was merely carrying the contract into complete effect.' The question then is whether the circumstances of this case lead to some different conclusion".

He then examined the circumstances and went on :

"Both those points obviously require consideration, but I have come to the conclusion that the completion which took place in 1945 should be regarded as a completion under the contract of 1939".

And concluded:

"In those circumstances, for the reasons which I have given, I do not think that the plaintiff falls to be regarded as a landlord who became landlord by purchase after September 1, 1939".

Wright v. Walford (supra) dealt with facts in the converse with interpretation of the same provisions and the reasoning proceeded along similar lines.

In an endeavour to resolve the apparent conflict in these cases, Carberry, J.A., in his judgment, the draft of which I had the privilege of reading, with scholarly diligence, has painstakingly extracted the ratio decidendi in a number of cases. Because of the line of reasoning I have taken and my interpretation of the relevant provisions of the Rent Restriction Act it is not essential to my decision to resolve the conflict; nevertheless, to entirely ignore the decision and dicta in these cases would leave important incidental questions unanswered.

The following provisions of the Act are directly relevant to the questions raised on appeal:

Landlord as defined by Section 2:

"'Landlord' includes any person deriving title under the original landlord and any person who is, or would but for the provisions of this Act be, entitled to the possession of the premises, and shall, for the purpose of the enforcement of any provisions of this Act whereby any liability is imposed on a landlord, be construed also to include any agent having charge, control or management of the premises on behalf of the landlord".

Provisions as to Notice—Section 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 expiration of the lease".

Section 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".

"Restrictions on Rights to Possession - Section 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) .....

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

(i) .....

(ii) Use by him for business, trade or professional purposes."

Now I am aware that in the definition of landlord, the word "includes" extends the ordinary meaning of the word and that the terms and tenor of the definition clearly have in contemplation successor landlords. Nevertheless, I decline to interpret the words "deriving title under the original landlord" to embrace any person who has entered into an executory agreement for the purchase of demised premises and has paid in ernest a comparatively small forfeitable deposit and may or may not go any further to completion. Accordingly, I would interpret the phrase "deriving title under the original landlord" as a person who at a particular time is a landlord by derivative title. Accordingly, I hold that at the time the notice was given competence to give a notice resided in the vendor and I accept as a correct statement of the law the note on *McMillen v. Chapman & S.S. Kresge Co.* [1953] 2 D.L.R. 671 as set out in the English and Empire Digest Note 2168:

> "Where the power to give a notice to quit is personal to a landlord, until he has done more than enter into an agreement to sell the demised property "he continues to have the power & right to give such notice".

In the instant case on the face of the notice that power was exercised by the original landlord Mr. and Mrs. Yap Mann Fung through their agent. The notice expressly so states.

Now the fulcrum of Mr. Hylton's argument as founded on *Thompson v. McCullough* was to the effect that because the respondent was incompetent to give notice it was equally unable to take the benefit of the notice.

Neither in authority nor from a practical point of view is it tenable as a general proposition that a person who was originally incompetent to do an act or enter into a transaction is necessarily thereby precluded from enjoying the benefit of that transaction if entered into by a competent person on his behalf. Indeed the whole doctrine of trust rests upon the competent trustee entering into transaction for the beneficiary who more often than not has neither the authority, capacity nor competence to so engage. I am of the view that on entering into an agreement for sale the prospective purchaser acquires a beneficial interest but until completion the vendor landlord remains competent to give a notice which eventually may redound to the purchaser's credit. To put it another way, on general principles the landlord deriving title from a predecessor succeeds to the benefits and burdens of his predecessor in title and this is not inconsistent with the definition of landlord in the Act. Mr. Hylton's argument followed to its logical conclusion would mean that between the execution of the agreement for sale and the completion of the sale, there would be no one competent to give a notice effective to terminate the tenancy an sufficient in reason to obtain an order for recovery. This incongruous and inconvenient interregnum would cause unnecessary hardships, particularly on purchasers of commercial premises for their own use, having regard to the generous notice period and the provision for counter-notice as provided in Section 26 of the Act. Mr.. Hylton's argument would render virtually useless the opinion expressed by Campbell, J.A., in delivering the judgment of the Court in *McQuick v. L. & V. Realties*—R. M. Appeal No. 13/82 delivered April 23, 1982. In that case in the notice given by the vendor landlord the reason was stated as "House for sale". The Court held that this was not a reason within the contemplation of Section 25 and continued:

> "In looking through the record we anxiously considered whether the order for possession could be supported on some basis other than that propounded by the learned Resident Magistrate. We accordingly considered whether L. & V. Realties Limited in effect was bringing the action on behalf of the purchaser. The Notice to Quit was served, on the 3rd of June, 1981, the evidence which was before the learned Resident Magistrate, was that the contract of sale was executed in August, 1981, therefore at the time when the Notice to Quit was served it could only have been served on behalf of the prospective vendor because at that time there was no purchaser who could be considered as landlord.

