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VALERIE THOMAS *v.* BEVERLEY WALKER

[COURT OF APPEAL (Carberry, Rowe and Carey, JJ.A.) October 19 and November 22, 1984]

Landlord and Tenant—Rent Restriction—Controlled residential premises—Notice to quit—Reasonably required by landlord for occupation as a residence for herself—Reasonably needed rather than reasonably desired—Onus of proof—Standard rental—Rent Restriction Act, s. 25(1) (e).

The respondent together with her father now deceased leased residential premises to the appellant and one Patricia Smith for one year at a monthly rental of $600.00 commencing on October 15, 1981. The premises had been assessed by the Rent Board in April 1975 at a monthly rental of $276.00. The appellant, Patricia Smith and a third person contributed to the payment of the rent. At the expiration of the lease in 1982 the respondent permitted the tenancy to continue but on a month to month basis. The appellant challenged the notice to quit which the respondent had served on Patricia Smith on the ground that it was irregular as the arrangement for the continuation of the tenancy had been made with her and that the notice had been given because she had refused to pay additional rent unlawfully demanded by the respondent. The Resident Magistrate held that the respondent was entitled to recover possession of the premises since in accordance with section 25 (1) (e) of the Rent Restriction Act the premises were reasonably required for her own occupation and that the appellant and the respondent who had become statutory tenants had been properly served with the notice to quit. The tenant appealed.

Held: (i) The Resident Magistrate must have contrasted the strong possibility of an improper motive on the part of the respondent to evict the appellant because of her refusal to pay the unlawfully demanded increased rental with the evidence of the respondent that she had been given notice to quit the premises she then occupied and in addition taken into account that despite the familiarity of the appellant with the circumstances of the respondent's existing tenancy she had not produced any evidence to challenge this.

(ii) The respondent's evidence was that she was under notice of eviction and had no where to go and it was not a sentimental desire on her part to live in her own home and on that basis she had shown that she reasonably required the premises for use as her personal residence.

(iii) The onus is on the landlord (respondent) to satisfy the test that less hardship will be caused by granting the order than by refusing it and the Resident Magistrate was in error in deciding otherwise; but the Resident Magistrate was entitled to take into account the factor that the appellant had no real need for a house of the size of the one in question excepting to indulge in her practice of subletting. Accordingly, the proviso to section 251 of the Judicature (Resident Magistrates) Act should be applied.

Appeal dismissed with costs to the respondent fixed at $50.00.

Cases referred to:

(1) *Quinlan v. Phillip* (1965) 9 W.I.R. 269.
(2) *McIntosh v. Marjouca* (1965) 6 J.L.R. 345.
(3) *Evelyn v. Atkins* (1970) 16 W.I.R. 444.

Appeal against decision of Resident Magistrate for St. Andrew (His Honour, Paul Harrison) by which he ordered the defendant/appellant to quit and deliver up possession of controlled residential premises.

Allan Wood for appellant.
Miss Pauline Finlay for respondent.

ROWE, J.A.: This was an appeal from the decision of His Honour Mr. Paul Harrision sitting as Resident Magistrate for St. Andrew in which he ordered the defendant/appellant to quit and deliver up possession of premises No. 4 Courtney Drive, Trafalgar Park, Kingston 10, on or before July 31, 1984.

Evidence was tendered at trial that the respondent together with her father, now deceased, leased to the appellant and one Patricia Smith a dwelling house consisting of 3 bedrooms, 2 inside bathrooms, living and dining rooms, maid's quarters and an outside bathroom at the monthly rental of $600.00 for the period of one year commencing on October 15, 1981. Premises 4 Courtney Drive were assessed by the Rent Board in April 1975 at a monthly rental of $276.00. Respondent made an application on July 10, 1981 for a review of the rental but up to the trial of this action in March, 1984 no decision has been arrived at by the Rent Board upon this application.

The appellant and two other persons made contributions to the rent money. Patricia Smith contributed $250.00 per month while Candice Dally paid up $150.00. At the expiration of the lease in 1982, the respondent permitted the tenancy to continue but on a month to month basis.

