REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1957

AND IN

THE WEST INDIAN COURT OF APPEAL

1957

EDITED BY

JOSEPH A. LUCKHOO, ESQ.,

Barrister-at-Law, Puisne Judge,

British Guiana

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The Honourable the Chief Justice, Chairman.
The Solicitor-General.
H. C. B. Humphrys, Esq., Solicitor.

LA PENITENCE, BRITISH GUIANA.

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1960

(In the Full Court of the Supreme Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Holder, C.J., and Bollers, J. (ag.)) July 6, 1956, June 17, 1957).

Landlord and tenant—Claim that landlord's alleged wrongful act caused electric current to be cut off from demised premises—Claim in tort for loss of convenience—No enforceable claim disclosed.

Landlord and tenant—Claim in tort for loss of convenience—No breach of implied term that the demised premises are reasonably fit for human habitation—Landlord and Tenant Ordinance, Cap. 185, s. 44 (3).

The respondent tenant Stephen claimed from the appellant landlord Luckie damages for the wrongful act of the appellant in causing the electric current to be cut off from premises occupied by the respondent and rented by him from the appellant. It was alleged by the respondent in his plaint that in consequence of the said wrongful act by the appellant the respondent suffered loss and convenience of electric current and light in the demised premises. The magistrate found that the electric wire carrying the current became defective through no fault of the respondent and that the respondent had only brought the defective state of the wire to the appellant's notice. The magistrate awarded the respondent damages holding that the appellant had committed a breach of the implied condition in section 44 (3) of the Landlord and Tenant Ordinance, Cap. 185, that is to say, the premises were not kept in all respect reasonably fit for human habitation, that as a result the health of the respondent's wife was injuriously affected and that the appellant had committed a breach of his agreement of tenancy with the respondent.

Held : (i) The claim being one in tort for loss of convenience it was not competent for the magistrate to award damages on a finding of breach of contract and the claim therefore was not enforceable.

(ii) The provisions of section 44 (3) of the Landlord and Tenant Ordinance, Cap. 185, entitle an inmate of the demised premises to an award of damages only where the property or the person or the health of the inmate is injuriously affected by reason of a breach by the landlord of the condition or undertaking implied by the subsection and as no such injury was proved no damages could be awarded. Further, that subsection contemplates an award of damages to the inmate and not to the tenant for injury to an inmate.

Appeal allowed.

H. Mitchell for the appellant.

C. Llewellyn John for the respondent.

Cur. adv. vult.

Judgment of the Court: This is an appeal from the decision of a Magistrate of the Georgetown Judicial District who gave judgment for the respondent for the sum of $100 and costs $6.24 in respect of an action in which the respondent claimed from the appellant the sum of $250 damages for the wrongful act of the defendant in causing the electric current to be cut off from the premises during May, 1955, up to the date of the filing of the claim and keeping the electric wires on the premises in a defective condition. The premises were occupied by the respondent who rented them from the appellant at a rental of $19.69 per month. It was alleged in the plaintiff's claim that in consequence of the said wrongful act by and on behalf of the defendant, the plaintiff suffered loss and convenience of electric current and light in the said premises.

The Magistrate in his memorandum of reasons for decision stated—

> " The Court was satisfied, having regard to all the evidence, that the wire became defective through no fault of the plaintiff. The Court was further satisfied that the plaintiff did bring the contents of "Exhibit "A" to the defendant's notice."

The learned Magistrate accepted the evidence of the plaintiff and his witnesses and found that there was—

(a) a breach of agreement;

(b) breach of the implied condition under section 44 of the Landlord and Tenant Ordinance, Chapter 185,

and then proceeded to award the sum of $100 damages and costs on that basis.

The appellant now appeals from the Magistrate's decision to this Court on the following grounds:—

1. that the decision was erroneous in point of law for the following reasons:—

(1) that the statement of claim of the respondent discloses no cause of action;

(2) that sub-section (3) of section 44 of the Landlord and Tenant Ordinance, Chapter 185, under which presumably the learned Magistrate decided the action before the Court, (if there was an action), (he himself has referred to section 44) applied only to the property or the person or the health of an inmate of any house according to the maxim *"Expressio unius personam vel rei est exclusio alterius"*, and accordingly, in so far as the respondent has adduced no evidence that his property, person or health has been injuriously affected, rather only evidence that he has been uncomfortable, the decision of the learned Magistrate is untenable within the meaning of the Ordinance under which it was made;

