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[6 J.L.R.]

DECISIONS

OF

THE HIGH COURT

AND OF

THE COURT OF APPEAL

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1956

COURT OF APPEAL 1955

HART v. SMITH

MACGREGOR, J.

We are satisfied that the agreement for sale was not ex facie illegal, and therefore this Court will not entertain the question of illegality. Moreover, as it was not pleaded in the Court below, the respondent did not have an opportunity of calling evidence which might have been open to him to meet the issue.

S. 155 of the Resident Magistrates Law, Cap. 432, provides:

> "No defendant shall be allowed, except as provided by the next succeeding section, to set off any debt or demand claimed or recoverable by him from the plaintiff, or to set up, by way of defence, infancy, coverture, or any statute of limitations, or his discharge under any statute or law relating to bankrupts or insolvents, or a justification in actions of libel or slander, or any defence of 'not guilty by statute,' or any equitable estate, right, or ground of relief, unless such notice thereof as is directed by the Resident Magistrate's Court Rules, or practice for the time being in force, shall have been given to the Clerk of the Court; and, in the case of a defence of 'not guilty by statute,' the defendant shall name in such notice the particular act or law under which the defence arises;"

O.X, r. 15 of the Rules of the Resident Magistrates Court provides:

> "When in any action the defendant relies upon any statutory defence, or any defence of which he is required by any statute to give notice, he shall in his notice set forth the year, chapter or number and section of the Statute or Law, or the short title thereof, and the particular matter on which he relies."

The papers disclose that no notice was filed in the case as required by the above quoted rule. But counsel for the appellant submitted that s. 156 of Cap. 432 applies. It reads:—

> "It shall be lawful for the Resident Magistrate to allow any defendant to set up any of the defences mentioned in section 155 of this Law although he has not given the notice required by the said section: Provided, that where it shall appear to the Resident Magistrate that the plaintiff is taken by surprise by any such defence, or that it is otherwise unjust to allow the defendant to avail himself of any such defence without having given notice thereof, he shall allow such defence only on such terms as to him may seem just."

The short answer to the submission is that at no time was the Resident Magistrate aware of such a defence, and no application was made to him concerning it.

For these reasons we dismissed the appeal, with costs fixed at £12.

Solicitors: K. C. Burke for the appellant; Robinson, Phillips and Whitehorne for the respondent.

14 S.C.J.B. 764

IN THE HIGH COURT (IN CHAMBERS)

1955 Feb. 21, 22 March 16

McINTOSH v. MARZOUCA

Rent Restriction—Landlord and Tenant—Order for recovery of possession of controlled premises—Less hardship—Onus of proof—The Rent Restriction Law, Law 17 of 1944, s. 17 (1).

On an application under section 17 (1) of the Rent Restriction Law, Law 17 of 1944, by the landlord for the recovery of possession from the tenant of controlled premises, the onus of proof 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, is on the landlord.

APPEAL from the order made by Waddington, Resident Magistrate, St. James, sitting in Petty Sessions.

Appeal dismissed.

Coore for the appellant.

Rowe for the respondent.

cur. adv. vult.

1955. March 16: MacGregor J. read the following judgment.

MACGREGOR, J. MACGREGOR, J.: This is an appeal by the tenant from an order of the Resident Magistrate, St. James, sitting in Petty Sessions, by which the tenant was ordered to give up possession to the complainant, the landlord, of premises at 6 Parade, Montego Bay, before 31st December, 1954. The section of the Rent Restriction Law, 1944, Law 17 of 1944, under which the order was sought, reads as follows:—

> "17—(1) No order or judgment for the recovery of possession of any controlled premises, or for the ejectment of a tenant therefrom, shall,.....be made or given unless—
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> .....
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> (e) the premises being a dwelling-house or a public or commercial building, are reasonably required by the landlord for—
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> .....
>
> (ii) use by him for business, trade or professional purposes;
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> .....
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> 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 paragraphs (e), (f) or (h) of this sub-section 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 paragraphs (e) or (f) of this sub-section, the question of whether other accommodation is available for the landlord or the tenant;"

IN THE HIGH COURT (IN CHAMBERS) 1955

McINTOSH v. MARZOUCA

MACGREGOR, J.