The appellant averred that the arrangement of the continuation of the tenancy was made only with her, the consequence being that the notice to quit was irregular as it only came to her attention on November 4, 1983 although it had been handed to Patricia Smith on October 31. The learned Resident Magistrate held that the appellant and Patricia Smith became statutory co-tenants on the expiration of the lease and that the service of the notice was valid. A complaint was made against this finding by the learned Resident Magistrate on the Grounds of Appeal but no argument was addressed to us on that issue.

Difficulties developed between the respondent and the appellant in August, 1983. Up to then rental had been regularly paid. In a conversation with the appellant, the respondent desired to increase the monthly rental in keeping with what other comparable properties in the area were then fetching and figures of $1,200 - $1,000 were mentioned. The minimum amount suggested by the respondent was $900. This, the appellant flatly refused to pay and she sought legal advice. Research by her legal advisers disclosed the controlled rent of $276.00 per month, (just a few dollars above the contribution of Patricia Smith) and the appellant standing upon her legal rights informed the respondent through the medium of an attorney's letter that she was in breach of the Rent Restriction Law and that the appellant would not be paying any further rental until she had lived out a period appropriate for the overpayment of rent. Notwithstanding this decision on the part of the appellant, she continued to collect the contributions from Patricia Smith and Candice Dally up to December, 1983.

The respondent is married and she lives with her husband. She lived at premises 82 Hope Road paying a monthly rental of $300. The landlord of those premises offered them to her for sale but she had no money with which to purchase that town-house. In evidence, the respondent said that her landlord gave her a Notice on October 22, 1983 to quit and deliver up the premises which she occupied at 82 Hope Road on December 31, 1983. That notice to quit inspired her to give the notice to the appellant as she the respondent did not own any other house.

It was the case of the appellant before the learned Resident Magistrate that the respondent was motivated to seek recovery of possession from the appellant solely on the ground that the appellant had refused to pay the additional rental unlawfully demanded and was holding to her legal right to pay no more than the standard rent ordered by the Rent Board. Challenged also was the resopndent's claim that she had been given notice to quit as the notice was not produced and no supporting witness was called to corroborate that aspect of her testimony. As the tribunal of fact, the learned Resident Magistrate accepted the

respondent as a witness of truth and found as a fact that she did receive notice to quit to become effective on December 31, 1983.

One of the grounds upon which a landlord may obtain an order for recovery of possession of a dwelling house which falls under the Rent Restriction Act, is that the premises are reasonably required by the landlord as a residence for himself, see section 25 (1) (e) of the Rent Restriction Act. This was the ground on which the respondent based her notice to quit delivered to the appellant. Mr. Wood criticized most strongly the finding of the learned Resident Magistrate that the premises were reasonably required by the respondent as a resident for herself. He submitted that such a finding was manifestly contrary to the evidence adduced at the trial and the inferences which could reasonably be drawn from such evidence. He said that on any reasonable view of the evidence the respondent had not proved that aspect of her case.

It goes without any necessity for emphasis that a tenant is entitled to the full protection afforded by the Rent Restriction Act and a paramount provision of that Act is that a landlord is not entitled to charge rent in excess of that fixed by the Rent Board for particular premises. During the course of this tenancy, the appellant found herself in a most favourable position. She had secured a house which was spacious and commodious so much so that for some 15 months two rooms were sublet at a rate equivalent to 145% of the controlled rent for the entire premises. She had space left over for herself and for an aged and infirm person whose care she benevolently undertook. There was however, no evidence that the respondent knew of the internal arrangements between the appellant and her two contributing partners. But the respondent was acting unlawfully when she made the demand for the excess rent and in all probability she must have been extremely upset when she received the letter from the appellant's attorneys conveying the unwelcome news that not only would she not get the excess rent but that she was obliged to disgorge the difference between $600 and $276 for each of the months of tenancy. The learned Resident Magistrate must have contrasted the strong possibility of an improper motivation on the part of the respondent to evict the appellant with the evidence of the respondent that she had indeed been given notice to quit premises at 82 Hope Road. In coming to his decision that the respondent spoke truthfully about her being under notice, the learned Resident Magistrate was influenced by the fact that "the defence revealed an inside knowledge of the circumstances of the occupancy of tenancy at 82 Hope Road" and could well have drawn the inference that if the defence had instructions that the appellant had not been given notice, such evidence would have been produced by the defence. This is not to say that the burden of proving that she was indeed under notice and reasonably required the premises in Trafalgar Park for a residence did not rest upon the respondent but the learned Resident Magistrate was entitled to have in contemplation the way in which the case was conducted in order to determine whether the respondent was a witness of truth. Had the respondent produced the notice to quit served upon her, that would probably be very cogent proof of that issue. I am quite unable to say however, that oral evidence that she was served with such notice was either inadmissible or insufficient to prove that fact on a balance of probabilities.

