COURT OF APPEAL

51.

10th April, 1991

Before: D.C. Calcutt, Esq., Q.C., (President).
A.C. Hamilton, Esq., Q.C., and
Lord Carlisle, Q.C.

Between: C. Le Masurier, Limited and
Fred Philip Webber Clarke — Appellants

And: Geoffrey Arthur Alker and
Northern Inn, Limited — Respondents

Appeal against an Order of the Royal Court (Samedi Division) of the 19th June, 1990, whereby it was ordered that the Appellants' Summons ("the Defendants" below) applying for the lifting of the interim injunctions and the striking out of so much of the Prayer of the Respondents' ("the Plaintiffs" below) Order of Justice as sought the withdrawal of the Appellants' Notices to Quit be dismissed.

Advocate R.J. Michel for the Appellants.
Advocate M.M.G. Voisin for the Respondents.

JUDGMENT

Hamilton J.A. This is an Appeal with leave of the Royal Court from an Order of that Court dated 19th June, 1990, refusing an application by the present Appellants. That application sought the raising of an interim injunction standing in favour of the present Respondents and the striking out of certain elements in the Order of Justice issued in

the same proceedings. The essential background to this appeal is as follows:

The Appellants are C. Le Masurier Limited a body corporate and Mr. F.P.W. Clarke, an individual who has a controlling interest in that body corporate. The Respondents are Mr. G.A. Alker and Northern Inn, Limited, a body corporate in which Mr. Alker has the sole beneficial interest.

The First Appellant is the proprietor of "L'Auberge du Nord" an inn situated in the Parish of St. John, Jersey. It acquired that property in 1946.

In about 1964 arrangements were made for the First Respondent to take over the tenancy of these premises, which had previously been tenanted by a Mr. Stock. The terms of the relevant tenancy Agreement are recorded in a letter from the First Appellant to the First Respondent which is undated, but which passed between those parties in about February, 1964.

The Agreement there recorded makes no express provision as to the expiry of the tenancy, but provides for an annual rental, initially at £400 per annum, payable quarterly in advance with effect from the 25th March, 1964. It is agreed that the premises exceed two vergées in extent.

The First Respondent has occupied the premises since 1964, from which through the medium of the Second Respondent, he has traded as an inn-keeper and a restaurateur.

It is clear that had these events stood alone, the tenancy would be subject to termination by either party on a year's notice expiring at Christmas, by virtue of Article 1.3 of the Loi (1919) sur la location de Biens-Fonds as amended.

In the course of this occupancy discussions apparently took place concerning the possibility of a tenancy being entered into which provided for a longer fixed term, but no agreement on this matter was

reached. Various works involving substantial capital expenditure were however carried out by the Respondents at various times. Some of that expenditure followed upon, and according to the Respondents, was on the faith of, an alleged assurance communicated through a third party in about January, 1987, that the tenancy would be allowed to continue indefinitely provided that certain conditions relative to the honouring of financial commitments, to compliance with the Licencing Laws and to acting as a good tenant were met. The Respondents claim that these conditions have at all times been met.

In early December, 1988, the First Appellant served upon the First Respondent a notice for repossession of the premises. That notice bore to expire at Christmas, 1989. No judicial action was taken by the Respondents in respect of that notice until 15th December, 1989, when an Order of Justice was obtained from the Bailiff in the present proceedings. That Order contained a Prayer in the following terms:

> "1. **THAT** service of this Order of Justice on the Defendants shall operate as an immediate Interim Injunction restraining the Defendants from taking and/or pursuing any further steps, including the institution of eviction proceedings in the Petty Debts Court to evict the Plaintiffs from the premises.
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> 2. That the Defendants be convened before the Royal Court so that in their presence and after proof of the facts alleged herein the Royal Court might Order:
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> (a) that the Second Defendant withdraw the notice to quit so that the Second Plaintiff might remain in occupation as tenant of the premises for such period and at such rental as the Court might deem just".

There followed a Prayer in the alternative for compensation in respect of sums expended upon repair and refurbishment and in respect of goodwill, a Prayer for general damages and a Prayer for costs.

The summons to which that Order was annexed was served upon the Appellants on or about the 19th December, 1989. The effect of such

service was to operate as an immediate interim injunction in terms of the relative part of the Order.

Due to a procedural defect that summons with the relative injunction fell shortly thereafter, but an interim injunction to the same effect came into operation upon service of a fresh summons. That interim injunction remains in force.