In his judgment the Resident Magistrate correctly stated the three issues that arose for his consideration; viz. that the premises are reasonably required by the landlord for use by him for business or professional purposes, that it is reasonable to make the order, and that less hardship would be caused by granting the order than by refusing to grant it. The appeal deals solely with his decision as to hardship.

[The learned Judge then stated the facts and dealt with matters which call for no report, and continued:]

It was submitted for the tenant that the onus of proving less hardship is on the landlord. In the English Act, the Rent & Mortgage Interest Restriction (Amendment) Act, 1933, 23 & 24 Geo. 5 Cap. 32, the proviso to the first Schedule reads:

> "Provided that an order.....shall not be made .....if the court is satisfied that having regard to all the circumstances of the case.....greater hardship would be caused by granting the order..... than by refusing to grant it."

The Jamaican section already quoted is:

> "Provided that an order.....shall not be made .....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.....than by refusing to grant it."

In England, it has been decided that the onus is on the tenant to prove that greater hardship would be caused. It was submitted that the change of the wording in the Jamaica Law, puts the onus on the landlord.

I agree with that submission. It seems to me that the wording of the Jamaican Law is to provide that the making of the order is to be conditional upon proof that less hardship would be caused by granting than by refusing.

In the circumstances set out above, therefore, the question for decision is, has the landlord proved that less hardship would be caused by granting the order than by refusing to grant it? I am satisfied that he has. The two facts in the scale for the tenant are, his 16 years occupation of the one premises, and that it is his only business. As against that are the facts that a good site is available to him at the new theatre, that it should be eminently suitable for the tourist business, that he has done nothing for eighteen months to find other accommodation, knowing all the time that the landlord desired to occupy his own premises, that the landlord has his stock lying idle, that he has a business in the same premises, and the inconvenience that exists at 7 Parade.

IN THE HIGH COURT (IN CHAMBERS) 1955

McINTOSH v. MARZOUCA

MACGREGOR, J.

The appeal must therefore be dismissed with costs fixed at £3. The order for possession will be amended for the tenant to give up possession on April 30, 1955. I will also indorse the order with the words "Liberty to apply", c.f. *Plymouth Co-operative Society, Ltd. v. Lock* (1945) 61 T.L.R. 562. No doubt, the Resident Magistrate will consider any application that may be made on behalf of the tenant.

Solicitors: Wellesley Campbell for the appellant; Nation & Nation for the respondent.

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3 C.A.J.B. 494

COURT OF APPEAL

1954 Oct. 15
1955 April 1

R. v. J. A. PANTON & SONS

Cayman Islands—Conviction by Justices in Petty Sessions—Prosecutor sitting as Justice of the Peace—Conviction repugnant to principles of natural justice—Appeal to Grand Court—Appeal from Grand Court to Court of Appeal.

The Commissioner of the Cayman Islands, as Collector General, instituted proceedings against the appellants for using an unlicensed truck on the public roads of Grand Cayman. The case came before a Petty Sessions Court in Grand Cayman consisting of the Commissioner and another Justice of the Peace. The appellants were convicted and fined. An appeal was taken to the Grand Court of the Cayman Islands and the fine was reduced. On appeal to the Court of Appeal, Jamaica:

HELD: (i) the effect of the Act of the Imperial Parliament, 26 & 27 Victoria Cap. 31, is to give a right of appeal to the Supreme Court of Jamaica from a decision of Justices in the Cayman Islands and therefore in the circumstances there was a right of appeal to the Court of Appeal in Jamaica:

(ii) the trial was repugnant to the principles of natural justice, and the conviction recorded cannot be allowed to stand.

Leeson v. General Council of Medical Education and Registration (1889) 43 Ch.D. 366, followed.

APPEAL from Barrow, Judge of the Grand Court of the Cayman Islands.

Appeal allowed.

Manley, Q.C., for the appellant.

Lincoln Robinson for the Crown.

1955. April 1: The reasons for the judgment of the Court (Carberry, C.J., Rennie, J. and Clare, J. (Ag.)) were read by Rennie, J.

RENNIE, J.

RENNIE, J.: The appellants were prosecuted, convicted and fined for using an unlicensed truck on the public roads of Grand Cayman. The case came before a Petty Sessions Court in Grand Cayman consisting of the Commissioner and another Justice of the Peace. At the trial objection was unsuccessfully taken to the Commissioner