

JAMAICA

IN THE COURT OF APPEAL.

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 40/81.

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)

BETWEEN: ASTON LEWIS - DEFENDANT/APPELLANT
A N D : VICTOR MCLEAN - PLAINTIFF/RESPONDENT

Mr. Maurice James for the Appellant.
Mr. R. Fairclough for the Respondent.

January 21; March 5, 1982.

CAMPBELL, J.A. (AG.):

On the 21st of January, 1982, after hearing submissions from learned counsel for the appellant and without calling upon learned counsel for the respondent in reply, we dismissed the appeal and affirmed the judgment of the learned Resident Magistrate. We promised then to give our reasons therefor at a later date as the appeal in our view involved matters of some importance namely:

- (a) the liability of a purchaser of land which is 'controlled premises' to pay compensation under section 25 (7) of the Rent Restriction Act for improvements to the land made by his vendor's tenant before the time of purchase; and
- (b) the true construction of the definition of 'commercial building' in section 2 of the Rent Restriction Act.

We now do so.

The appellant sometime in 1968 rented a square of land at Yallahs in St. Thomas from one Mr. Lee which was stated by the appellant to be for commercial purposes. With the permission of Mr. Lee he erected thereon a relatively permanent building of concrete and lumber with an adjoining shed. The building and shed together comprised a two bedroom dwelling-house, a licensed bar and a hardware and lumber

store. The appellant lived in the dwelling-house and operated a bar and a hardware and lumber business from the rest of the building and shed. There was no agreement between him and Mr. Lee for the payment to him of compensation for any loss or damage suffered by him occasioned by his being required lawfully by Mr. Lee to vacate the land.

In or about October, 1979, Mr. Lee entered into an agreement with the respondent for sale to him of land including that on which the appellant had erected his building. The appellant was served with a notice to quit issued by Mr. Lee. This notice was served on the appellant by the respondent's wife on November 19, 1979, limited to expire on 31st December, 1979. The land was duly transferred to the respondent by a registered transfer and he entered into possession in April, 1980. The appellant continued in possession of the square of land originally let to him paying no rent therefor.

The respondent on a date in 1980, subsequent to his entry into possession, commenced proceedings for recovery of possession of the square of land from the appellant in the Resident Magistrate's Court, St. Thomas, and obtained judgment on 8th June, 1981. The appellant was ordered to deliver up possession on or before 7th September, 1981.

The appellant in his defence in the Resident Magistrate's Court had pleaded as hereunder:

- "1. The Plaintiff is not entitled to possession from Defendant in that Defendant has acquired an equitable interest in the land.
2. This Court has no jurisdiction to try case as regard the equitable interest claimed.
3. No valid notice was at anytime served on Defendant to vacate the land which the Defendant deems is commercial land."

The learned Resident Magistrate in her reasons for judgment made the following findings of fact:

- "1. The Plaintiff is now the owner in fee simple of certain lands at Yallahs in the parish of St. Thomas - lands registered at Volume 330 of the Register of Titles.
2. The Defendant received a legal notice to quit and deliver up possession on or before 31st December, 1979.

- 3. The Defendant who is still in possession of the land has not paid any rent to anyone for the land he once rented from the former Joseph Lee, since he received notice in November, 1979."

In the light of the above findings the learned Resident Magistrate clearly made no specific finding as regards the issues except in respect of the validity of the notice to quit. She passed over 'sub silentio' the other issues pleaded namely the existence of an equitable interest in the land on the facts of the case and the ouster of her jurisdiction to adjudicate on the same.

Counsel for the appellant in his appeal contends on two separate and distinct grounds that the learned Resident Magistrate erred in giving judgment for the respondent.

These grounds in substance are that:

- 1. The appellant having erected his building on the land with the agreement and or acquiescence of Mr. Lee, his original landlord, an equitable interest in the land - was thereby created in his favour enforceable against Mr. Lee. The plaintiff having bought the land from Mr. Lee acquired the land subject to this equitable interest since Mr. Lee cannot sell a better title than he himself had.
- 2. The notice to quit given by Mr. Lee not being a one year notice as required under section 26 of the Rent Restriction Act is invalid. The respondent therefore takes the land subject to the appellant's tenancy and the respondent not having served a valid notice or any at all was not entitled to recover possession.

Dealing with the first ground of appeal, it is patently clear that learned counsel in his formulation was confused as to the gravamen of his complaint. In the manner in which this ground of appeal is formulated it suggested that he was contending that the existence of an equitable interest in land in favour of a person who is in possession of the said land, necessarily preclude the fee simple owner from ever recovering possession from the possessor who claims that equitable interest. However in his submission before us he made clear that his real complaint was that consequent on the erection by the appellant of the building an equitable charge had arisen in his favour enforceable

against Mr. Lee. The existence of this equitable charge precluded the Resident Magistrate from making an order for recovery of possession against him without his being paid compensation for loss or damage suffered. No such order for compensation having been made, the order for recovery of possession was made by the learned Resident Magistrate in error.

In support of his contention that an equitable charge had arisen, he relied on McCollin v. Carter (1974) 26 W.I.R. 1 a judgment of Douglas, C.J. in the High Court of Barbados.

In that case the learned Chief Justice found that the defendant entered upon the land of the plaintiff as a licensee. The land had however been promised to the defendant's daughter by the plaintiff as a gift. The plaintiff acquiesced in the execution by the defendant of substantial improvement on the land. In an action by the plaintiff for recovery of possession from the defendant on the allegation that the defendant was a tenant, the defendant denied that he was a tenant and counter-claimed for specific performance alleging an oral contract coupled with acts of part performance. Both the claim and counter-claim were dismissed. However the learned Chief Justice having found that the plaintiff had acquiesced in the improvement, made an order by way of declaration on the principle laid down in Chalmers v. Pardoe (1963) 3 All E.R. 552 that if and when the defendant gave up possession he would be entitled to compensation equivalent to the expenditure incurred by him with interest thereon.