> Had the agent, on the evidence, been able to establish that the notice had been served on behalf of the purchaser albeit at the time only a beneficial owner, the position would have been different because such a purchaser, even though he is not at the time vested with the legal estate, could properly on his own behalf or though an agent, bring an action for recovery of possession because he is, in our view, comprehended in the definition of "landlord" as he is a person who but for the provision of the Act would be entitled to possession on execution by him of the contract of sale. In this case, however, it is clear that the "plaint was not brought on behalf of any such beneficial owner as a purchaser".

This was clearly an obiter observation and it was not considered as to whether or not it was necessary to show that the purchaser had duly performed his obligations under the agreement when the notice was given. What is clear from the statement is that the Court held that the purchaser had a sufficient beneficial interest to take the benefit of the notice.

In holding that the successor landlord deriving title from a predecessor takes both benefits and burdens I am comforted by the reasoning and decision in *A. D. Wimbush and Son, Ltd. v. Franmills Properties, Ltd. and Others* [1961] 2 All E.R. 197, a case to which my attention was adverted by Carberry, J. A. The facts are as set out in the headnote:

> "F., the landlord of business premises, served a notice dated July 1, 1958, under s. 25 of the Landlord and Tenant Act, 1954, terminating the tenants' tenancy on June 30, 1959, this notice being in the prescribed form [Form 7 prescribed by the Landlord and Tenant (Notices) Regulations, 1957] and stating that the landlords would oppose an application for a new tenancy, the ground of opposition being that provided by s. 30 (1) (g), viz., that on the termination of the current tenancy 'the landlord intends to occupy the holding for the purposes . . . of a business to be carried on by [him] therein'. The tenants forthwith notified F. that they were not willing to give up possession, and in October, 1958, they applied to the court for a new tenancy under s. 24 (1). On June 24, 1959, the application not having yet been determined, M. became the landlord. It was not in dispute that M. had the intention required by s. 30 (1) (g), but the question arose whether M. was entitled to rely on the notice and on the ground of opposition stated therein, since, though M. was the landlord at the hearing, he was not the landlord at the date when the notice was given".

It was held that M. was entitled to rely on the notice. In the course of his judgment Plowman, J., at p. 202 referred with evident approval to an interlocutory observation of Parker, L.J., in *X.L. Fisheries Ltd. v. Leeds Corp.* [1955] 2 All E.R. 875 and noted that this observation had the approval of the Court of Appeal in *Piper v. Muggleton* [1956] 2 All E.R. at p. 253:

> "The incoming 'landlord' must, we think, be bound by the acts or omissions of his predecessor while answering that description (see the remark of Parker, L.J., in *X.L. Fisheries, Ltd. v. Leeds Corp.* (1955) 2 Q.B. at p. 640, and that may well preclude any effective opposition on his part, save as regards the terms of the new tenancy.'"

If it were necessary so to decide, I would be prepared to hold that the notice in the instant case in its present form conforms with the advice advocated in *Graham v. M'Ilwaine* (ante) in that it was given and signed by an agent acting for both parties.

There remains the question whether the reason therein is within the contemplation of Section 25 of the Act.

Now the effective date of a notice is the date of expiration because it is on that date that the cause of action arises. By that time, the plaintiff respondent in the instant case was the landlord within the meaning of the Act and the person competent to bring the action. Implicit in both the McQuick and the Wimbush decision is that the reasons contemplated in the Act

must be personal to the landlord and must exist in him at the time that the matter comes up before the Court.

Both these requirements co-exists in the instant case. There has been no challenge to the complaint that the respondent needed the premises for its own use or to the finding of the learned Resident Magistrate that in the circumstances it was reasonable to make the order.

For these reasons I would dismiss the appeal, affirm the judgment and order delivery of possession one month from the date hereof—Costs of appeal to be the respondent at $50.

CARBERRY, J.A.: This case raises an interesting point on the interaction between the common law relating to landlord and tenant and the statute law, viz The Rent Restriction Act.

The defendant/appellant Golden Star Manufacturing Co. Ltd., were, and claim to be so still, the tenants of a commercial building situated at 5 First Street, Newport West, Kingston 13, in the parish of St. Andrew. To avoid confusion I will hereinafter refer to them as the tenants. they held under a tenancy (it may have been a lease: we have never seen it) granted by Mr. and Mrs. Yap Mann Fung. They appear to have been monthly tenants at a rent of $900.00 per month. The rent must have been fixed some years ago, for the evidence, which was unchallenged, indicated that the normal commercial rental at todays rates for such a building in that area would have been in the region of $3,000.00 per month.

In July of 1983, at an unspecified date, the plaintiff/respondent, Frozen Foods Ltd., entered into an agreement to buy the premises from Mr. and Mrs. Yap Mann Fung for the sum of $420,000.00. The sale was made subject to the existing tenancy. The premises were subject to the Registration of Titles Act, there being two titles registered at Volume 1016 Folio 54 and Volume 1016 Folio 39 of the Register Book of Titles. The agreement provided for a deposit of 10% of the purchase price, and completion was to take place within 30 days of the signing of the agreement, when the balance of the purchase price was to be paid and the necessary transfer to be lodged for registration.