The Order of the Royal Court dated 19th June, 1990, under appeal, was to the effect of refusing an application by the Appellants to raise that interim injunction. The Prayer of the Order of Justice was in the course of proceedings in the Royal Court amended to substitute the First Defendant for the Second Defendant in the first line of paragraph 2(a) of the Prayer.

Central to the issue between the parties are the terms of the Loi (1946) concernant l'expulsion des locataires refractaires. That Law insofar as material provides:

"ARTICLE 1.

Toute cause en expulsion de locataire sera de la compétence de la Cour pour le recouvrement de menues dettes (ci-après désignée "la Cour"), à moins que le locataire n'occupe le biens-fonds en question en vertu d'un contrat passé devant Justice.

ARTICLE 2.

(1) S'il y a contention de la part d'un locataire que l'avertissement à lui servi de quitter le biens-fonds qu'il occupe est informe où lui a été notifié sans droit, il pourra, dans le courant d'un mois après avoir reçu ledit avertissement, faire assigner le propriétaire à comparaître devant la Cour pour voir statuer sur la valeur dudit avis.

(2) La Cour statuera sommairement sur la cause et aura pouvoir de condamner l'une ou l'autre des parties aux frais, y compris ceux d'avocat et d'écrivain.

ARTICLE 3.

(1) Si, à l'échéance de la location, le locataire n'a pas quitté le bien-fonds, le propriétaire le fera assigner à comparaître devant la Cour pour voir ordonner son expulsion de biens-fonds et se voir, en outre, condamné à payer les frais de la procédure et le loyer qu'il pourra encore devoir au propriétaire.

[(3) Sous la réserve des dispositions de l'alinéa (3A) de cet Article, la Cour, s'il y a lieu, en présence du défendeur ou sur son défaut, et après s'être assurée que toutes les formalités prescrites par la loi ont été dûment remplies, autorisera le Vicomte ou un membre assermenté de son Département à mettre le propriétaire en possession du biens-fonds et à en expulser sommairement le locataire.

(3A) La Cour aura le pouvoir de surseoir au jugement en vertu de l'alinéa précédent ou à l'exécution dudit jugement si la Cour estime que l'expulsion sommaire du locataire pourrait lui causer un préjudice plus grave que celui que pourrait être causé au propriétaire si le locataire restait en possession, et que le locataire mérite un délai:

Etant entendue que les dispositions de cet alinéa ne s'appliqueront pas s'il s'agit -

(a) des maisons, offices et terres d'une contenance excédant deux vergées; ou

(b) des terres avec ou sans édifices, mais sans maisons, d'une contenance excédant une vergée.]"

By virtue of proviso (a), Article 3A is not applicable to the present case.

No steps were taken by the Respondents to bring proceedings in the Petty Debts Court for a ruling upon the notice served in December, 1988, either within a month of such service, or at any time since then.

The basis of the application to raise the interim injunction is that no challenge to the notice having been taken in the Petty Debts Court and that Court having exclusive jurisdiction to deal with any challenge to that notice, there is no justification for restraining by action in the Royal Court proceedings being instituted or continued in the Petty Debts Court at the instance of the Appellants for an Order for recovery of possession under Article 3 of the 1946 Law.

The authority cited for the proposition that the Petty Debts Court has exclusive jurisdiction to deal with any challenge to a notice to quit is the case of Forster -v- Harbours and Airport Committee (24th January, 1990) Jersey Unreported, C. of A. In that case this Court had occasion in circumstances bearing some similarity to the present to construe the Act of 1946 and to conclude in the light of its legislative history that the Petty Debts Court had exclusive

jurisdiction to make an Order for expulsion of a tenant. There, as here, the tenant had a contention that the landlords were estopped from serving a notice to quit in circumstances in which they had allowed the tenant to expend money in the belief that he had a right to remain in the premises for longer than the period ending on expiry of the notice to quit.

The President of the Court, Mr. J.M. Chadwick, Q.C., said at p.11 of that judgment:

> "In my judgment, looking at the legislation as a whole, the inescapable conclusion is that since 1946 the only court with jurisdiction to make an order for the expulsion of a locataire réfractaire in all cases other than those of contract leases is the Petty Debts Court. Further, the procedure which has been laid down for taking objection to the notice to quit and for the consideration of cases of hardship is the procedure in the 1946 Law".

