JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 42/2008

BEFORE: **THE HON. MR. JUSTICE PANTON, P.**
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN	**STUART'S JOINERY & DOOR MANUFACTURERS COMPANY LIMITED**	**APPELLANT**
AND	**VINCENT ROY WILSON**	**RESPONDENT**

Roy Fairclough and Ronald Paris instructed by Paris & Co. for the Appellant.

Ms. Carol Davis for the Respondent.

January 22 and September 25, 2009

PANTON, P.

I have read the reasons for judgment written by my learned sister Harris, J.A. I agree with her reasoning and conclusion, and have nothing to add.

HARRIS, J.A.

1. This is an appeal against the judgment of Rattray J. in which he ordered that the appellant deliver up to the respondent possession of property known as 77-78 Claude Clarke Avenue, Montego Bay, in the parish of Saint James .

2. The respondent and one Mr. Desmond Blake are the registered proprietors of the property, it being registered at Volume 1389 Folio 327 and Volume 1389

Folio 328 of the Register Book of Titles. It is held by them as tenants in common.

3. Sometime in early 2003, the respondent, without Mr. Blake's knowledge, entered into an agreement with the appellant for a monthly rental of the property for the sum of $70,000.00. The appellant entered into possession of it and the respondent commenced the collection of the rent. In or about 2005 the respondent became physically incapacitated, following which, Mr. Blake engaged in the collection of a monthly rental of $87,500.00. Mr. Blake still continues to accept rental from the appellant.

4. On May 28, 2007, a Notice to Quit the property by August 31, 2007 under the hand of the respondent, was served on the appellant. The appellant remained on the property beyond the expiry date of the notice. Following this, the respondent, on September 18, 2007, issued a Fixed Date Claim Form seeking recovery of possession of the property. The appellant, through its Managing Director Mr. Winston Stuart, filed an affidavit in response to the Fixed Date Claim Form stating among other things, that at the time of the letting of the property the appellant was unaware of Mr. Blake's co-ownership. An affidavit was also filed by Mr. Blake on which the appellant relied as its defence.

5. Paragraphs 5 to 7, 11 and 12 of Mr. Blake's affidavit are pertinent to the disposal of this appeal. The paragraphs read:

"5. The Claimant purported to enter into a

lease with the Defendant without my knowledge or permission so that when I found out that the Defendant was but one of three tenants of the property and that the Defendant was not sharing any of the rental with me I gave instructions to a firm of Attorneys-at-law in Kingston to file proceedings against the Claimant and the Defendant herein seeking inter alia an account of rental collected by the Claimant as well as an order to sell the said properties and for the Defendant to give up possession of the premises. However, I did not pursue that matter.

6. The Claimant has since continued to act in relation to the management and use of the said properties without consulting me. Sometime in June 2005 the Claimant fell down and broke his legs which resulted in him being incapacitated for almost a year.

7. During the Claimant's period of incapacitation I took over the responsibility of collecting the rental of the premises including the tenancy of the Defendant. Since that time the Defendant has been paying the monthly rental to me and at present the Defendant is not in arrears of rent in anyway whatsoever. The Defendant pays a monthly rental of $87,500.00.

...

11. The Claimant has therefore brought this action against the Defendant at a time when I am desirous of continuing the tenancy of the Defendant. The Claimant by commencing this action has therefore again without consulting me and without my knowledge taken unilateral action in breach of my rights as a co-owner of the said properties.

12. The Claimant and I have not partitioned the said properties and therefore we are still co-owners of undivided equal shares in the said properties and I do not see on what basis the Claimant can without my agreement determine the tenancy of the Defendant the income from which (as matters stand at the moment between the Claimant and myself) continues the only form of income I have derived from the said properties to date."

On April 23, 2008 Rattray J. made the following order: -

"(i) The Defendant is to hand over possession of premises part of land known as 77-78 Claude Clarke Avenue, Montego Bay, in the parish of Saint James and registered at Volume 1389 Folio 327 and Volume 1389 Folio 328 of the Registered Book of Titles, to the Claimant by the 31st of July 2008."

6. The following original grounds of appeal were filed: -

"(a) The Learned Judge erred in outlining the facts from which he defined the sole issue for determination of the claim as being "whether or not a Notice to Quit can be given to a tenant of registered property owned by tenants in common by one of the owners" in that the Learned Judge omitted to outline other relevant facts which he ought to have taken into account in defining the sole issue for determination of the claim.

(b) The Learned Judge in outlining the sole issue for determination failed to include or to take into account the fact that the Appellant/ Defendant had filed in support of his case an affidavit by DESMOND BLAKE the other co-owner of the property affirming the

continuation of the tenancy of the Appellant/ Defendant of part of the said property.