These payments were made and the transfers lodged for registration—and the evidence shows that they were registered on the 26th September, 1983. On that date therefore the plaintiffs became the owners in law of the premises, and entitled in law to the reversion of the lease; from that date on, if not before, (for that is in dispute) they became landlord of the tenants.

The evidence shows that Jamaica Frozen Foods are a company wholly owned by the Government of Jamaica. Their premises were next door to the premises that they had bought, and they urgently needed it for expansion, as they were then being compelled to pay some $3,600.00 per month for premises a half a mile away in which to store some of their products. Acquisition of the new premises would have saved this rental, brought their operations closer together and reduced the risk of pilferage and the transportation costs involved.

The evidence shows that on the making of their agreement in July to purchase these premises, their managing director Mr. Selwyn Campbell approached the managing director of the tenants, Mr. Percival Chuck, with a view to getting possession of the building, at the earliest possible time. The tenants refused to leave. To summarize, Frozen Foods over the period attempted to find alternative accommodation for their tenants, and advised of several premises to which the could move. The rentals of the alternatives were however the normal commercial rents in that area, averaging some $3,000.00 per month, and as the tenants were only paying $900.00 per month they declined to move. In desperation Frozen Foods even offered to sell the premises to the tenants for the same $420,000.00 that they had paid. That price was considered too expensive by the tenants who refused the offer,

and indicated that in their view under the Rent Restriction Act they were entitled to at least a year's notice. This seems to have been a reference to section 26 of the Rent Restriction Act (termination of a tenancy of public and commercial buildings). It will be considered at greater length below.

On the 31st August, 1983, the tenants were served with a year's notice to quit the premises by midnight of the 31st August, 1984. The notice will be set out in full below. The tenants did not leave. In the meantime they duly paid their rent of $900.00 per month to the plaintiffs. Eventually the premises burnt down on the 7th November, 1985. Since that date the tenants have paid no rent, but apparently have continued to be in possession of the premises. I should have thought that the destruction of the building would not necessarily have relieved them of the duty to pay rent, but the point has not been argued and the question of whether there can be frustration of a lease continues, so far as I know, to be a somewhat controversial one. See Cheshire & Fifoot: The Law of Contract; 9th Edition 550 et. seq. citing *Matthey v. Curling* (1922) 2 A.C. 180 and *Cricklewood Property & Investment Trust Ltd. v. Leighton's investment Trust Ltd.* (1945) A.C. 221.

Before considering the facts and the law in greater detail, it may be useful to make some preliminary observations on the relationship between the law of landlord and tenant and our Rent Restriction Act. The Act assumes the existence and continuance of the normal common law (and any other statutes applicable) relating to landlord and tenant. The relationship is one that is created in the first place by contract, and that contract (or lease, if there is one) forms the inception of the relationship and governs it, subject to the controls and alterations introduced by the Rent Restriction Act. Thus the common law rules apply to notices given purporting to determine the contractual tenancy, though these may be varied by the parties in their contract. Subject to such special terms, the notice given to determine the contractual tenancy must be of the appropriate length, end on the appropriate day, be given to the appropriate person by the appropriate person. In short, before turning to the Rent Restriction Act, when it is sought to terminate an existing tenancy, the person seeking to terminate it must show that the contractual tenancy, the basis of the original relationship between the parties, has been ended by an effective legal method. (See Cheshire's Modern Law of Real Property—11 Edition p. 451-453).

Now the Rent Restriction Act, and it has by now a fairly long history in Jamaica, was introduced in 1944 to protect tenants against landlords. Speaking generally it has done so in two ways: (a) by controlling the quantum of rent which could be charged, and (b) by protecting the tenants occupation of the rented premises. (a) has been achieved by the establishment of Rent boards empowered to fix the rents that may be required of a tenant, while (b) has been achieved by limiting the power of Courts to make orders requiring the tenant to give up possession of the premises. Landlords may recover possession only if they show (i) that they would have been so entitled at law, by the termination of the contractual tenancy by an appropriate legal method, and in addition (ii) they must satisfy the additional requirements laid down in the Act.

The provisions of both (a) and (b) above are protected by the sanctions of the criminal law: it is an offence to demand and receive more than the controlled rent, and it is an offence to take the law into your own hands and summarily eject a tenant by force, or fraud or the like.

The protection given by (b) has had the effect of creating a new type of tenancy, or tenant: the statutory tenency or statutory tenant, which describes the situation in which the contractual tenancy has been duly determined, but the tenant, protected by the provision in (b) is allowed to continue to hold over on such terms and conditions of the original tenancy as are consistent with the provisions of the Act, particularly those fixed under (a): see section 28 of the Act.

It is however necessary to enquire what are the tenancies that are so protected by the Rent Restriction Act. There is no doubt that originally these acts were designed to protect tenancies of dwelling houses. However, almost from the inception in Jamaica they were also extended to cover public and commercial premises. Coverage of commercial buildings has always been controversial, as evidenced by the many amendments made from time to time. "Public or commercial building" is defined in section 2 of the Act, and the premises with which we are concerned appear to fall within that category. The premises are therefore prima facie "controlled premises." See section 3 of the Act. Under section 3, as amended by Act 2 of 1983, public or commercial buildings can be exempted from the Act if certain conditions are met. It was not however argued that these premises had been so exempted.