(3) that the learned Magistrate misdirected himself as to the meaning of and the law in relation to the term "fit for human habitation" under the provisions of section 44 of the Landlord and Tenant Ordinance, Chapter 185, and as defined in *WHITEHEAD vs. HIVE (1952) B.G.L.R. 6,* to which the Magistrate himself referred;

(4) that even if it is ultimately decided that there is evidence upon which the Court could rely that the health of the respondent was injuriously affected (and it is contended on behalf of the appellant that there is no evidence upon which the Court could rely that the health of the respondent was affected by the use of the light from a kerosene lamp instead of the use of electric light), it is urged on behalf of the appellant that the action of the respondent in purchasing and in using a kerosene lamp after the discontinuance of his supply of electricity was a *novus actus interveniens,* the flow of damages from which deliberate

use by the respondent is not attributable to the appellant and is too remote.

2. The decision of the learned Magistrate could not be supported having regard to the evidence.

At the hearing of the appeal we informed Counsel for the appellant that we were impressed by his first three grounds and we would not consider ground 1(4).

With reference to ground(1), Counsel for the appellant urged that no enforceable action was disclosed in the plaint. There is no mention of any agreement and of any breach of agreement. The action is founded in tort and not in contract. The words "wrongful act" are used. The injury of which the plaintiff complained was a loss of electric current and light on the said premises. He urged that the Magistrate gave judgment and awarded damages on the basis of contract which on the face of the claim did not exist. In so far as the claim was based on tort for the loss of convenience, he urged the Court to find that the plaint as so worded could not stand and was unenforceable. *(PEREIRA v. VANDEYAR W.L.R. 1953).* There was no separate tort for loss of convenience. Damages claimed in tort for loss of convenience could not be enforced. To succeed the respondent should have framed his claim on one of the recognised torts, such as trespass, nuisance and negligence. Counsel further contended that the evidence which followed tended to support the claim as drawn. The respondent repeated in evidence that he had been inconvenienced and uncomfortable. This clearly indicated the intention of the respondent that the claim should be for loss of convenience and nothing else. Although there was a relationship of landlord and tenant which of itself implied an agreement, yet his claim was founded upon tort and not contract. The Magistrate may have advised the respondent at any stage during the hearing to amend the claim but he did not do so himself, and the respondent did not apply for leave to amend his claim. Consequently, he must stand by his claim. The Magistrate's reasons for judgment were based on contract, whereas the claim was brought under the head of "TORT". The action as framed, therefore, was not actionable.

Solicitor for the respondent in reply to ground (1) submitted that an objection that the claim disclosed no cause of action was an objection which could have been taken at the hearing of the proceedings *in limine*. In this case this was not done. This would also go to the jurisdiction which the Magistrate had in the matter. Solicitor for the respondent also referred the Court to section 9 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, and submitted that this point could not be taken in the Court of Appeal. The submission made at the close of the case for the respondent that there was no case to answer was substantially different from the submission that the plaint disclosed no cause of action. He referred the Court to Rule 1(1) (d) under PART V of the Magistrates Rules, 1939. He also urged on the Court that in paragraph 1 of the claim there was an agreement alleged and that was a contract. Paragraph 1, he submitted, alleged that the premises were wired for the supply of electric current on the said premises. He referred to page 3 of the Magistrate's reasons, as follows:—

"Apart from the question of agreement simpliciter, there is implied under the provisions of Section 44 of the Landlord and Tenant Ordinance, a condition that any premises let, shall be, at the commencement and during the tenancy, in all respects reasonably fit for human habitation."

Here there was a general breach of the agreement that the landlord had provided the wire at the commencement and had accordingly held out that this wire was in a fit and proper state for the purpose of providing electric current. Electric current was part of the tenancy. The tenant could look for the continuance of that wire being in a fit and proper state, provided he paid his rent. Counsel finally submitted that the Magistrate considered that the premises were wired for electricity. He also cited PEREIRA v. VANDEYAR, the facts of which are as follows:—

