JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 53 OF 2003

BEFORE: **THE HON. MR. JUSTICE SMITH, J.A.**
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN:	**JAMAICA COTTAGES AND MOTEL ASSOCIATION LIMITED**	**APPELLANT**
AND	**CARL CAMPBELL**	**RESPONDENT**

Miss G. Mullings instructed by Patrick Bailey & Co. for the Appellant

Ravil Golding and **Mrs. Grace-Ann Cameron-Small** instructed by Lyn-Cook, Golding & Co. for the Respondent.

January 15 & 16 & December 14, 2007

SMITH, J.A:

I have read in draft the judgment of Harrison, J.A. and I agree with his conclusions and the reasons therefor.

K. HARRISON, J.A:

1. This is an appeal by Jamaica Cottages and Motel Association Ltd. ("the Appellant") against the judgment of Harris J. (as she then was) delivered on May 16, 2003. Judgment was awarded in favour of the appellant in the sum of $323,816.83 for outstanding rent with interest at 12% per annum thereon. Judgment was also awarded to the defendant ("the Respondent") on his counterclaim in the sum of $2,930,054.80

in respect of overpaid rent. The sum of $323,816.83 with interest was ordered to be set off against the sum of $2,930,054.80.

The factual background

2. Cecil Steele, a Director of the appellant company was responsible for renting and overseeing the property situated at 5 Dumfries Road, New Kingston. The Respondent by an oral agreement in 1991, rented a portion of these premises at a rental of $15,000.00 monthly. The rented area comprised a kitchen, dining area and one room. The latter was used for off-track betting. The Respondent had also operated a bar and restaurant on the premises.

3. The Appellant contended that the Respondent was allowed to occupy the premises for a period of twelve (12) hours daily, that is, between 6:00 am and 6:00 pm. This period, when converted amounted to 20% of the whole property. However, the Respondent denied that the occupancy was limited to 12 hours daily. He said that the off-track racing was carried on until 10:00 pm on some occasions.

4. There is no dispute that the monthly rental was increased over the years as follows:

September 1, 1992	$20,000.00
October 1, 1993	$24,000.00
April 1, 1994	$30,000.00
March 1, 1995	$60,000.00
April 1, 1996	$90,000.00

5. On January 19, 1995 it was formally agreed in writing between the parties that the Respondent would occupy the premises at a rental of $60,000.00 monthly on a 24 hour basis except for New Years Eve night when it reverted to the appellant. The agreement reads as follows:

> "January 19, 1995
>
> Mr. Karl Campbell
> Chances Entertainment Ltd.
> 5 Dumfries Road
> Kingston 5
>
> Dear Sirs,
>
> Please be advised that effective March 1, 1995, your rental will be increased to $60,000.00 per month. As discussed, this will entitle you to full use of the facilities now occupied except on New Year's Eve.
>
> Please sign and return the enclosed copy of this letter to indicate your receipt of this notice.
>
> We look forward to our continued good business relationship.
>
> Sincerely yours,
>
> CECIL STEELE
>
> ....."

6. The rent was eventually increased to $90,000.00 monthly. The Respondent fell into arrears with his monthly payment and was served with a Notice to Quit to deliver up possession of the property. He was sued for recovery of the outstanding rent.

The pleadings

7. The Appellant filed a specially endorsed Writ of Summons in the Registry of the Supreme Court on February 9, 2000 and sought to recover the sum of One Million and

Eighty-Five Thousand Dollars ($1,085,000.00) for the arrears of rent from the Respondent. It was pleaded inter alia, that the respondent occupied the premises "as tenant" (sic) of the Plaintiff. The Endorsement and Writ of Summons (now referred to as Particulars of Claim) read as follows:

"Rental owing from:

(a) December 1998	-	$ 20,000.00
(b) January 1999 to February 2000 @ $90,000.00 per month	-	$1,260,000.00
		$1,280,000.00
LESS payment (on account)	-	$195,000.00
TOTAL	-	$1,085,000.00"

8. The Defence and Counterclaim pleaded inter alia as follows:

"3. If, which is denied, the Defendant is liable in his personal capacity to the Plaintiff for the sum of $1,085,000.00 for arrears of rent, the Defendant says that he is entitled to set off the amount of $3,140,136.88 being rental collected by the Plaintiff in excess of the standard rent and its permitted increases.