Section 25 of the Act deals generally with restrictions of the landlords right to possession. The portions that may be applicable to this case are set out below:

"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) .....

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

(iii) a combination of the purposes in sub-paragraphs (I) and (ii).

(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)

There are a great many other contingencies indicated as providing adequate reasons on which the courts may act in making a possession or ejectment order. Section 25 contains two further provisions that may be relevant. They read:

"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) (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)

Section 25 contains a great many other provisions relating to the making of such orders, including adjournments and provisions for the compensation of tenants in certain circumstances.

Section 26, "*Termination of tenancy of Public and commercial buildings*" was a comparatively new section introduced by Law 41/1960. The portions relevant to this case read as follows:

"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 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."

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. Subject to what is said below, in employing section 26 landlord does not, (unless he wished to do so) have to specify in the notice any of the reasons or contingencies listed in section 25.

This was originally made abundantly clear by a subsection of which was contained in section 26 up to 1979. It read:

"26(9) At the expiration of a notice by a landlord in accordance with the provisions of this section this Act shall cease to apply to the premises in respect of which the notice was given unless the tenant has given notice to the landlord and applied to the court in accordance with the provisions of this section."

If the tenancy in question is one for a fixed term of years, the landlord can not give the notice refereed to earlier than twelve months before the expiration of the lease.

The effect of section 26, originally, was that by giving the statutory notice of one year, the tenancy or a public or commercial building could be "de-controlled" or taken outside of all the provisions set out in the Act in section 25. No doubt the landlord would still have to prove that on ordinary common law principles he had validly ended the *contractual* tenancy, for all that the section had done was to render the Rent Restriction Act no longer applicable to the relationship, but the special provisions of the original contract or lease or tenancy would continue to apply.

For the sake of completeness it should be noted that subsections (3) to (8) of section 26 provided that on being served with a landlord's notice under section 26 (1) - (2), the tenant may serve a counter notice, not later than nine months after getting the landlord's notice, indicating that he proposes to hold over and will ask the court to substitute a new date for the date of termination specified in the landlord's notice. On such an application the court may fix a substituted date of termination not more than twelve months later than the original date of termination. That date when fixed will have the effect of a possession order allowing the landlord to recover possession on a substituted date *without further recourse to the court*. In making such an extension of the tenancy the court is required to be satisfied that it is reasonable to do so, and to consider the hardship incurred in making or refusing the order.

Having provided in section 26 for a method of both ending a "controlled" public or commercial tenancy by the giving of the specified length of notice, and de-controlling the premises thereafter, the legislature in 1979, by Act 36 of 1979 reversed its previous policy relating to public or commercial buildings to a considerable extent. The question is how much?

Subsection 9 of section 26 (set out above) was deleted and a new section 31 was inserted. The relevant portions of the new section 31, which remains in the law as of this date, (but which was further amended by Act 2 of 1983) reads at present thus:

"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.

(2) Where the reason given in any notice referred to in subsection (1) is that some rent lawfully due from the tenant has not been paid, the notice shall, if the rent is paid before the date of expiry of the notice, cease to have effect on the date of payment.

(3) Where any notice referred to in subsection (1), other than a notice under section 26 (1), is given after a tenant has, under section 19A of this Act or under section 30 (now omitted) of the Rent Restriction (Amendment) Act 1983 (which relates to exclusion of certain commercial buildings from this Act), applied to a Board to review a decision of the Assessment Officer the period of the notice shall, notwithstanding anything to the contrary in the notice, be deemed to be not less than one month and to commence -

(a) when the Board disposes of the review; or

(b) four months after the date of service of the notice whichever is earlier.

(4) Subject to subsection (2), where, in relation to any controlled premises, the landlord or tenant has given notice to quit, or the landlord has commenced proceedings for the recovery of possession of the premises or for the ejectment of the tenant therefrom, the acceptance by the landlord of payment of rent for any period during which the tenant remains in possession of the premises after the giving of the notice or the commencement of the proceedings shall not prejudice the notice or proceedings."

It should be explained that section 3 which governed the application of the Act, and provided which premises should be regarded as controlled premises, and which premises should be regarded as exempt, had been amended by the 1979 Act as regards 3 (1) (e) which exempted certain public and commercial buildings. All others were however to be controlled premises. In short public and commercial buildings were re-controlled in large measure.

Section 3 (1) (e) was again amended by Act 2 of 1983 and now provides for the exemption of certain public and commercial buildings in respect of which the landlord has applied for and received a certificate of exemption from an Assessment Officer (an official appointed to and attached to the Rent Board under section 9 of the Act).

The developments above are difficult to follow. The difficulty is compounded by two factors: (a) The Government printer has apparently ceased to publish the annual volumes of the Laws of Jamaica, and (b) the present loose leaf system of the Laws of Jamaica operates on the principle that when an amendment is made to the law, the original law itself is removed and the law as amended is inserted. This makes it virtually impossible to follow the development and changes made.