"The plaintiff was the tenant of a flat within the protection of the Rent Restriction Acts of which the defendant was the landlord. The plaintiff lived in the flat with his wife, and child aged two. On October 8, 1952, the defendant, without going into the flat, cut off the supply of gas and electricity to it and left the plaintiff without any alternative means of heating or lighting. The plaintiff, after two days' discomfort, went with his wife and family to stay with friends for five days, returning when the gas and electricity supply was restored on October 14. In this action the plaintiff claimed damages for breach of the terms of his tenancy agreement. At the end of the hearing and at the instance of the county court judge the particulars of claim were amended and a claim was added for damages for eviction. The judge awarded to the plaintiff £3. 10s. special damages together with £25 general damages for the inconvenience caused to him. He further held that the plaintiff was entitled to punitive damages and awarded to him an additional sum of £25 on the basis that the defendant's conduct constituted a deliberate and malicious tort entitling the plaintiff to punitive damages. The defendant appealed on the ground that the damages awarded were excessive:—HELD, that the plaintiff had not proved any separate tort since although so far as the plaintiff had been evicted the defendant's conduct was *prima facie* a breach of contract, the cutting off of the gas and electricity did not amount to a tort—it did not constitute an interference with any part of the demised premises and could not be regarded as a trespass; and that, the plaintiff not having brought himself within the head of tort, the award of the additional sum of £25 punitive damages could not stand. LAVENDER v. BETTS /1942/2 All E.R. 72) considered and distinguished. SEMBLE, there is no separate tort of eviction. So far as eviction is wrongly achieved by a landlord it is *prima facie* a breach of contract."

In this case it will be seen that where the landlord deliberately cut off the supply of electricity as a result of which the tenant suffered dis-

comfort, the matter was treated as one of breach of contract. The learned authors of Clarke and Lindsell on TORT, state:—

> "One who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom, but generally speaking, he is not liable for damage which is not the natural or ordinary consequences of such an act, unless it be shown that he knows, or has reasonable means of knowing, of the consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person."

We agree with the submissions made by counsel for the appellant that the words "wrongful act" appearing in the claim indicated that the action was framed in tort and not in contract. Paragraph (1) of the claim merely sets out the status and relationship of the two parties, but does not allege a specific or an implied agreement between the plaintiff and the defendant and certainly not a breach of any agreement. Section 9, Chapter 17, cited to us by counsel for the respondent, does not apply as the action so framed as it was disclosed, a cause of action, but one in tort and not in contract. In our view the action ought to have been brought under the head of "CONTRACT" for breach of an express or implied term of the tenancy of the said premises.

Under section 28(a) of Chapter 17 this Court may amend either in whole or in part any order made by the Magistrate with reference to the cause, or may make any order which the Magistrate ought to have made. Under PART XIII of the Summary Jurisdiction (Civil Procedure) Rules, 1939, Chapter 12, of the Subsidiary Legislation, the powers of amendment given to the Magistrate are clearly laid down. The position is not covered by the Magistrate's powers of amendment. It follows, therefore, that this Court cannot properly amend the plaintiff's claim if it is wrongly framed. Rule 1(1) (d) under PART V to which Solicitor for the respondent has drawn our attention in our opinion does not apply, and does not permit of an action being framed in tort and judgment for damages being awarded on the basis of contract. We are, therefore, in agreement with the submissions made by counsel for the appellant.

On ground (2) of the appellant's grounds of appeal, counsel for the appellant submitted that under sub-section 3 of section 44, Chapter 185, on which the Magistrate purported to base his award of damages, gave rise to damages only where the property or the person or the health of an inmate of any house to which this section applies, was "by reason of a breach by landlord of the condition or the undertaking injuriously affected." In this case there was no evidence that the property or the person or the health of the tenant was injuriously affected. There was no evidence that the health or person of the tenant/respondent was at all affected; that the respondent's wife suffered from colds could hardly be traced to the lack of electric lights, or to the use of kerosene oil lamps; that the respondent was unable to use his radio was not an injury to the health or person of the tenant. Counsel for the appellant contended that the learned Magistrate misdirected himself as to the meaning

of the term "fit for human habitation", and cited the test laid down in *Hill & Redman — Law of Landlord and Tenant* — 11th Edition, page 1103:

> "In determining for the purpose of this Act whether a house is fit for human habitation, regard shall be had to the extent, if any, to which by reason of disrepair or sanitary defects the house falls, and the provisions of any by-laws in operation in the district, or of any enactment in any local Act in operation in the district dealing with the construction and drainage of new buildings and the laying out and construction of new streets."

And again in the case of *Whitehead v. Hive* [1952] B.G.L.R. 6, at p. 9, the Full Court of Appeal, in their judgment stated:—

> " 'Reasonably fit for human habitation' means that the premises are not in a condition which might tend to endanger the health and well-being of its inmates. In our view the landlord's statutory obligation to repair is restricted to his maintaining the house fit for human habitation..... Nor would the avoidance of mere inconvenience of the inmates which is not likely to result in the impairment of their health be deemed under the Ordinance to be warranted by the landlord as a term implied under the tenancy agreement."