COUNTERCLAIM

4. The Defendant repeats paragraphs 1 to 3 of the Defence hereof and says that the said premises is and was at all material times subject to the provisions of the Rent Restriction Act and the standard rent in relation to the said premises is and was at all material times $15,000.00 per month.

5. If, which is denied, the agreement to rent the said premises was between the Plaintiff and the Defendant in his personal capacity, the Defendant says that it was an express and/or implied term of the agreement between the Plaintiff and the Defendant that the standard rent would not be increased by more than 7 ½ % per annum.

> 6. Further and/or in the alternative, by virtue of Section 3 of the Rent Restriction (Percentage of Assessed Value) Order 1983 the standard rent of the said premises could not be increased by more than 7 ½ % per annum.
>
> 7. In breach of the said agreement and/or contrary to the Act the Plaintiff has since on or about the 1st day of September, 1996 purported to charge and/or collect rent in excess of the standard rent and its permitted increases in the amount of $3,140,136.88. The Defendant intends to refer to and rely on Section 20 of the Rent Restriction Act and Section 3 (1) of the Rent Restriction (Percentage Assessed Value) Order 1983 at the trial of this action for its full terms and effect".

9. In response to the Defence and Counterclaim the Appellant alleged that the character of the letting had changed materially each year and that rental was increased since additional space was allocated to the Respondent between 1991 and 1995.

The findings below

10. The learned trial judge found that the respondent was personally liable to the appellant for the arrears of rent claimed. It was not in dispute that rent was owed for the period December 1998, to February 2000. The learned judge also found that the respondent was a tenant of the appellant and was protected at all material times under the Rent Restriction Act.

11. The premises were subject to control of the Rent Restriction Act ("the Act") and was therefore restricted to a 7½ % annual increase of rental as dictated by the Rent Restriction (Percentage Assessed Value) Order. The judge held that because no standard rent had been determined by an Assessment Officer, it ought to be fixed at $15,000.00 since it was that sum which was paid for rent when the premises were first

let in 1991. In calculating the standard for the period 1992 to February 2000, the learned judge stated inter alia:

> "Taking the effective date of the first increase to be September 1992 and taking into account an annual increase of 7½ %, by December 1998 the standard rental would have been $24,885.74 monthly. The evidence revealed that the defendant paid to the plaintiff $70,000.00 on account of the debt. The defendant would therefore be indebted to the plaintiff as follows:
>
> | | | |
> |---|---|---|
> | December 1998 | - | $24,885.74 |
> | January 1999 – March 1999 @ $24,885 74 monthly | - | $74,657.22 |
> | April 1999 to February 2000 @ $26,752.17 | - | $294,273.87 |
> | Less sum paid on account | - | $70,000.00 |
> | Total | - | $323,816.83" |

12. Turning to the counterclaim the learned judge said:

> "Section 20 of the Rent Restriction Act permits a tenant to recover any sums paid as rental to his landlord in excess of the standard rental. It is indisputable that the defendant had paid that sum to his landlord in excess of the standard rent. It is therefore necessary to determine the extent of the plaintiff's liability to the defendant.
>
> The defendant stated that he paid sums to the plaintiff for space rented between 1991 and 2000. He declared that rent moved from $15,000.00 to $120,000.00 over the period. The plaintiff admitted that there were the following increases:
>
> | | |
> |---|---|
> | September 1, 1992 | $20,000.00 |
> | October 1, 1993 | $24,000.00 |
> | April 1, 1994 | $30,000.00 |
> | March 1, 1995 | $60,000.00 |
> | April 1, 1996 | $90,000.00 |
> | April 1, 1998 | $120,000.00 |
>
> Although the defendant averred in his counterclaim that he paid the plaintiff an amount of $3,140,136.88 in excess of the standard rent, he did not specifically state in evidence the amounts he had paid. He merely stated that he paid rental to

the plaintiff. This notwithstanding, the plaintiff's evidence discloses that the defendant had paid the rental charged, up to November 21, 1998. The defendant would thereby be entitled to recover any sum overpaid by him."