The original law before the amendment is no longer available. The loose leaf system as operated has provided the means of knowing how the law now stands, but at the expense of tracing how it has developed.

Dealing then with the law as it now stands, and on the basis that no further change has taken place since the amendments made in 1983, the situation is that public and commercial buildings generally are subject the controls in the Rent Restriction Act.

Certain public and commercial buildings however may become exempt by the Landlord applying for an exemption certificate under section 3 (1) (e) of the Act.

Where this has not been done, (and there is no evidence that this was done in the instant case) the premises remain subject to the Act.

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. The effect of a notice under section 26 used to be that it ended the tenancy and also, under the old subsection 9, released the premises entirely from the Rent Control Act. As the Act now stands however, the effect of a section 26 notice will be to terminate the particular tenancy of a public or commercial building, but to leave it still subject to the Act, so that any new tenant would for example be entitled to the protection of the Act.

Further, it is of course still open for a landlord of commercial premises to proceed under section 25 simpliciter, for any of the reasons set out there.

Comparing our Rent Act, as it stands at present, with comparable legislation in England, our Rent Act does not contain the provisions of the English Statutes which in effect prevent a landlord from acquiring premises in which there is a sitting tenant and then turning the tenant out by making an application that he requires the premises for his own use and occupation. The English Statutes contain special provisions relating to "*landlords by purchase*" the effect of which is to provide that a stipulated period of time must elapse before a person buying premises with a sitting tenant can apply to turn him out on the ground of wanting the premises for his own use or occupation. Further, the Jamaica Statute provides only for a year's extension in the case of commercial premises.

In the case before us the attorneys acting for both the vendor and the purchaser (Frozen Foods Ltd.) on the 31st August, 1983 served the following notice on the Tenants. It was exhibit 1 in the Trial before the Resident Magistrate and reads thus:

"August 31, 1983
JAMAICA S.S.

Notice To Quit

To: Golden Star Manufacturing Co. Ltd.
5 First Street
Newport West
Kingston 13

Re: 5 First Street, Newport West
Kingston 13
Volume 1016 Folio 54, and
Volume 1016 folio 39

We act for Mr. and Mrs. Yap Mann Fung from whom you leased the above premises. We also act for Jamaica Frozen Foods Limited, Purchaser of the premises.

On behalf of the Lessors and on their instructions, we hereby give you one year's notice terminating your tenancy of the above premises. Accordingly, you are requested to quit and deliver up the said premises by midnight of August 31, 1984.

This notice enured for the benefit of the Purchaser who will assume the ownership upon completion and will be entitled to exercise all rights and benefits of ownership at that time.

"The reason for the giving of this notice is that the premises have been sold and the Purchaser requires it for its own business and trading purposes.

Rattray, Patterson, Rattray

PER:

Attorneys-at-Law for and on behalf
of Mr. and Mrs. Yap Mann Fung"

It is of interest to record the tenants' response to the arrival of the termination date of the one year notice given to them. It is contained in a letter dated 7th August, 1984, which reads thus:

Golden Star Manufacturing Company Ltd.
Makers of Quality Rubber Products
5 First Street, Newport West, Kingston 13, Jamaica

Directors	P.O Box 186, Kingston 11
P.N. Chuck	Jamaica W.I.
C.E. Chuck	Cable Address "Goldstar"
	Telephone: 92-39146

August 7, 1984

Jamaica Frozen Foods Ltd.
4 Fourth Street
Newport West
Kingston 13

Attention: Mr. Selvyn Campbell

Dear Mr. Campbell

We received your notice to quit premises at 5 First Street as of August 31, 1984. We have been trying to either rent or purchase a new location. We have also checked out the various places that you referred to us but found none of them acceptable. One place had no roof and the rental on the others was astronomical.

We have even tried to sell our operations to another manufacturer who already has space to relocate this business and just about concluded our agreement but the Credit restrictions prevented the prospective purchaser from getting the necessary financing.

Since that time we have actually made a deposit on some property but we are still waiting for our Bank to approve the additional financing which we need to put up adenyl construction and to finance the exorbitant relocation expenses before we can actually move onto the property.

In view of this we hope that you will bear with us and allow us some additional time.

Unfortunately, during this past year it has been practically impossible to find suitable factory space to lease as we have been experiencing. It is even more difficult to procure a place to relocate our type of operation because of the numerous heavy industrial machinery and equipment for which solid foundation and 900 amps of 415/220 vol 3 phase electricity is required.

We are making every effort to finalize our plans for moving and will do so as soon as it is possible. In the meantime we will appreciate your patience with us.

Yours faithfully,
Percival N. Chuck, Managing Director"

It will be seen that the tenants made no attempt to exercise any of the statutory remedies given to them by section 26 (3) to (8) of the Rent Restriction Act.

