

NMLS

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO: 26/2005

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

**BETWEEN: JUDITH McKENZIE APPELLANT

AND VINNETTE OXFORD RESPONDENT**

Garth McBean instructed by Garth McBean and Co. for Appellant

**Miss Jacqueline Cummings instructed by Archer, Cummings and Co. for
the Respondent**

January 23, 24 & December 20, 2006

SMITH, J.A:

I have read in draft the judgment of Harris, J.A., and I am in agreement
with her reasoning and conclusion.

HARRISON, J.A:

I also agree.

HARRIS, J.A:

On January 24, 2006 we allowed this appeal. We set aside the decision of
the learned Resident Magistrate. The matter was remitted to the Resident
Magistrate's Court for a re-trial with the direction that section 25 (2) of the Rent

Restriction Act be invoked. It was further ordered that the matter be heard by another Resident Magistrate. We promised to put our reasons in writing. We now do so.

This is an appeal from a decision of Her Honour Mrs. P. Primo Griffiths, made in favour of the respondent in an action for recovery of possession of property and the recovery of arrears of rent.

The appellant is a tenant in respect of property known as 5 Handel Avenue in the parish of Saint Andrew. Her tenancy commenced in April 1991, at which time she paid a monthly rental of \$3,500.00. At that time her landlord was a Miss Kathleen Miller. In 1996, the rent was increased to \$10,000.00 and then to \$15,000.00 monthly. In January 1998, the appellant agreed to pay a further increased rental of \$20,000.00 monthly, commencing May 1, 1998.

Miss Miller died in April 1998, and her nephew Rudyard Miller assumed ownership of the property. The appellant began paying the rent of \$20,000.00 monthly in May 1998, which she continued paying until April 2000, when the rent was further increased to \$25,000.00. She refused to accept the increase and ceased paying rent.

A written Notice to Quit and deliver up possession of the property was served on the appellant. The Notice expired on September 30, 2000. Mr. Miller thereafter instructed Mrs. Oxford who had been his agent since 1999 to put up the property for rent. The appellant refused to vacate it. Following this, the

respondent commenced action for recovery of possession of the property and for outstanding rent of \$240,000.00 from May 2000, to May 2001.

The appellant's summary defence was that she was not indebted to the respondent for rental, as the standard rent for the property had not been determined by the Rent Assessment Board and that she had been charged a sum in excess of that which is permissible under the Rent Assessment Act.

On May 14, 2001, the learned Resident Magistrate entered judgment as follows:

- "1. Judgment in the sum of \$240,000.00 with interest thereon at the rate of 12% per annum from May 2000 to May 2001:
2. Order of possession on or before 21st May 2001:
3. Cost to Plaintiff in the sum \$22,517.00".

Two original and two supplemental grounds of appeal were filed.

Original ground 1

"The Learned Trial Judge erred in ordering recovery of possession of the premises in question which are controlled premises governed by the Rent Restriction Act. The Learned Trial Judge so erred for the following reasons:-

- (i) The ground under Section 25 (i) of the Rent Restriction Act upon which the Plaintiff/Respondent relied at trial is that the Defendant/Appellant had not paid rental for a period in excess of 30 days.
- (ii) The Plaintiff/Respondent had for a period charged the Defendant/Appellant rental in excess of the standard rent permitted under the Rent Restriction Act and by the Rent

Assessment Board and as a consequence the Defendant/Appellant owed no rental to the Plaintiff/Respondent at the time of trial.

- (iii) As a consequence of there being no rent owed by the Defendant/Appellant at the date of trial there was no ground under Section 25 of the Rent Restriction Act upon which the order for possession would have been made".

Original ground 2

"For the reasons outlined in sub paragraphs (i) (ii) and (iii) of ground 1, the Learned Trial Judge also erred in giving judgment in favour of the Plaintiff/Respondent in the sum of \$240,000.00 with interest at 2% per annum from May 2000 to May 2001".

Supplemental ground 1

- "1. The Learned Resident Magistrate erred in failing to consider whether pursuant to Section 25 (i) (d) of the Rent Restriction Act the Plaintiff/Respondent and the Landlord of the premises in question has proved on a balance of probabilities that he had taken steps as a consequence of the Notice to Quit which would seriously prejudice him if he did not obtain possession of the premises".

Supplemental ground 2

- 2. The Learned Resident Magistrate erred in failing to find that the Plaintiff/Respondent and or the Landlord had failed to prove on a balance of probabilities that he had taken steps as a consequence of the Notice to Quit given by the Defendant/Appellant which would cause serious prejudice to him if he did not obtain possession of the premises".

Mr. McBean submitted that the property was controlled premises under the Rent Restriction Act, the standard rental must be determined by due regard to section 17 (1) of the Act and the increased rental paid was in excess of that permitted by the standard rent. He further submitted that the appellant has a good defence to the claim for recovery of possession.

It was Miss Cummings' submission that the respondent was entitled to recover possession of the property as the appellant was in arrears of rent and had been served with a Notice to Quit. She further argued that the appellant failed to prove that she was entitled to invoke the provisions of section 17 (1) of the Rent Restriction Act.

Before the learned Resident Magistrate, two main issues arose for consideration. The first was whether the rent charged by the respondent exceeded that which is permitted by the Rent Restriction Act. The second is whether the Notice to Quit served on the appellant is valid and if valid, whether the respondent was entitled to recover possession of the property. In dealing with the first issue, the learned Resident Magistrate made reference to the contractual obligation of a tenant to pay rent. She subsequently stated her finding as follows:

"I found, from the evidence adduced that the last payment of rent made by the Defendant was April 2000. Hence, the Defendant created a duty by her own contract for which she was bound to fulfil.