Further down the same page he continued:

> "But on the real issue which is in contention between the parties, that is to say whether the plaintiff should be expelled from the premises at the Airport, exclusive jurisdiction is now vested in the Petty Debts Court, and the Royal Court would, in my view, not be entitled to make an Order for expulsion.
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> If that is the real question between the parties it seems to me that the Bailiff was right in holding that the matter should in the first instance go to the Petty Debts Court. That Court can decide whether or not this plaintiff has a tenancy for a greater term than from month to month. If it decides that he has then it will not make an Order for his expulsion; if it decides that he has not, then it has powers which can be exercised under Article 3 of the 1946 Act to alleviate hardship which might thereby be caused.

If there are questions remaining to be decided between the parties after that primary matter has been resolved, they can be dealt with in the Royal Court proceedings but it would be inappropriate to litigate those questions first in the Royal Court in circumstances in which the real relief to which they would lead is one which the Royal Court is not empowered to grant".

Mr. Harman agreed with that judgment. I also agreed with it and added the following:

"In doing so I particularly agree with the construction of the statute of the Law of 1946 which he has indicated in his judgment. It appears to me regarding the terms of that Law as a whole, against the legislative background of the Law of 1887 which it repealed and replaced, that the Law was intended to vest in the Petty Debts Court a jurisdiction to deal with all cases which are concerned with the expulsion of tenants other than those which are expressly excluded by the Law itself".

The Respondents did not argue in this Court that the decision in Forster was wrong on the facts in that case. They did, however, argue that in the circumstances of the present case their appropriate remedy lay in the Royal Court and that they were not in the circumstances bound, if seeking to maintain possession of the premises, to challenge the notice to quit by instituting proceedings in the Petty Debts Court under Article 2(1) of the 1946 Law. The principal argument in support of the latter proposition was that the expression "sans droit" in Article 2(1) did not extend to circumstances in which the challenge was based upon equitable estoppel of the kind upon which the Respondents relied.

The Magistrate sitting in the Petty Debts Court was not, it was argued, vested with equitable powers which would allow him to entertain and give effect to such a challenge. In any event the legal position was not so clear that this Court would be justified in ruling at the stage of interim injunction to the effect that the Magistrate had such powers.

Concern about the scope of the Magistrate's powers was expressed albeit tentatively by the Bailiff in his judgment at p.7 in the present case. He said halfway down that page:

> "Furthermore, it might be that the Petty Debts Court is prevented from considering the point of equity and the matters raised by the plaintiff in the course of today's hearing such as the alleged promise to allow them an indefinite lease and the spending of money and therefore the promissory estoppel matter which arises from the latter point, firstly, because an application to submit that the original notice was ultra vires could not be heard by the Petty Debts Court because it was out of time and secondly because there is some doubt in our mind, but I do not think it necessary to decide this point, as to whether the Petty Debts Court is fully seized of equitable jurisdiction".

I shall return in due course to the matter of the application being out of time, but for the present deal with the matter of equitable jurisdiction. In Forster -v- Harbours and Airport Committee one of the contentions advanced in the Petty Debts Court was an equitable defence based on estoppel. The Court of Appeal apparently had no difficulty in holding that that was a defence which could properly be adjudicated on by the Magistrate in the Petty Debts Court. It appears that the Royal Court in the Forster litigation took the same view since first, (as appears from p.5 of the Appeal Court judgment) the Royal Court allowed an appeal from the Magistrate, the effect of which was to remit to the Magistrate to hear, in the event of his discretion being exercised in favour of a late application, the contention of estoppel on the merits. Secondly, because the Royal Court in the proceedings initiated in it held that such a contention should in the circumstances be dealt with in the Petty Debts Court. It is true that no argument appears to have been presented at any stage in the Forster litigation that a Magistrate did not have a jurisdiction to deal with equitable defences nor was the doubt expressed by the Bailiff in this case raised in the Forster litigation.

It is accordingly necessary to consider whether a Magistrate sitting in the Petty Debts Court has statutory power to deal with an

equitable objection to a notice to quit, and if he has whether the practice and procedure of that Court inhibits him in exercising that power.

In my opinion there can be no serious doubt that he has such power. Nor in my view on the basis of the material placed before us is there any reason to suppose that the practice and procedure of that Court is not such as can be adapted and applied to entertain and where appropriate give effect to such a contention.