Eventually, on the 14th August, 1985, a year after the tenants request for further time and nearly two years after the giving of the original one year's notice on 31st August, 1983, Frozen Foods Ltd filed the plaint, the subject of this appeal. That plaint was heard before the Resident Magistrate for the parish of St. Andrew; the only evidence presented was given on behalf of the Plaintiffs. The tenants elected to offer no evidence, but to stand on their submissions that the notice to quit of the 31st August, 1983 was invalid. Their argument is set out below in greater detail. It was not accepted by the Resident Magistrate who on the 28th February, 1986, ordered that the tenants deliver up possession on or before the 31st March, 1986. The Tenants appeal from that order, and in the interim secured a stay of execution pending the determination of the appeal.

Before us the tenants' counsel, Mr. Hylton, repeated the argument advanced at the trial. It is attractive but unsound. It proceeds thus: at the time that the notice to quit dated 31st August, 1983 was served on the tenants neither the vendor, the original landlords Mr. and Mrs. Yapp Mann Fung nor their purchasers, Frozen Foods Ltd. were competent to give this notice. As to the former they were not in a position to say that they required the premises for their own use—they were selling it. As to the latter they were not competent either to give such a notice, for though they were buying for their own use, they had not yet become owners of the legal estate. Mr. Hylton pointed out that at common law the landlord competent to give a notice to quit must be the person legally entitled to the immediate reversion of and in the demised premises. He cited for this proposition the following passage from Woodfall, Landlord & Tenant, 24th Edn. page 694:

> "Any person for the time being legally entitled to immediate reversion of and in the demised premises, e.g. as assignee, devisee, executor or administrator of the landlord may give notice to quit . . . Any subsequent owner deriving title through or under the party giving the notice may avail himself of it. But an assignee of a lease with only an equitable title cannot exercise the right to determine the tenancy. Nor can a purchaser who has entered into a contract to purchase land subject to a tenancy before he has completed the purchase; he may, however, after completion be estopped by his conduct from setting up the invalidity of the notice to quit."

He also cited from the 4th Edition of Halsbury, Volume 27: Landlord and Tenant, page 147, para. 193: Who may give or receive notice.

> "A notice to quit may be given by either the landlord or the tenant. For this purpose the landlord is the person in whom the legal reversion is vested, or the person whom the tenant is bound to recognize as his landlord by estoppel."

The passage has the following footnote (2):

> " . . . a beneficiary . . . or a purchase before completion (*Thompson v. McCullough* (1947) K.B. 447; (1947) 1 All E.R. 265 C.A. *Graham v. M'LLwane* (1918) 2 I.R. 353 cannot unless he is acting for the person having the legal estate (Re Knight and Hubbards underlease *Hubbard v. Highton* (1923) 1 Ch. 130)) give a valid notice to quit . . ."

The rule at common law appears than to be that only the person immediately entitled to the legal reversion may give a valid notice to quit.

Proceeding from that point on, Mr. Hylton argues that until the new owners were registered in the register book of titles on the 26th September, 1983, they were not entitled to give the notice, and the vendors could not give it either because they were not in a position to say as required by section 31 that they wanted the premises for their use and occupation under section 25 (1) (e). This assumes that section 31 applies and that a section 26 notice must be one that sets out a reason that complies with section 25. Mr. Hylton

further relies on a recent decision of this court *Beverly McQuick v. L & v. Realties* (Resident Magistrate's Civil Appeal 13/1982 delivered on 23rd April, 1982), where it was held, in a case brought under section 25 of the Act, that not only must there be a valid notice to quit, determining the contractual tenancy, but there must be contained in it, or appear otherwise a reason that falls within section 25 as being a valid reason empowering the court to make a possession order. As Campbell, J.A., puts it:

> "However, even before the tribunal can consider whether the making of the order would b just and reasonable, it has to consider whether the order is being sought in one of the circumstances which have been specifically prescribed by the legislature as circumstances which would entitle it to make the order."

This was a reference to section 25 and the conditions outlined in it and it was a case where the premises (a dwelling house) was to be sold, and the party giving the notice, the real estate agent acting for the vendor was in no position, nor was the vendor, to say that the premises were required for the vendor's use and occupation. They were not: it was the purchaser who would require the premises. However, at the time that the notice was served no purchaser had materialized. The vendor and his agents were at that stage trying to get themselves into a position in which they could give vacant possession to any purchaser who did materialize. The notice to quit was given 3rd June, 1981 and not until August 1981 was the contract of sale executed. Campbell, J.A., added:

> "Had the agent, on the evidence, been able to establish that the notice had been served on behalf of the purchaser, albeit at the time only a beneficial owner, the position would have been different because such a purchaser, even though he is not at the time vested with the legal estate, could properly on his own behalf or though an agent, bring an action for recovery of possession because he is, in our view, comprehended in the definition of "landlord" as he is a person who but for the provision of the act would be entitled to possession on execution by him of the contract of sale. In this case, however, it is clear that the plaint was not brought on behalf of any such beneficial owner as a purchaser."

In *McQuick's* case then there was no purchaser on the scene: it was pure and simple a case in which a vendor was seeking to get the tenant out so that he might be better able to sell his premises with vacant possession to whomsoever he might be able to persuade to buy it. He would obviously get a better price if he could give vacant possession: but as was pointed out, an intention to sell the premises is not one of the recognized grounds under section 25 on which an order for possession can be made against a tenant under the Act. It was also clear that what was involved was a dwelling house, not a commercial building, and the application was made under section 25.