The Grounds of Appeal

13. The grounds of appeal are stated as follows:

"(a) The Learned Judge failed to consider all the evidence of both parties regarding the effect of changes in the size and nature of Defendant's letting.

(b) The Learned Judge erred in declaring that the Defendant was entitled to the sums Counterclaimed (sic).

(c) The Learned Trial Judge's verdict was inconsistent with the evidence and did not take into account the evidence relating to the change in the size of the Defendant's letting during his tenancy of the subject premises".

The statement of issues

14. The Appellant identified the following issues in the appeal:

"1. Whether the provisions of the Rent Restriction Act which prevent increases in rental over and above 7 1/2% per annum apply to the letting of the Defendant/Appellant throughout the duration of this case?

2. Whether the Learned Judge erred in holding that restrictions provided by the Rent Restriction Act (in relation to the charging of rent) applied to a "part-time" tenancy and/or an arrangement without exclusive possession.

3. Whether the Defendant/Respondent was in fact in a position to claim a refund of the sums paid to the Claimant/Appellant by way of excess rent throughout the tenancy".

The Arguments and Submissions

15. Miss Mullings, for the Appellant, submitted at the very outset that the letting was based on a 12 hour occupancy per day so, there was no exclusive possession in respect of the 1991 letting. Mr. Golding objected strenuously to this submission on the ground that it was raised in this Court for the first time and was not pleaded and argued in the court below. He argued that at all material times the Respondent was regarded as a tenant of the Plaintiff. We overruled Mr. Golding's objection and Miss Mullings was allowed to proceed with her submissions.

16. Miss Mullings submitted that the Respondent had occupied the premises as a "part-time" tenant between 1991 and February 1995 and since he did not have exclusive possession of the premises he was not a protected tenant under the Act. She also submitted that the learned judge had failed to consider the evidence regarding the effect of changes in the size and nature of the Respondent's letting and that her decision was inconsistent with the evidence.

17. Miss Mullings argued that the Respondent was a mere licensee between 1991 and February 2005 and that a standard rent could only have been calculated on the rent from March 1, 2005 (the date that he was given exclusive possession).

18. Mr. Golding submitted on the other hand, that even if the Respondent had initially arranged to occupy the premises 12 hours daily, he would still have had exclusive possession between 6:00 am and 6:00 pm for the purpose of being a protected tenant under the Act. He said no evidence was led to the contrary that the Respondent did not have exclusive possession as a tenant during the hours of occupancy.

19. Mr. Golding argued that a licence is usually created where, for example, there are family arrangements, acts of friendship or generosity which he said, served to negative any intention to create a tenancy. He submitted that the Court should look at all the surrounding circumstances in order to ascertain what the parties had intended. He invited the Court to examine the pleadings and the evidence adduced below, because they clearly established that the matter was dealt with on the basis of a landlord and tenant relationship. Furthermore, he said that no evidence was led to establish any special relationship between the parties.