No evidence was adduced by the Defendant that some frustrating event occurred which cause (sic) her obligation to end.

Therefore, she was bound to fulfil her obligation to pay the rent for the outstanding period May 2000 to April 2001".

In addressing the second issue she stated:

"There is no evidence about the date when rent was due and also no point was taken regarding the length of the notice. Therefore, I made no express finding on the validity of the notice. I found though, that the notice to quit and deliver up possession on the 30th September 2000 and the reason 'leaving premises, I am seeking somewhere less expensive' which was given by the defendant in the said notice Exhibit H 1 – to be valid – therefore, the defendant on all the circumstances should have vacated the premises on the date stipulated by her and allow (sic) the plaintiff to have vacant possession of the premises".

She went on to state:

"The Defendant in her defence did not challenge any of the reasons advanced by the Plaintiff, but, instead focused her defence on an aspect of the law which in this particular case require (sic) that a separate action be filed".

She thereafter found as follows:

". . . that the Defendant's failure (a) to challenge the reasons advanced by the Plaintiff for recovery of possession, and (b) to file a counter claim to address her concern as it relates to the over-payment of rent has effectively assisted the Plaintiff to discharge that burden which the Rent Restriction Act placed on her (the plaintiff). Therefore, the Plaintiff in all the circumstances was entitled to recover possession of the premises at 5 Handel Avenue, Kingston".

In her analysis for judgment she stated that the Rent Restriction Act was the governing statutory instrument in this case. Although this was her view, she failed to pay due regard to the relevant requirements of the Act.

Section 17 of The Rent Restriction Act provides for the letting of premises and prescribes the requirements for the determination of the standard rent. The Section so far as relevant to these proceedings reads:

"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:

Provided that –

- (a) premises shall not, for the purposes of this section be regarded as having been let in the same category of letting on or before the 1st day of July, 1976, if they were so let under a tenancy agreement or lease providing for a progressive rent".

Section 19 – (1) states:

"An Assessment officer shall, in determining the standard rent of any premises in any category of letting, act according to the principle that the standard rent shall be a rent of which the annual rate is such percentage of

the assessed value of the premises as the Minister shall prescribe by order".

The Rent Restriction (Percentage of Assessed Value) Order 1983, section 3 stipulates that the annual increase of the standard rent shall be 7½%. It reads:

"The standard rent as determined for any person pursuant to the schedule shall be increased on each anniversary of the application date by such amount as shall be necessary to increase by 7½% the standard rent payable immediately prior to such increase."

Under section 20 of the Rent Restriction Act, where the standard rent exceeds that which is permitted under the Act, the excess is irrecoverable by the landlord.

Section 25 (1) of the Act specified several grounds under which a landlord may not recover possession of controlled premises. Sections 25 (1) (a) and 25 (2) are of manifest importance in this case. Section 25 (1) (a) reads:

"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 . . ."

Section 25 (2) provides:

"A court asked to make such an order or give such a judgment-

- (a) shall require the Secretary of a Board to furnish the court with a certificate setting out such information as the Board possesses in relation to the premises in respect of which the application is made;
- (b) may -
 - (i) adjourn the application from time to time;
 - (ii) stay or suspend execution of the order or judgment, or postpone the date of possession for such period as it thinks fit, and from time to time grant further stays or suspensions of execution and further postponements of the date of possession;
- (c) shall, if it makes the order or gives the judgment, state in writing the grounds on which it does so".

Under section 25 (4) of the Act, a certificate of the Assessment Officer or the Secretary of The Rent Assessment Board, remitted to the court, in keeping with the requirement of section 25 (2) (a) of the Act, is admissible as evidence of its contents.

The critical question for the learned Resident Magistrate was, what was the standard rent at the time the property was let? The tenancy commenced in April 1991. In light of section 17 (1) of the Rent Restriction Act it would have been necessary for the standard rent, as of April 1991, to have been determined. Such rent would be subject to a 7½% annual increase as ordained by the Rent Restriction (Percentage Assessed Value) Order 1983. It is without doubt that the standard rent is the determinative factor as to whether rent is due

and owing flowing from which, is the question as to whether in light of section 25 (1) (a) of the Rent Restriction Act, the Notice to Quit issued was valid so as to warrant recovery of possession of the property.

It was incumbent on the learned Resident Magistrate to have applied section 25 (2) of the Act by obtaining the requisite certificate from the Rent Assessment Board in order to ascertain the standard rent. This she failed to do.

The defence of the appellant is that she has paid rent in excess of that which she ought to have paid. If, in fact, the amount paid by her exceeds the rent due by her such amount would be irrecoverable by the respondent by virtue of section 20 of the Act.

An appellate court will not interfere with the judgment of a trial judge unless he or she is plainly wrong in law or on the facts. There will however be, intervention by the court where it is shown that he or she had erred in the application of the law or misapplied the facts. See ***Watt v Thomas*** [1947] A.C. 484.

The learned Resident Magistrate failed to take into account the relevant provisions of the Rent Restriction Act, in particular section 25 (2). This rendered her findings flawed.

It cannot be said that all the material relevant to the issues before her were adequately and satisfactorily addressed. In the interest of justice there ought to be a new trial.

SMITH, J.A.

ORDER:

- (1) The decision of the Resident Magistrate made on May 14, 2001 is hereby set aside.
- (2) Matter remitted to the Resident Magistrates' Court with direction to invoke section 25(2) of the Rent Restriction Act in order to ascertain the standard rent as of May 2000.
- (3) Matter to be heard by another Resident Magistrate.