In an effort to satisfy the Court that the learned Resident Magistrate erred in his finding that the premises were reasonably required by the respondent as a resident for herself, Mr. Wood relied upon the judgment of Wooding, C.J., in *Quinlan v. Phillip* (1965) 9 W.I.R. 269. That was a case in which a person, then a tenant, purchased other premises intending to make it his home. The house he bought was occupied by a husband and wife, their seven children as also an aunt. The new owner wished to go into occupation and he offered the tenants the apartment he then occupied as alternative accommodation. This offer was refused on the ground that the accommodation offered was inadequate for the tenants requirements. There was no pressure upon the house owner to give up the rented apartment

which he occupied together with his wife and he received occasional visits from his daughter-in-law. the landlord's application for recovery of possession of his newly acquired house was refused by the Magistrate and his appeal to the Court of Appeal of Trinidad and Tobago was equally unsuccessful.

Wooding, C.J., in giving judgment referred to section 14 (1) of The Rent Restriction Ordinance, Cap. 27 No. 18 under which the action was brought and which is similar to section 25 (1) (e) of The Rent Restriction Act of Jamaica, which he said prohibits the making of an ejectment order unless two and sometimes three conditions are satisfied viz:

> "First the landlord must establish one or more of the grounds specified in the lettered paragraphs of the subsection; in 'addition' to use the language of the Ordinance, the Court which is asked to make the order must consider it reasonable so to do; and finally, in the case of certain grounds which may be relied upon by the landlord, the Court must also be satisfied that having regard to all the circumstances of the case less hardship would be caused by granting the order than by refusing it."

Then in relation to what is meant by "reasonably required", Wooding, C.J., said:

> "It has long been accepted that 'reasonably required' means 'reasonably needed' and not merely 'reasonably claimed'. 'Reasonably needed' manifestly cannot be equated with absolute necessity, but it undoubtedly connotes rather more that desire."

The Court went on hold that the landlord's laudable desire to be the owner of the house in which he lived rather than to be a tenant was a far cry from what is necessary to prove reasonable need.

Here the respondent gave evidence that she was under notice to quit, and had no where to go. Unlike the position of the applicant in *Quinlan v. Phillip* supra, this respondent faced that threat of eviction come December 31, 1983. It was no mere sentimental desire on her part to live in her own home; she was acting under the spur of eviction. In my opinion the Magistrate rightly concluded that the respondent reasonably required the premises for use as her personal residence.

The next ground argued by Mr. Wood was that the learned Resident Magistrate was in error when he found that greater hardship would be caused to the respondent if the order for possession was refused and that in all the circumstances it was reasonable to make the order. In the first place, he submitted, there was no onus upon the appellant to show that greater hardship lay on her rather than on the landlord. In the second place, there was no scrap of evidence from the landlord as to hardship upon her and finally, such evidence of hardship as there was came from the appellant.

What did the evidence show? Ms. Smith and Dally vacated the premises on December 15, 1983 and went to set up house elsewhere because, as they said, they had been given notice by the respondent. The appellant said that having got notice she made enquiries about other accommodation, she checked the newspapers and "list with real estate agent." This latter phrase could mean either that she checked listings of a real estate agent or that she placed her name on his list. She was seeking premises with about three bedrooms suitable for herself, her sub-tenant and her lodger with a price rental in the range of $400 per month. She said she had made enquiries on Wellington Drive, but up to the time of trial she had not obtained alternative accommodation.

One of the findings of fact made by the learned Resident Magistrate was counched in this way:

> "No other accommodation was available to the plaintiff."

There is no specific evidence recorded in the notes upon which this finding could be made but I am prepared to infer from the conduct of the case as a whole that the learned and very experienced Resident Magistrate considered that if the respondent had but $300

per month to spend on rent, there was no reasonable possibility of her obtaining anything like comparable accommodation in St. Andrew.