The Authorities

20. It is undisputed that regardless of the terms used by the parties, the court must look at the nature of the letting in order to determine whether the relationship of landlord and tenant exists. ***Street v Mountford*** [1985] 2 All E R 289 illustrates the point vividly. The headnote reads as follows:

> "The landlord granted the appellant the right to occupy a furnished room under a written agreement which stated that the appellant had the right to occupy the room 'at a licence fee of £37 per week', that 'this personal licence is not assignable', that the 'licence may be terminated by 14 days written notice' and that the appellant understood and accepted that 'a licence in the above form does not and is not intended to give me a tenancy protected under the Rent Acts'. The appellant had exclusive possession of the room. Some months after signing the agreement the appellant applied to have a fair rent registered in respect of the room. The landlord then applied to the county court for a declaration that the appellant occupied the room under a licence and not a tenancy. The county court judge held that the appellant was a tenant entitled to the protection of the Rent Acts, but on the landlord's appeal the Court of Appeal held that the occupier was a mere licensee since, notwithstanding the fact of exclusive possession, the

> agreement bore all the hallmarks of a licence and the parties had in fact only intended to create a licence. The appellant appealed to the House of Lords.
>
> **Held:** The test whether an occupancy of residential accommodation was a tenancy or a licence was whether, on the true construction of the agreement, the occupier had been granted exclusive possession of the accommodation for a fixed or periodic term at a stated rent, and unless special circumstances existed which negatived the presumption of a tenancy (e.g (sic) where from the outset there was no intention to create legal relations or where the possession was granted pursuant to a contract of employment) a tenancy arose whenever there was a grant of exclusive possession for a fixed or periodic term at a stated rent. The intention of the parties, as manifested in the agreement, that they only intended to create a licence (and expressed the agreement to be a licence) and that they agreed not to be bound by the Rent Acts was irrelevant. Accordingly, since the effect of the agreement between the appellant and the landlord was to grant the appellant exclusive possession for a fixed term at a stated rent, and no circumstances existed to negative the presumption of a tenancy, it was clear that the appellant was a tenant. Her appeal would therefore be allowed. ..."

21. ***Somma v Hazelhurst and Savelli*** [1918] 1 WLR 1014 decided that a non-exclusive occupation agreement phrased in terms of a mere licence fell outside of the English Rent Act protection.

22. In ***Errington v Errington*** [1952] 1 All ER 149 it was held that if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only. Lord Denning delivering the judgment of the court said inter alia, at page 154:

"... The classic definition of a licence was propounded by Vaughan, C.J., in the seventeenth century in ***Thomas v Sorrell*** (3) (Vaugh. 351):

> "A dispensation or licence properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful."

The difference between a tenancy and a licence is, therefore, that in a tenancy an interest passes in the land, whereas in a licence it does not. In distinguishing between them, a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not. If he was let into exclusive possession, he was said to be tenant, albeit only a tenant at will: see ***Doe d. Tomes v Chamberlaine,*** (1839) 9 L.J. Ex 38, 151 E.R. 973 ***Lynes v Snaith;*** (1899) 1 Q.B. 486 whereas if he had not exclusive possession he was only a licensee: ***Peakin v Peakin.*** (1895) 2 I.R. 359 This test has, however, often given rise to misgivings because it may not correspond to realities. A good instance is **Howard v *Shaw***, (1841) 10 LJ Ex 334; 151 E.R. 973 where a person was let into exclusive possession under a contract for purchase. Alderson, B., said that he was a tenant at will, and Parke, B., with some difficulty agreed with him, but Lord ABINGER C.B., said (8 M. & W. 122):

> "While the defendant occupied under a valid contract for the sale of the property to him, he could not be considered as a tenant."

"Now, after the lapse of a hundred years, it has become clear that the view of LORD ABINGER was right. The test of exclusive possession is by no means decisive. The first case to show this was ***Booker v Palmer*** [1942] 2 All ER 674 where an owner gave some evacuees permission to stay in a cottage for the duration of the war, rent free. This court held that the evacuees were not tenants, but only licensees. Lord Greene M.R. said ([1942] 2 All ER 677):

> "To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind."

23. ***Abbeyfield (Harpenden) Society Ltd. v Woods*** (1968) 1 WLR 374; (1968) 1 All ER 352 decided that the modern cases show that a man may be a licensee even though he has exclusive possession. The case held that the court must look at the agreement as a whole and see whether a tenancy really was intended.