Sub-section 3 of section 44 of the Ordinance reads —

> "When the property or the person, or the health of an inmate of any house to which this section applies, is by reason of a breach by the landlord of the condition or the undertaking in this section mentioned injuriously affected such inmate shall be entitled to recover damages from the landlord of the house in respect of such injurious affection."

In a claim for injury to property under this sub-section the respondent must show that the injury of such property arose as a direct result of the house being not reasonably fit for human habitation in the sense given above. Section 44 of Chapter 185 is taken from section 2 of the Housing Act, 1936, (26 Geo. 5 & 1 Edw. 8, c. 51), which in turn follows section 1 of the Housing Act, 1925, (15 Geo. 5, c. 14) which has replaced section 15 of the Housing Town Planning Act, 1909, and which followed the Act of 1885. It will be noted that a section similar to sub-section 3 of section 44 of Chapter 185 does *not* appear in the English Acts. As a result it has been held in England that the landlord cannot be sued by anyone, save the tenant (*Ryall v. Kidwell* [1914] 3 K.B. 135) Strangers to the contract cannot sue on the implied undertaking. For example, tenant's wife or children (*Cavalier v. Pope* [1906] A.C. 428), (*Bromley v. Mercer* [1922] 2 K.B.).

It is apparent that this would not be the legal position in this Colony where by sub-section 3 of section 44 of Chapter 185 the Legislature specifically gives the right to an inmate of any house to which the section applies, to recover damages from the landlord of the house when his property or his person or his health is by reason of the breach of the

statutory condition injuriously affected. In this case, therefore, the Magistrate was wrong when he awarded damages to the plaintiff based on the ground that the health of the plaintiff's wife was injuriously affected.

We are in agreement with the submissions made by counsel for the appellant on the second ground of appeal, and for these reasons the appeal must be allowed and the judgment of the Magistrate set aside. We award to the appellant the costs of this appeal fixed at $25.00 and of the proceedings in the Magistrate's Court also fixed at $25.00.

The appeal is accordingly allowed

JHAMAN v. ANROOP

(In the Supreme Court, Civil Jurisdiction (Stoby, J.) March 20, June 15, 1957).

Practice and Procedure—Writ of summons—Issue of—By a barrister—Claim for declaration of ownership of land with claim for $500 for damages for trespass —Dispute concerning land—No allegation in writ of summons or in statement of claim that the value of the land does not exceed $500—Claim for declaration not consequential upon or ancillary to claim for damages—Value of land in fact exceeds $500—Issue of writ a nullity—Legal Practitioners' Ordinance Cap. 30, s. 42 (1) B (c).

The plaintiff's writ of summons which was not specially indorsed was issued by a barrister at law acting as a solicitor and was indorsed with claims for (a) a declaration of ownership to a parcel of land; (b) a declaration of undisturbed possession for over 60 years; (c) an injunction in the usual terms and a mandatory injunction; (d) a claim for the sum of $500 as damages for trespass and (e) costs. The value of the parcel of land was not stated in either the writ of summons or the statement of claim but counsel for the plaintiff stated that it exceeded $500.

Section 42 (1) B (c) of the Legal Practitioners' Ordinance, Cap. 30, provides that a barrister may act alone in any cause or matter where the writ is not specially indorsed in which the sum of money claimed or the value of the land or thing in dispute as alleged in the statement of claim does not exceed the sum of $500. It is also provided by that enactment that a claim for any additional relief in any such cause or matter by way of a declaration, an injunction, the appointment of a receiver, the taking of an account, or other consequential or ancillary remedy shall not affect the right of audience. Under s. 42 (1) B (d) of the Ordinance is provided that in any proceeding for a declaration of title to land under the Civil Law of British Guiana Ordinance, Cap. 7, a barrister may act alone irrespective of the value of the land.

It was submitted *in limine* on behalf of the defendant that the writ of summons signed by counsel was improperly issued on the ground that the claim for damages together with the value of the land in dispute exceeded $500.

For the plaintiff it was contended that the claim for a declaration was ancillary to the claim for damages and also that a barrister could act alone where such a declaration is sought.

Held: (i) The claim for the declaration was not ancillary in the particular circumstances of the case as it was not possible to adjudicate in respect of the claim for damages for trespass without resolving the dispute concerning the land.