On the matter of statutory power, the issue is one simply of construction of the Law of 1946 as read against the statutory provisions under which the Petty Debts Court was established and now operates. The critical provision in the Law of 1946 is Article 2(1) and in particular the phrase "sans droit". It was argued that that phrase was not apt to embrace a situation in which by conduct a landlord had disabled himself from insisting on the removal of his tenant in the circumstances in which the relative notice to quit was served. I am unable to accept that argument. I can see no reason in principle why the expression "sans droit" should be read in a restrictive sense. It appears to me to cover any situation in which the landlord either never had the right to insist upon a notice to quit of the kind served, or had lost such a right by conduct or otherwise. The Law of Jersey has never, we were informed, had a division of legal and equitable jurisdictions which was at one stage an aspect of English jurisprudence.

In a Jersey Law made in 1946 I see no reason to doubt that an objection founded on "sans droit" includes an objection founded on conduct which modifies pre-existing rights. This is not a matter of discretionary powers or of equitable remedies, but of whether as a matter of substantive right, a valid objection to the notice can in the circumstances be advanced. We were referred to certain Jersey authorities on matters of remedy, York Street Pharmacy Ltd -v- Rault (1974) JJ 65; and Symes -v- Couch (1978) JJ 19, but I do not regard these cases as being in point.

It is to be noticed that the 1946 Law envisages in Article 2(2) that the ruling by the Magistrate will be "sommairement". A similar provision applicable to both the Royal Court and the Petty Debts Court in their respective jurisdictions is to be found in the 1887 Law which the 1946 Law repealed and replaced. However, it was not argued that this provision was such as to prevent justice being done in circumstances where an objection based on equitable estoppel was advanced. Nor do I consider that it inhibits an appropriate investigation of and adjudication upon such an objection. Presumably it is intended consistently with the general objective of the Petty Debts Court that procedure should be expeditious and without the formal pleading requirements of the Royal Court. This is perfectly consistent with a jurisdiction concerned with whether possession of property should or should not be given up on a particular date and with the provision that the objection be taken within a month of the notice.

It is plain from the Law of 1891 as amended which presently governs general procedure in the Petty Debts Court that, where appropriate, the Magistrate may hear evidence including testimony of witnesses in matters pending before him. Accordingly the procedure available in the Petty Debts Court is such that an objection based on equitable estoppel may be considered. It may be that there has hitherto been little practice of such objection, but I see no reason why such practice should not develop as issues of that kind arise.

It is accepted by both parties that the principles to be applied in this Court and in the Royal Court in relation to the grant or continuance of interim injunctions are those enunciated by Lord Diplock in American Cyanamid Co -v- Ethicon Ltd (1975) 1 All ER 504 (also reported at [1975] A.C. 396). At p.407H of the official report, Lord Diplock said:

> "It is no part of the Court's function at this stage of the litigation to decide difficult questions of law which call for detailed argument and mature considerations".

On the other hand the Court has a duty to consider any underlying question of law and if the legal position is clear and is to the effect

that there is no serious issue to be tried, it is the responsibility of the Court to rule accordingly (see Associated British Ports -v- The Transport and General Workers' Union (1989) 1 WLR 939 per Lord Goff of Chieveley at pp 979-80). Although the tentative doubt expressed by the Bailiff has given me pause, I am satisfied that the position in law is indeed clear and that there was and is no good reason why the Petty Debts Court should not entertain this issue.

In the light of the decision of this Court in Forster -v- Harbours and Airport Committee, the decision in which was not challenged in argument before us, a case which falls within the 1946 Law is to be adjudicated in the first instance in the Petty Debts Court and not in the Royal Court. In these circumstances it is plain that the legal contention underlying the Respondents' application for an injunction is without substance and that the interim injunction must be raised to allow matters to be adjudicated upon in the Petty Debts Court.

I should add that there may indeed be circumstances in which justice or convenience may require the staying of proceedings in the Petty Debts Court. For example, if during the dependence of litigation in the Royal Court as to the terms of a tenancy the landlord chose to serve a notice to quit in an attempt to pre-empt the Royal Court proceedings, the appropriate course might well be for the tenant to take objection in the Petty Debts Court, but for the latter proceedings to be stayed until resolution of the issue in the Royal Court. Such are not, however, the circumstances here.