24. The facts in ***Addiscombe Garden Estates Ltd v Crabbe*** [1957] 3 All ER 563 reveal that by an agreement dated 12 April 1954, and purporting to be a licence, the owners of certain property, comprising a club house and tennis courts, authorized the club to occupy and enjoy the property for a period of two years from May 1, 1954. The club continued to occupy the premises after the period had expired. In an action by the owners, claiming possession of the premises, the club contended:(i) that the agreement was not a licence but a tenancy agreement; (ii) that the Landlord and Tenant Act, 1954, Part 2, which provides security of tenure for business tenants, applied to the tenancy because the premises comprised in the tenancy were occupied by the club for the purposes of a business carried on by the club, within s 23(1) of the Act; and (iii) that, as no notice terminating the tenancy had been served by either party under the Act, the tenancy continued. It was held inter alia:

> "(i) the relationship between the parties to the agreement was to be determined by law and not by the description given to the agreement by the parties, and

> this agreement, on a consideration of all its relevant provisions, and having regard to its showing an intention to confer a right to exclusive possession, created the relationship of landlord and tenant between the parties to it."

25. In ***Aslan v Murphy*** (Nos. 1 and 2) [1990] 1 WLR 766 Lord Donaldson of Lymington M.R stated at page 770:

> "The labels which parties agree to attach to themselves or to their agreements are never conclusive and in this particular field, in which there is enormous pressure on the homeless to agree to any label which will facilitate the obtaining of accommodation, they give no guidance at all. As Lord Templeman said in Street v. Mountford [1985] A.C. 809, 819:
>
> "The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

Analysis of the submissions

26. What is abundantly clear from the decided cases is that a tenancy confers upon the tenant a right of exclusive occupation for a fixed period of time and at an agreed rental. In other words, a tenancy will not exist unless the occupier has a right of exclusive possession of the premises. A licence on the other hand, confers merely a personal permission to occupy the premises. Family arrangements, acts of friendship or generosity negative any intention to create a tenancy. See ***Aslan v Murphy*** (Nos. 1 and 2) [1990] 1 WLR 766 and ***Family Housing Association v Jones Westminister City Council*** (Third Party) [1990] 1 WLR 779.

27. It is also abundantly clear from the evidence adduced at the trial, that the Respondent was treated as a tenant from the very inception of the agreement between the parties. The special endorsement on the Writ of Summons had referred to the Respondent as a "tenant" of the Appellant and the Appellant had sought to recover arrears of rent and interest thereon from him. Cecil Steele, a Director of the Appellant testified that the Respondent became a tenant of his in 1991. He also said that the Respondent had asked him to "rent" him space at 5 Dumfries Road. Steele knew from the very outset that the rented area was to be used for off-track betting (both local and international), and as bar and restaurant.

28. The Respondent's initial stand was that he was not personally liable for the rent and that at all material times he had contracted with the Appellant as a representative of a company called "Chances Entertainment Limited". The learned trial judge found however, that he was liable on the basis of the evidence adduced.

29. There is also the letter of the 20th September 1993 which Cecil Steele had written to the Respondent. It spoke of the increase in rental for the premises and it also gave the reasons for the increase. This is what the letter says:

> "This is to advise that effective October 1, 1993 your rental at the above premises will be increased to $24,000.00 per month.
>
> The above increase is consequent on the increase in property taxes effective from April 1, 1993 in addition to the increased cost of insurance premiums and water rates as well as the cost of general maintenance.
>
> We look forward to our continued good relationship.
>
> Yours sincerely
>
> Sgd. Cecil T. Steele."

30. Based on the evidence presented, the learned judge could properly have concluded that the initial arrangement between the parties went beyond that of a mere licensee/licensor. It was not a case where the Appellant could say that it was extending some personal privilege to the Respondent. The hours for use and occupation were fixed at 12 hours daily initially, but it would appear that during those hours, the Respondent had exclusive possession of the rented premises.