It is not clear whether the court in that case was refereed to the common law rule that only a person entitled to the immediate legal reversion could give a valid notice. It was not necessary in that case, for what was in issue was whether any of the specific requirements under section 25 had been satisfied, and it was clear that they had not. In the instant case the respondent's counsel, Miss Warren, for her part relied on the obiter dicta in the Mcquick case, to the effect that were there was a beneficial owner, that is a purchaser who had executed a binding contract for sale, such a person could be described as a "Landlord" for the purposes of the Act. The definition of "landlord" for the purposes of the Act given under section 2 of the Act reads as follows.

> "Landlord includes any person deriving title under the original landlord and any person who is , or would but for the provisions of this Act be, entitled to the possession of the premises, and shall, for the purpose of the enforcement of any provisions of this Act whereby any liability is imposed on a landlord, be construed also to include any agent having charge, control or management of the premises on behalf of the landlord;"

Miss Warren argues that the definition significantly speaks of "any person deriving title," and that this includes a person who is in the course of deriving title, i.e. one who has signed a binding contract for sale, even though the sale has not yet been consummated by his paying the balance of the purchase price, and having the title conveyed to him.

Mr. Hylton answers by asking "what if the sale never went through? but went off e.g. because the purchaser could not complete? Can a tenant have two landlord?

There is considerable force in this reply, It will be noted that in the McQuick case, obiter, it was suggested that a purchaser who had completed the sale, and was a beneficial though not legal owner, might be able to claim to be a person deriving title. It was not suggested there that the claim might be made when only the deposit had been paid and a binding contract signed.

While conceding that a person who has become in equity the beneficial owner of the premises, having paid the entire purchase price, and perhaps having had the transfer of title lodged to be registered, may possibly be regarded under the Act as being in process of "deriving" title under the original landlord, I should prefer to express no final opinion on that proposition. It is possible that even after the entirety of the purchase money has been paid and a transfer lodged, some defect in the vendor's title might arise, e.g. fraud against the true owner, and the sale might still fail to go through to ultimate completion. In any event the common law rule would still remain to be dealt with. A tenant can not be left in a position in which he has to deal with a person who appears to be becoming his landlord, only to find that as the sale fails at the last moment his prospective landlord never becomes such because he never acquired the legal title to the reversion.

Miss Warren supported her proposition by citing a number of cases, viz: *Emberson v. Robinson* (1953) 1 W.L.R. 1129; (1953) 2 All E.R. 755; *Cairns v. Piper* (1954) 2 Q.B. 210; (1954) 2 All E.R. 611; *Wright v. Walford* (1955) 1 All E.R. 207. All are U.K. Court of Appeal decisions, and they appear in 4th Edition Halsbury, Vol 27 Landlord and Tenant para. 675: *Landlord by Purchase*. The paragraph appears in that section dealing with protected and statutory tenancies. Unfortunately these cases are not at all relevant to our present problem. They deal with a situation in which under the English Rent Acts the landlord is restricted from claiming possession of the premises on the ground that he requires them for his own use and occupation, unless he has bought them at a specified period before he makes the claim, or before the tenancy in question arose.

The objective of those sections was to prevent or restrict a landlord purchasing premises with a sitting tenant and then making a claim for possession on the ground that he wanted them for his own use and occupation. In that situation it was necessary to decide whether or not he had become a landlord by purchase in the "closed season" so to speak. In that situation the relevant date was the date of purchase, not the date when the landlord became landlord, and "purchase" was used in the nontechnical sense as meaning the date of a binding contract to purchase rather than the date of completion. As has been pointed out we have no equivalent provisions in our Rent Restriction Act, and in any event what was being discussed there was not who did the purchaser become landlord, but was his "purchase" made within the period in which the law protected the tenant.

There is however a very clear answer to Mr. Hylton's argument. in terms of the Act itself. Section 25 which prescribes the circumstances in which the courts may make an order for possession against the tenant is dealing with "controlled" premises generally.

It is perfectly possible for "commercial" praises to be "controlled" premises, see section 3 (2). The only public or "commercial" premises exempted from the Act are those now covered by the proviso to section 3 (1) - particularly (e).

It is possible for an application to be made for possession of controlled commercial premises under section 25 of the Act, and this is recognized in the sections quoted earlier from section 25, for example sections 25 (1) (e), (h), and (k).

But what Mr. Hylton's argument over-looks is that section 25 as has been pointed out, provides a completely different and alternative approach in respect of Public and Commercial premises and in short provides a method for terminating existing tenancies in public or commercial premises by giving the tenant a year's notice to quit. If a section 26 notice had to contain one of the reasons required under section 25 to be effective, section 26 would be completely meaningless and its retention in the Act would seem incomprehensible. The tenant has for his part been given a right to give counter notice and to apply to the court for an extension in accordance with the provisions of the section.

This tenant did not do so; and so far from seeking to exercise those rights under the section, he was content to beg for more time, unspecified, see his letter of 7th August, 1984.