(c) The Learned Judge by failing to pay any or any sufficient regard to the facts set out in the affidavit of Desmond Blake defined the sole issue for determination of the claim by excluding any reference in his definition to the affirmation of the continuation of the tenancy of the Appellant/Defendant by Desmond Blake the other co-owner.

(d) The Learned Judge by failing to consider the affirmation of the tenancy by the other co-owner in defining the sole issue for determination by him therefore fell into error by failing to consider all the material facts from which he was required to appreciate and define the issues for determination in the Claim and so decide the matter before him.

(e) The Learned Judge failed to appreciate the distinction and difference between joint or co-ownership qua joint tenants and joint or co-ownership qua tenants in common.

(f) The Learned Judge therefore fell into error when he felt satisfied that the **Hammersmith case** applied equally to tenants in common when that case concerned a joint tenancy and bore no relevance to tenants in common.

(g) The Learned Judge unfairly exercised his discretion by only granting three months to the Appellant/Defendant to quit commercial premises."

The following supplemental grounds were also filed:

"1. The Learned Trial Judge erred in applying English Real Property Law to the consideration of co-ownership in Jamaica in which jurisdiction a limitation made to 'tenants in common' still effectively created a tenancy in

common, an estate abolished by the Law of Property Act 1925 in England.

2. The Learned Trial Judge in declaring the issue to be singular failed to appreciate that issue had been joined on two (2) matters:

   i. the validity of the notice served and if valid

   ii. whether the Respondent/Claimant was entitled on the facts to an order for possession.

3. By treating the issue of possession as merely contingent on and indivisible from that of the validity of the notice to quit the Learned Trial Judge failed to consider the central practical material question which on the evidence divided the parties that is, 'does the law in Jamaica demand that the Appellant/Defendant yield possession to the Respondent/Claimant?'

4. The Learned Trial Judge erred in failing to appreciate that relevant evidence before the Court and adverted to by the Judge disclosed that the Respondent/Claimant's 'co-owner' united in possession with the Respondent/ Claimant had entered into a relationship of landlord and tenant with the Appellant/ Defendant before the service of the notice to quit."

7. Mr. Fairclough submitted that the learned trial judge, having recognized that the property is subject to a tenancy in common, erroneously found that the dispute as to the right to possession of it was solely dependent upon the validity of the notice to quit. He argued that the **Hammersmith case** established that a dispute over the right to possession is determinable on the validity of the notice to quit only in circumstances where the parties hold as joint tenants

irrespective of whether they are lessors or lessees. It was his further submission that, in the present case the parties hold as tenants in common and in a tenancy in common the four unities of time, title, interest and possession do not co-exist as in the case of a joint tenancy, accordingly, there cannot be a joint demise by tenants in common.

8. It was Miss Davis' submission that unity of possession is common to both joint tenancy and tenancy in common and in the present case, there being no demarcation with respect to any part of the property, both tenants in common are entitled to possession of the whole and as a consequence the consent of both would not be required for the continuation of the tenancy. She further submitted that the principles laid down in the **Hammersmith case** are equally applicable to a joint tenancy as well as tenancy in common and that the notice to quit by the respondent effectively determined the tenancy.

9. The learned trial judge found that the notice to quit was valid and that the respondent, in his capacity as a tenant in common, could have issued a valid notice to quit without the concurrence of Mr. Blake and could have thereby terminated the tenancy. These findings give rise to two fundamental issues. They are:

(a) What is the effect of the notice to quit issued by the respondent?

(b) If it is found to be valid, whether the respondent was entitled to terminate the

> tenancy and recover possession of the property.

10. The learned trial judge, before arriving at his conclusion, at paragraph 8 of his judgment, said: -

> "Having carefully considered the submissions of both Counsel and having reviewed the authorities cited, I am satisfied that the principles outlined in the **Hammersmith case** are also applicable to a case concerning tenants in common. The essence of any landlord/tenancy relationship insofar as the continuance of a periodic tenancy is concerned, is the continuing will of all the parties for continued existence of that relationship. Once that will is no longer present, either party is entitled to take the necessary steps provided for in the agreement for its termination. I am of the view that this principle can be relied on by any one of two or more individuals who own property, whether they do so as joint tenants or as tenants in common."

At paragraph 9 he went on to say: -

> "I adopt the dicta of Lord Bridge in the **Hammersmith case** at page 484, paragraph *F* where he stated: -
>
> > 'Hence, from the earliest times a yearly tenancy has been an estate which continued only so long as it was the will of both parties that it should continue, albeit that either party could only signify his unwillingness that the tenancy should continue beyond the end of any year by giving the appropriate advance notice to that effect. Applying this principle to the case of a yearly tenancy where either the lessor's or the lessee's interest is held jointly by two or more parties, logic seems to me to dictate the conclusion that the will of all the

> joint parties is necessary to the continuance of the interest.'
>
> In the present case three months notice was given to the Defendant to vacate the premises, signifying the intention of one of the owners of his unwillingness to continue the tenancy beyond the end of August, 2007. I am satisfied that the notice to quit was properly given and although given by one of two co-owners, was sufficient to terminate the tenancy relationship."