31. In my judgment, the evidence clearly indicates that there was an intention between the parties to create a monthly tenancy from the very outset of the Respondent's occupation of the premises. There was indeed a landlord and tenant relationship.

32. I now turn to consider whether the learned judge was correct in determining the standard rent for the premises. A letter from the Ministry of Environment and Housing had certified that the premises were not exempted under the Act. The letter reads as follows:

> "MINISTRY OF ENVIRONMENT AND HOUSING
> SECTION: ASSESSMENT BOARD
> 64 Duke Street
>
> 20th September 1999.
>
> TO WHOM IT MAY CONCERN
>
> RE: PREMISES — 5 DUMFRIES ROAD, KINGSTON 5
>
> This is to certify that the above-mentioned premises is not exempted (sic) and therefore is entitled to 7½ % annual increase in rental.
>
> Madge Ashby—Coleman
> Secretary/Administrator".

33. The premises were never assessed by a Rent Assessment Officer so section 17(1) of the Rent Restriction Act must be considered. It provides as follows:

> "17. (1) Subject to subsection (2), until the standard rent of any premises in relation to any category of letting has been determined by an Assessment Officer under section 19, the standard rent of the premises in relation to that category of letting shall be the rent at which they were let in the same category of letting on the 1st day of July, 1976, plus any increases sanctioned pursuant to this Act or, where the premises were not so let on that date, rent at which they were last so let before that date plus such increases as aforesaid, or, in the case of premises first so let after that date, the rent at which they were, or are, first so let, plus such increases as aforesaid: ..."

34. It is my considered view, that the learned judge having seen and heard the parties was in a position to conclude that the increase in rental over the years was not due to the allocation of additional space but was charged for other reasons that were not permitted under the Act. At one stage Colin Steele said that the increases were due to: (a) increases in property tax; (b) increased general insurance premiums; (c) water rates and general maintenance of the property. When he was confronted under cross-examination he did change his evidence to say that the increases were due to additional space allocated to the Respondent.

35. In my judgment, the learned judge was also correct when she held that the Act was applicable throughout the duration of the tenancy and that the standard rent should be fixed at $15,000.00. This meant that the premises were subject to the restriction of 7½% of annual increase of rental as dictated by the Rent Restriction

(Percentage Assessed Value Order) and any sum charged in excess of that standard rent was recoverable by the Respondent.

36. Was there any part of the sum claimed by the Respondent in the Defence and Counterclaim barred by virtue of the Statute of Limitations? The learned judge had observed that the Limitation Statute was not pleaded in the Reply to the Defence and Counterclaim and that it ought to have been pleaded. She held that it was improper for the Appellant to ask the court to find that a part of the Respondent's claim fell outside of the period prescribed by the statute. She therefore found that the Appellant was liable to refund the Respondent the sum of $2,930,054.00 which was the sum calculated as the excess rental under the Act.

37. The authorities have made it abundantly clear that a plea of limitation is only a defence when it is raised on the pleadings and it must be specifically pleaded. See ***The Jamaica Flour Mills Ltd v The Administrator General for Jamaica (Administrator for the Estate of Clinton Alfred Cox, Deceased)*** (1989) 26 JLR 154 Rowe P., said at page 156 of that case:

> "We think that in this case if the appellant wished to rely upon the period of limitation he ought to have set out in his Summons not only the fact that he wished so to do but also to set out what he considered to have been the applicable period."

38. In the instant matter, the Appellant had failed to plead that the counterclaim was statute barred. No objections were raised when the evidence relating to the counterclaim was adduced. It is therefore my view that the learned judge was correct

when she ordered that the Respondent was fully entitled to the sum claimed in the counterclaim.

Conclusion

39. For my part, I would dismiss the appeal with costs to the respondent.

McCALLA, J.A:

I have read in draft the judgment of Harrison, J.A. I agree with his reasons and conclusions and there is nothing further I wish to add.

SMITH, J.A.

ORDER:

The appeal is dismissed with costs to the respondent to be agreed or taxed.