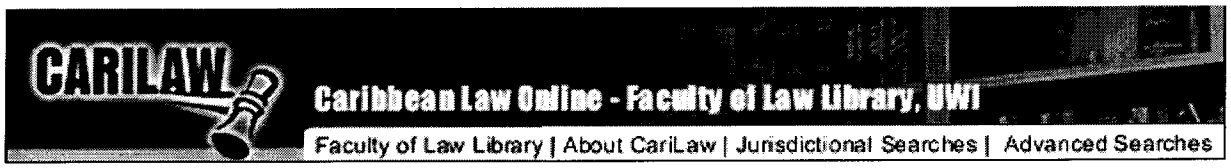

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Record **2** of 3 records.

MCQUICK v. L & V REALTIES LTD.

Citation # JM 1982 CA 18

Country Jamaica

Court Court of Appeal

Judge Kerr, P. (Ag.) | Carey, J.A , Campbell, J.A (Ag.)

Subject Real property

Date April 23, 1982

Suit No. Civil Appeal No. 13 of 1982

Subsubject Landlord and tenant - Notice to quit - Rent Restriction Act, s. 25 - Facts: The appellant tenant of the respondent company was given notice to quit on the ground that the house was for sale. The appeal was based on the ground that the notice was not based on any known circumstances under the Rent Restriction Act, s. 25. The trial judge considered it an oversight on the part of the legislature in not making specific statutory provisions to cover a case such as this. The judge reasoned that the state never intended in general to deprive an owner of property from exercising his right of selling the property as one of the incidents of ownership - Held: Appeal allowed. Resident Magistrate had failed to consider the issue before him.

Full Text Appearances: Mr. Howard A. Fraser for the appellant

No appearance for the respondent

Campbell, J.A. (Ag.): The appellant, Beverley **McQuick**, appeals to this Court from the decision of the learned resident magistrate in the Half-Way Tree Resident Magistrate's Court in which he gave judgment for the respondent, L. & V. Realties Limited and made an order for the appellant to vacate premises not later than the 31st December, 1981.

The background to this order is that L. & V. Realties Limited, who appears to be a real estate agent, filed a plaint in the Resident Magistrate's Court in which it described itself merely as the plaintiff, and sought an order against the appellant, Beverley **McQuick**, for possession of premises No.14 Champlin Avenue in the parish of St. Andrew.

When the case came up before the learned resident magistrate, learned counsel on behalf of the appellant intimated as his defence, in limine, that he was taking exception to the validity of the Notice to Quit on the ground that it was a notice which was not in compliance with the Rent Restriction Act. Evidence was led on behalf of the respondent, the gist of which is that the appellant was a tenant of the respondent's company in respect of premises 14 Champlin Avenue in the parish of [1] St. Andrew; that the appellant had been given Notice to Quit and had not complied with the notice. A copy of the Notice to Quit was admitted in evidence as exhibit 1, and it is dated the 3rd day of June 1981 requiring the appellant to vacate the premises on the 31st of July 1981. At the top of the notice is the caption "Reason for Notice – House is for sale."

The evidence before the learned resident magistrate further revealed that there was an agreement for sale of the property; that the vendor was one Miss Joyce Richardson, and that the agreement for sale was concluded in August 1981. The respondent conceded that he was acting, as agent for the vendor, and also that at the time the notice was served the property had not yet been sold. It appears the property had thereafter been sold before the action came on for trial.

At the close of the case for the respondent the appellant's counsel intimated, that the appellant would not be giving evidence. He made submission to the magistrate to the effect that notwithstanding that a Notice to Quit had been served, and even though there was no challenge to the validity of the notice in relation to the time given within which the property should be vacated, the appellant was challenging the Notice to Quit on the more substantial ground that it was not based on any of the known circumstances under section 25, of the Rent Restriction Act on which the resident magistrate was empowered to make an order for possession. He rested his submission on this ground.

The learned resident magistrate in his reasons for judgment made it clear that he agreed that under section 25, an order for possession could not be made where the reason given is that the house is up for sale. He went on to say that if he had to decide the matter on this narrow premise namely the provision of section 25 he would be bound to give judgment for the appellant. However, he went on to deliver himself to the effect that the wording of section 25, was not to be considered exhaustive. It did not exclude a jurisdiction to make an order for possession in the circumstances before him since it must have been an oversight on the part of the legislature in not making specific statutory [2] provision to cover the case in point. He propounded reasons based on a philosophy that the state never intends in general to deprive an owner of property from exercising his undoubted right of selling the property as one of the incidents of ownership.

He went on to say that where fetters are apparently imposed by the legislature on the right of an owner to deal with his property as he considers fit, if such fetters are shown to be too onerous then for reasons which he mentioned, it must be assumed that it was never so intended by the legislature.