He later said at paragraphs 11 & 12: -

> (11) "Lord Browne Wilkinson at page 492 of the **Hammersmith** case stated: -
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> > 'The speech of my noble and learned friend Lord Bridge of Harwich, traces the development of the periodic tenancy from a tenancy at will. He demonstrates that a periodic tenancy is founded on the continuing will of both landlord and tenant that the tenancy shall persist. Once either the landlord or the tenant indicates, by appropriate notice, that he no longer wishes to continue, the tenancy comes to and end. The problem is to determine who is 'the landlord' or 'the tenant' when there are joint lessors or joint leassees (sic).
>
> He went on to say further on that page at paragraph G:
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> > "Where there were joint lessors of a periodic tenancy, the continuing 'will' had to be the will of all the lessors individually, not the conjoint will of all the lessors collectively. This decision created an exception to the principles of the law of joint ownership."

> (12) I accept and adopt the passages cited and I am of the opinion that the dicta of Lord Browne Wilkinson insofar as it refers to joint lessors suffices to encompass not only a joint tenancy situation, but also that of a tenancy in common."

11. It must be observed that, in arriving at his decision, the learned trial judge expressly relied on the case of **Hammersmith and Fulham London Borough Council v. Monk** (1992) 1 A.C. 478. In that case the issue before the court was whether a periodic tenancy could have been unilaterally terminated by notice given by one of two joint owners of a leasehold interest. It was held that the termination of a lease by way of notice could have been validly exercised by one joint lessee without the consent of any other joint lessee.

12. In the case under review, the agreement was in respect of a monthly tenancy. The respondent issued and served on the appellant a notice to quit and deliver up the possession of the property within three months. Miss Davis contended that the notice is valid in that it is in compliance with the Rent Restriction Act and is therefore effective. It cannot be disputed that the notice was issued in accordance with sections 25 and 26 of the Act. Nor can it be said that it was not served in conformity with the statutory requirements. The real question, however, is whether the notice could have effectively determined the tenancy.

13. It is indisputable that the respondent and Mr. Blake are co- owners of the demised property. Does the interest in the property held by the respondent as a

tenant in common confer on him the right to evict the lessee without Mr. Blake's consent? The learned trial judge found that a valid notice to quit was issued and, placing reliance on the **Hammersmith case**, took into account the English statutory provisions with respect to proprietary interests in lands. This impels me to examine the law as it relates to proprietary interests in land.

14. At common law, joint tenancies and tenancies in common co-exist as legal estates and equitable interests. This was the position in England prior to 1925. However, the advent of the Law of Property Act 1925 has changed the manner in which estates can be held. In England, by operation of the law, a legal tenancy in common is incapable of subsisting after 1925, as, Section 34 of the Law of Property Act 1925, in abolishing tenancies in common, converted all joint ownership of legal estates and equitable estates into joint tenancies. This is not so in Jamaica.

15. In Jamaica, the common law position continues to be relevant so far as the co-ownership of legal estates is concerned. Joint tenancies and tenancies in common still operate as two separate and distinct entities. Further, the Registration of Titles Act, by acknowledging the different species of proprietorship in land, expressly specifies the manner in which a legal estate is capable of being held. Section 3 of the Act defines a proprietor as one who owns property solely, jointly or in common with any other person. The section provides:

> "proprietor" shall mean the owner solely, jointly or in common with any other person, whether in possession, remainder, reversion, expectancy or in tail, or otherwise, of land or of a lease, mortgage or charge; and such word shall also include the donee of a power, or other person empowered or authorized to appoint or dispose;"

16. The Act specifically designates the types of estates which are capable of existing in land. It particularizes a tenancy in common as one of three definite interests which can be held in land. This clearly demonstrates that a tenancy in common, is and continues to be recognized as a distinct and separate interest from a joint tenancy.

17. The proprietary interest held by the parties in the **Hammersmith case**, was a joint tenancy and not a tenancy in common. These two estates are distinctive in nature. As a consequence, the common law, in recognition of this, dictates that these concurrent interests portray several distinguishing features. The only common thread which runs between them is that of unity of possession. Unlike joint tenants, each tenant in common holds a distinct, fixed share, though undivided. The interest, although not demarcated, remains undivided and until demarcation, each co-owner is entitled to the property as a whole. Therefore, each tenant in common is entitled to occupy the property in common with the other co-owners. See **Fisher v Wiggs** (1700) 12 Mod 296.

18. A demise by a tenant in common, even if joint or, on terms, operates as a separate and distinct demise by each tenant in common of his undivided share.