This appeal would not have merited a written judgment had the learned trial judge not said;

> "On the evidence, the Court finds that the defendant did not make any realistic enquiries to obtain alternative accommodation. Assuming that she owed an obligation to Mr. Graham, 'the stranger within our gates' enquires for a '3 bedroom house' is not the alternative accommodation she needs. *The defendant has not discharged the onus placed upon her*. The plaintiff under notice to quit has no alternative premises at which to reside" (emphasis mine).

The proviso to section 25 (1) of the Rent Restriction Act in so far as is material states:

> "Provided that an order or judgment shall not be made or given on any ground specified in paragraph (e) . . . 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 the ground specified in paragraph (e) . . . the question of whether other accommodation is available for the landlord or the tenant."

In *Quinlan v. Phillip* supra, Wooding, C.J., said:

> "In our opinion, it is often of the first importance to bear in mind that the ordinance throws upon the landlord the onus of showing that less hardship would be caused by granting than by refusing the order. In England, the onus is the other way. There, it is for the tenant to show that greater hardship would be caused by granting than by refusing the order. Here, therefore, if in the result the issue lies 'medio' it must be resolved in favour of the tenant."

Ten years before *Quinlan v. Phillip* was decided MacGregor, J., in giving judgment in *McIntosh v. Marzouca* (1955) 6 J.L.R. 349 had given the lead as to the onus of proof. he said:

> "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 Jamaican Law, (the Rent Restriction Law, Law 17 of 1944 section 17 (1), puts the onus on the landlord.
>
> I agree with that submission."

The two cases cited above make it perfectly clear that the onus is upon the landlord and the landlord alone to satisfy the hardship test and this would include where relevant, any question as to the availability or suitability of alternative accommodation. There was in the instant case no onus upon the tenant to show that she had made reasonable efforts to secure alternative accommodation.

I do not conceive it to be the law that were a landlord reasonably requires the rented premises for his own residence, he must in all cases adduce evidence to show that he has gone out and sought alternative accommodation for the tenant, that he has offered that accommodation to the tenant and that the tenant has unreasonably refused to accept the alternative accommodation.

Fraser, J.A., was dealing with a case where alternative accommodation had been offered and refused in *Evelyn v. Atkins* (1970) 16 W.I.R. 444. He offered useful guidance on this issue when he said:

> "Where the issue between the parties at the trial is whether or not other accommodation was offered, it is relevant to consider the suitability of any accommodation shown to be available at the time of the trial. But where other accommodation has been offered or refused, the relevant issue was whether or not such accommodation was suitable in all the circumstances. Moreover, it is to be observed that the section does not prescribe that other accommodation must be available. It prescribes that an order shall not be made unless the court is satisfied that, having regard to all the circumstances of the cases less hardship would be caused by granting the order than by refusing to grant it; and such circumstances are declared to include the question whether other accommodation is available for the landlord or the tenant; and yet also, the court may refuse to make an order although other accommodation is available for the landlord or the tenant. The decisive factor which must ultimately determine the issue is whether, objectively, it is reasonable to make the order having regard to the comparative circumstances of the parties."

I am of the view that the learned Resident Magistrate was entitled to take into consideration the factor that the appellant had no real need for a three bedroom house except to indulge in her practice of subletting. The respondent would just be in a break-even position if she vacated the town-house where she was paying $300 per month and went into occupation of a house from which she was receiving $276.00 per month for rent. When the actual circumstances of the respondent and the appellant are objectively weighed, one cannot say that the matter is "in the medio". Notwithstanding that the learned Resident Magistrate was in error as to the onus of proof on one of the issues relating to hardship, I was of the view that the proviso to section 251 of the Judicature (Resident Magistrate) Act should be applied.

For these reasons, I was of the view that the appeal should be dismissed with Costs to the respondent fixed at $50.00.

CARBERRY, J.A.: I agree.

CAREY, J.A.: I have had the opportunity of reading in draft the judgment of my learned brother Rowe J.A. and wish to say that I entirely agree with it. I was myself in process of drafting my own reasons but find that they follow so closely those of my learned brother, that it would amount to a needless reiteration of what had already been so felicitously expressed.