The present plaint was brought under the provisions of section 26, and the restrictions set out in section 25 have no application. The only remaining valid line of defence that this tenant has is to fall back on the contractual or common law position. His lease, if there was one, was never in evidence: we only know that he was the sitting tenant of the previous owner and landlord, at a monthly tenancy or monthly rent of $900.00.

Accepting the common-law rule that only the person immediately entitled to the legal reversion can give a tenant a valid notice, the notice given here purported to do exactly that. It expressly states that the notice is given "on behalf of the lessors and on their instructions." The outgoing landlord was on any view of the matter still the landlord: his title to the reversion had not yet been divested, and he was competent therefore to give a notice under section 26. Further, as this was a notice under section 26 and not section 25, there was no necessity to comply with the section 25 requirements despite section 31. In any event the notice gave a "reason" i.e. that the purchaser needs the premises for his own occupation.

Mr. Hylton's argument that once a landlord enters into negotiations to sell his premises a situation arises in which neither he nor the purchaser to be can deal with the tenant defies common sense. There is no interregnum of this sort. To use the phrase "the king is dead, long live the king!" The landlord does not cease to be landlord until he has parted with the immediate legal right to the reversion. As the earlier citations from Woodfall and Halsbury show, this can happen, but in the case of a proposed sale it will not happen until the title to the demised or rented premises has been transferred, or the right to possession of the reversion lost.

One may agree that a tenant can not have two competing landlords, (apart from co-ownership of the premises), but it is at least equally clear that he must have one.

The notice of 31st August, 1983 was on any view an effective notice and under section 26 of the Act, the tenancy was determined and accordingly the Resident Magistrate was completely justified in making the order for possession that he made. It was also reasonable to do so.

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. I agree with the order proposed by the President, (Ag.) that the tenant must deliver up possession within one month of the date hereof.

WRIGHT, J.A.: 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 noting that I can usefully add.

MUTUAL HOUSING SERVICES LTD. *v.* MARLEY AND PLANT LIMITED

[SUPREME COURT (Wolfe, J.) November 7, 8; December 12 and 13 1985; January 9, 10 and November 24, 1986]

Arbitration— Award—Dispute arising under contract—Submitted to arbitrator—Arbitrator handed down award outside of period allowed to do so under statute—Whether functus officio arbitration—Award—Arbitrator indicating that he made "No Award" on certain claims—Whether misconduct—Arbitration—Award—Power of court to set aside award—Arbitration Act. ss. 4(c), 12(2), 10, 13(2).

Mutual Housing Services Ltd entered into a contract with Marley and Plant Limited. Problems developed and the matter was brought before an arbitrator in April 1985. Four months later the arbitrator handed down his award without expressly extending the time allowed for making the award by virtue of the Arbitration Act. In relation to certain claims and counterclaims the arbitrator indicated that he made "no award". He found for Marley and Plant Limited and ordered that Mutual Housing pay interest of 15% on the award made. Mutual Housing applied for an order to set aside the award on the basis that it was bad on the face of it, that the arbitrator misconducted himself and that at the time of making the award the arbitrator was functus officio. Marley and Plant Limited then applied for an order to strike out Mutual's application on the basis, inter alia, that it was without merit and was an abuse of the process of the court.

Held: (i) s. 12(2) of the Arbitration Act empowers the court to set aside the award of an arbitrator if it is bad on the face of it, if there is misconduct of the part of the arbitrator, or if the arbitrator was functus officio. These are the allegations set out by Mutual Housing. If they are sustainable then the applicant has an arguable case and it would therefore not be in the interest of justice to strike out the application as Marley and Plant Ltd. wishes. The motion to strike out the application is therefore refused.

(ii) s. 4(c) of the Arbitration Act stipulates that arbitrators should make their awards within 3 months of the commencement of proceedings. S. 10 of the said Act allows the court to enlarge the time in making an award even in cases like the present, where the award has already been made after the period fixed for making it has expired. The power of the court to enlarge is discretionary and will not be exercised unless the court thinks fit. In the instant case the delay of one month is not considerable and in the interest of justice the time allowed for making the award is enlarged to the date when it is handed down. At the time of making the award therefore the arbitrator was not functus officio.

(iii) s. 12(2) of the Arbitration Act enacts that where an arbitrator or umpire has misconducted himself the court may set aside the award. Misconduct in this case denotes irregularity. In awarding 15% interest, the arbitrator was not misconducting himself as he has powers so to do and the award is not excessive. However, in making claims of "no award" in instances where specific findings were necessary the arbitrator misconducted himself and in the interest of justice the award should be set aside.

Arbitration award set aside.

Cases referred to:

(1) *Nagle v. Feildem* (1966) 2 Q.B. 633; (1966) 2 W.L.R. 1027; (1966) 1 All E.R. 689

(2) *Dyson v. Attorney-General* (1911) 1 K.B. 410; 105 L.T. 753; 27 T.L.R. 143

(3) *Re An Arbitration Between Montgomery, Jones and Co. and Liebenthal and Co.* [1898] 78 L.T. 406

(4) *Browne v. Collyer*, 20 L.J.Q.B. 426