Pausing here we must state that the true legal principle is that if the legislature by words imposes fetters however onerous on the disposition of property by individuals it must be construed as a matter of policy originated by the executive and given expression to by the legislature. It is not part of a Court's function to say that the fetters are onerous and, because they are onerous there resides in it an inherent power not to give effect to the clear legislative intent.

Dealing with the Rent Restriction Act, it is very clear, and the learned resident

magistrate did not seem to doubt that it imposed constraints or fetters on the right of a person at common law to deal with property, which he owns. He did not appear to doubt the fact that the primary intention behind the legislation was the protection of tenants by giving to them security of tenure, particularly in situations where the Government itself cannot fulfil the social needs of providing houses for all its residents.

Now section 25 of the Rent Restriction Act, in summary, provides that notwithstanding that an otherwise valid Notice to Quit has been served on a tenant, which has expired, that tenant cannot be required to vacate the premises which he occupies except by an order of the appropriate Court. In making an order, there is a general overriding principle, which must be observed by the tribunal, namely, that the order must in all the circumstances be just and reasonable. However even before the tribunal can consider whether the making of the order would be just and reasonable, it has to consider whether the order is being [3] sought in one of the circumstances which have been specifically prescribed by the legislature as circumstances which would entitle it to make the order. One of those circumstances is where the landlord requires the premises for his own occupation or for occupation by members of his family or close relatives. If that circumstance is established by evidence, then the learned resident magistrate would thereafter be required to have regard to the circumstances of both the tenant and the landlord who requires the premises for his own occupation, thereby to determine where the balance of justice and reasonableness resides. If he considered that the balance is in favour of the tenant he makes no order. If he feels it would be just and reasonable for the landlord to have his property he makes an order on the tenant to vacate the premises.

Before the learned resident magistrate in this case was a plaintiff who described himself as agent for the vendor. By the definition of "landlord," such an agent is also a landlord, but what had to be considered here, was whether the landlord be it L. & V. Realties Limited, or Miss Joyce Richardson, required the premises for occupation. It is clear on the evidence that such was not the case. Therefore, even though the plaint was brought by a landlord it was not a case, which fell within any of the paragraphs of section 25 under which an order for possession could have been made.

In looking through the record we anxiously considered whether the order for possession could be supported on some basis other than that propounded by the learned resident magistrate. We accordingly considered whether L. & V. Realties Limited in effect was bringing the action on behalf of the purchaser. The Notice to Quit was served, on the 3rd of June, 1981, the evidence which was before the learned resident magistrate, was that the contract of sale was executed in August, 1981, therefore at the time when the Notice to Quit was served it could only have been served on behalf of the prospective vendor because at that time there was no purchaser who could be considered as landlord. Had the agent, on the evidence, been able to establish that the notice had been served on [4] behalf of the purchaser albeit at the time only a beneficial owner, the position would have been different because such a purchaser, even though he is not at the time vested with the legal estate, could properly on his own behalf or through an agent, bring an action for recovery of possession because he is, in our view, comprehended in the definition of "landlord" as he is a person who but for the provision of the Act would be entitled to possession on execution by him of the contract of sale. In this case, however, it is clear that the plaint was not brought on behalf of any such beneficial owner as a purchaser.

Reverting to the facts of the case, it is clear that however favourably one regards

the position of the purchaser who desires to have the house for his occupation there is no action brought by him for recovery of possession. The only person who has brought the action is a person who is not entitled to have an order for possession at the time when the plaint was filed or at anytime thereafter for the simple and obvious reason that nowhere was the landlord contending that he desired the premises for his own occupation, and he is not entitled to an order merely on the basis that he wants vacant possession for the purpose of being able to sell the premises to some prospective purchaser. This being the case it is our view that the learned resident magistrate failed to consider the issue before him and proceeded on a dissertation on the philosophy of the Rent Restriction Act and of the legislative intent behind it which was totally irrelevant to the situation, which dissertation we venture to say, certainly does not, in our view, reflect the national interest. On the contrary we consider the legislature has clearly given expression to what in its view will better promote the national interest.

What the Court is required to do is to consider whether a person who seeks an order for possession has brought himself within the parameters set by section 25. The respondent not having brought itself within the context of section 25 the only order which appropriately could [5] have been made by the learned resident magistrate was an order refusing possession, that is to say dismissing the respondent's claim.

We accordingly are of the view that this appeal must succeed.

Kerr, P. (Ag.): In the circumstances appeal allowed, judgment of the Court below set aside and judgment entered for the defendant with cost, such cost to be taxed. Cost of this appeal $50, to the appellant. [6]

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