The principle in Chalmers v. Pardoe (supra) on which the learned Chief Justice founded himself was stated thus in the opinion of Sir Terence Donovan at page 555:

"There can be no doubt on the authorities that where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that that part of the land will be made over to the person so expending his money, a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation, and when, for example by reason of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended."

The validity of the principle laid down above and the correctness of its extended application to the facts found in McCollin v. Carter (supra) are not in doubt.

However, the principle re-iterated in Chalmers v. Pardoe (supra) is irrelevant to the facts in the instant case, because there never was any promise of assurance of the land to the appellant on the faith of which he erected his building. He built in right of the terms of a tenancy granted to him.

The right of a tenant to compensation from his landlord for any building erected by him on the rented land during his tenure is to be sought primarily in the terms of his tenancy. However, in the case of a tenancy of 'building land' in 'controlled premises', a tenant may, notwithstanding the absence of any such term stipulating for the payment of compensation, recover compensation for any loss or damage suffered by him as a result of the erection by him of any such building by invoking the discretionary power of the court under section 25 (7) of the Rent Restriction Act in an action for recovery of possession or ejection instituted against him by the landlord.

The Rent Restriction Act by section 2 in regard to 'building land', section 3 (2) in regard to 'controlled premises' and section 25 (7) in regard to the discretionary power of the court provide as follows:

(a) Section 2:

" 'Building land' means land let to a tenant for the purpose of the erection thereon by the tenant of a building used, or to be used, as a dwelling or for the public service or for business, trade or professional purposes, or for any combination of such purposes, or land on which the tenant has lawfully erected such a building but does not include any such land when let with agricultural land."

(b) Section 3 (2):

'Controlled premises' refers to -

"all building land, dwelling-houses or public or commercial buildings to which this Act for the time being applies."

(c) Section 25 (7):

"In granting an order or giving judgment under this section for possession or ejection in respect of building land, the court may require the landlord to pay to the tenant such sum as appears to the court to be sufficient as compensation for damage or loss sustained by the tenant, and effect shall not be given to such order or judgment until such sum is paid."

A purchaser who enters into possession of land which is 'controlled premises' on which a building has been erected prior to his purchase pursuant to a tenancy of 'building land' between a third party and his vendor, may, notwithstanding that he is not privy to the tenancy, become statutorily liable qua landlord to the tenant to a similar extent as his vendor provided he had at the time of his purchase actual or constructive knowledge of the tenancy and does not obtain vacant possession. He becomes liable qua landlord even where his vendor had served a valid notice to quit on the tenant who notwithstanding has remained in possession thus becoming a statutory tenant at the time when the purchaser enters into possession albeit the tenant thereafter pays no rent to him. This liability follows from the definition hereunder of landlord in section 2 and of the protection given to statutory tenancy by section 28 (1) of the Act.

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 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."

Section 28 (1):

"A tenant who under the provisions of this Act retains possession of any premises, shall, so long as he retains possession, observe and be entitled whether as against the landlord or otherwise, to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act,"

In the instant case, the appellant in his evidence admitted that he at no time made any claim for compensation against Mr. Lee his original landlord nor was there any agreement between Mr. Lee and him for the payment of any compensation for his building if he had to give up possession. In effect he was saying that there was no contractual obligation on the part of Mr. Lee to pay compensation.

Since Mr. Lee would not on the evidence be contractually liable, the respondent equally would not be so liable. Perhaps it was because of this clear admission by the appellant that there was no agreement for compensation coupled with the absence of any circumstance which would justify the payment of compensation why the learned Resident Magistrate passed over 'sub silentio' the question of the exercise by her of her discretion to order compensation in favour of the appellant under section 25 (7) of the Act. This ground of appeal fails as being without merit.

Learned counsel next submitted that no order for recovery of possession should have been made because the notice to quit given on 19th November, 1979, to expire on 31st December, 1979, was invalid. The premises he says, is deemed to be 'commercial premises'; therefore, a twelve month notice to quit was required as provided for under section 26 of the Act.

'Commercial building' is defined in section 2 of the Act under the rubric 'public or commercial building' as:

" 'Public or commercial building' means a building or a part of a building separately let, or a room separately let, which at the material date was or is used mainly for the public service or for business, trade or professional purposes, and includes land occupied therewith under the tenancy but does not include a building, part of a building or a room when let with agricultural land."

It was admitted on the evidence that the building erected by the appellant, was from the time of its erection being used at least partially for commercial purposes namely as licensed premises and also as a hardware store and lumber shed. However, it is not the use being

made of a building for commercial purposes at any random time as for example, when a notice to quit is served, which makes it a commercial building subject to the provision of section 26. In our judgment it must have been used previous to the letting as a commercial building or is being used as a commercial building at the time of letting which is the material time of which section 2 speaks. There was never a letting of any building to the appellant in 1968 nor indeed at any other time.

What the appellant lawfully did, pursuant to his tenancy agreement with Mr. Lee was to erect a building for his own commercial use on the square of land let to him as 'building land'.

No special statutory notice to determine the tenancy of building land is provided for under the Act. Since therefore the letting in this case was not that of a commercial building so requiring a twelve month's notice to quit and since there was no complaint that the notice actually given was for any other reason invalid, the learned Resident Magistrate was correct in finding as a fact that the notice to quit served on the appellant was a valid notice. This ground of appeal equally is without merit.

Chapman

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Boyd