In **Thompson and Others v. Hakewill** (1865) 19 C.B.R. Vol. 17-20 966, at page 971 Byles J. said:

> " There is no doubt that a demise by tenants in common, though joint in its terms, operates as a separate demise by each tenant in common of his undivided share, and a confirmation by each of his companions: *Eccleston v. Clipsham,* 1 Wms. Saund. 153; 2 Rol. Abr. 64; Sheppard's Touchstone, by Preston, 85; *Heatherley v. Weston*, 2 Wils. 232."

A lease by tenants in common operates as a demise of the moieties of each co-owner. **Burne v Cambridge** (1836) Mood. & R 539, NP.

19. In a joint tenancy, the unities of time, interest and title must co-exist. In a tenancy in common, there need not be unity of interest, nor unity of time when the interest of the co-owner is vested, nor unity of title. A further distinction is that on the death of one joint tenant his interest in the land accrues to the other joint tenant by the doctrine of jus accrescendi. That is to say, it passes to the surviving joint tenant. This is an essential characteristic of a joint tenancy which additionally manifests the exclusive nature of a tenancy in common. The death of a co-owner demands the passing of his interest under his will or intestacy. This shows an unreserved right of a tenant in common to dispose of his undivided share as he wishes.

20. In the **Hammersmith case** the co-owners were joint tenants, not tenants in common. The unity of interest of those joint tenants was the enabling factor which permitted the co-owner to terminate the tenancy by appropriate

notice without the concurrence or knowledge of the other co-owner. In a tenancy in common, the absence of unity of interest would operate as a bar to one tenant in common effectively terminating a tenancy without the consent of the other. It follows that a notice to quit by a tenant in common, even if issued in compliance with relevant statutory provisions, could not operate so as to adversely affect the interest of a co-owner without his consent.

21. To accept that **Hammersmith** is applicable to the instant case would be to ignore the fact that, as a matter of law, the legal estates of joint tenancies and tenancies in common are distinctively different. Tenancies in common form a vital and integral part of Jamaican jurisprudence. Consequently, due regard must be paid to the law as it relates to a tenancy in common. Such interest could never be grounded in any right of one co-owner, on the issuance of an appropriate notice, to discontinue a tenancy. This would mean that a co-owner who is a tenant in common could assign unto himself a right to recover possession of property without the consent of the other tenants in common. Each tenant in common must be a party to the termination of a lease for the purpose of the recovery of possession. It follows therefore, that a lessor, being a tenant in common, is not authorized to terminate a lease so as to bind the other co-owner without his consent. It appears to me that **Hammersmith** could only be applicable as persuasive authority in Jamaica in cases where co-owners of a legal estate hold as joint tenants.

22. A further issue to be addressed is the effect of Mr. Blake's averment of his desire to continue the tenancy, he having been engaged in the collection of rent from the appellant since 2005. It was a finding of the learned trial judge that Mr. Blake, having found that the premises were rented, took over the responsibility of the collection of rent from the appellant. Implicitly, in this finding by him, this act on Mr. Blake's part is confirmation of the rental agreement between the appellant and the respondent. This finding must obviously lead to the conclusion that Mr. Blake's collection of the rental was an approval of the agreement notwithstanding that at the time of the letting he was unaware of the tenancy agreement between the appellant and the respondent.

23. The respondent, in 2003, collected $70,000.00 monthly as rental from the appellant. Two years later, in 2005, Mr. Blake began collecting rental of $87,500.00 monthly. In my view, this is merely a variation of the original rental sum. This amount, the appellant readily paid to Mr. Blake. It follows that the agreement would still have been valid and subsisting. In addition, Mr. Blake's desire to continue the tenancy clearly supports this fact. The rental agreement was still in force at the time at which the respondent issued and served the notice to quit with a view to the recovery of possession of the property.

24. Mr. Blake and the respondent being tenants in common do not enjoy unity of interest in the demised property. Mr. Blake, as a tenant in common, having a distinct share in the property, would have been required to have been a

party to the notice to quit if he were to be bound by it. The notice to quit could only have effectively put an end to the tenancy if Mr. Blake had consented to the issuing and service of it. Consequently, the service of the notice to quit could not have had the effect of terminating the lease. Therefore, the respondent alone would not have been entitled to recover possession of the property, as, possession also resides with Mr. Blake by virtue of his undivided interest. It follows that the learned trial judge had erred in finding that the **Hammersmith case** applies to tenancies in common, thereby giving the respondent a right to recover possession of the property, he, having served a notice to quit on the appellant.

25. I would allow the appeal with costs to the appellant to be agreed or taxed.

DUKHARAN, J.A.

I too agree and have nothing further to add.

PANTON, P.

ORDER

Appeal allowed.

Order of Rattray, J. made on April 23, 2008 is set aside. Costs to the appellant to be agreed or taxed.