Before reverting to what procedure may yet be available in the Petty Debts Court I should mention one other contention advanced by the Respondents. It was argued that an objection in the Petty Debts Court would not serve the Respondents' purpose since if successful it would only strike down the instant notice and the tenant would not have a judicial finding which established his rights as sought to be laid down under head 2(a) of the Prayer of the Order of Justice. I express no opinion upon the question whether the Royal Court could in the circumstances pronounce an order of the kind set out in head 2(a). However, the Magistrate in the Petty Debts Court is required to determine the rights and obligations of the parties only insofar as is

necessary to decide whether or not the notice to quit is valid. That decision will involve reaching a view as to whether in the whole circumstances the landlords are entitled to repossession on the basis of the notice served by them. If the Magistrate decides that the landlords are not entitled to possession, it is unlikely in the absence of a change of circumstances that a fresh notice to quit would have any better prospect of surviving a challenge. If the tenant for the purpose of establishing his general rights under the tenancy wishes to have a finding made by the Royal Court as to the terms and conditions of the lease, he may proceed with an application to the Royal Court for such a finding.

The issue whether the Appellants are entitled to repossession must however, in the circumstances of this case, be decided first and that in the appropriate Court. In these circumstances, although in my view the interim injunction should be raised, it is inappropriate at this stage to strike out head 2(a) of the Prayer of the Order of Justice.

It was accepted in argument by the Appellants that the raising of the interim injunction would not automatically result in their obtaining an Order for possession. That was because, although the month for taking an objection had long expired, there remained a discretion in the Magistrate to accept an objection out of time. This was decided by the Royal Court on appeal from the Petty Debts Court in the Forster litigation and is referred to at page 5 of this Court's judgment in that case. That decision by the Royal Court was in my view plainly correct. The time limit of one month is in my opinion a directory and not a mandatory requirement. This consideration does not appear to have been brought to the attention of the Bailiff in the present case and may have influenced his view on the matter of the interim injunction.

If the Respondents in the light of the present decision make a late application to the Magistrate challenging the notice to quit served in December, 1988, it will be for the Magistrate to exercise his discretion on the matter. It should be recorded, however, that it was accepted by the Appellants in this Court that until the decision of the Royal Court and subsequently of this Court in Forster, it was not

generally recognised by the profession that equitable estoppel was an objection which could be taken in the Petty Debts Court. The decision of the Royal Court in Forster was given on the 30th May, 1989, more than four months after the expiry of the one month period for objecting to the December, 1988, notice, and the decision of this Court in January, 1990, was given after the present proceedings had been commenced and the period of notice had expired at Christmas, 1989.

I mention these circumstances as relevant for consideration by the Magistrate if he is called upon to exercise a discretion in favour of a late objection.

For the sake of completeness it should be added that the Respondents accepted in argument that they recognised throughout that there was a risk that the Appellants would seek to found on the notice served in December, 1988. They had not been misled by the Appellants' conduct or otherwise to suppose the notice was not seriously intended. They failed to take objection to the notice within the one month period not because they supposed it would not be acted upon, but because they thought in the circumstances that the appropriate challenge was by proceedings in the Royal Court.

In these circumstances no question arises of an injunction in the Royal Court being appropriate on the basis that the Respondents had been misled by the conduct of the Appellants not to take objection in the Petty Debts Court.

In all these circumstances the appropriate Order in my view to be pronounced by this Court is to allow the appeal to the extent of raising the interim injunction contained in the Order of Justice of the 15th December, 1989; to refuse the appeal insofar as it relates to striking out Prayer 2(a) of the Prayer of that Order of Justice; to remit to the Royal Court the present proceedings insofar as relating to Prayer 2 heads (a) to (d) inclusive with an Order to stay until the final determination of any objection which may be taken in the Petty Debts Court against the notice to quit served in December, 1988, or until further Order of the Royal Court.

CALCUTT, J.A.: I agree.

CARLISLE, J.A.: I agree.

JUDGMENT ON COSTS.

On the matter of costs we are of the view that the Appellants have to a substantial extent been successful in this appeal, but not to the extent that they should be entitled to their full costs having regard to their lack of success on the second aspect of the matter.

We consider that the appropriate Order in respect of costs should be that the Appellants should be entitled to their costs against the Respondents to the extent of one half in this Court and in the Court below.

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL.

In relation to the matter of the application for leave to appeal to the Judicial Committee of the Privy Council, we are of the opinion that the present circumstances cannot be distinguished from those in the case of Forster -v- Harbours and Airport Committee decided on the 6th April, 1990. The matter before this Court is in our opinion clearly an interlocutory matter and in these circumstances, following that decision, leave to appeal by this Court must be refused. That of course is, as the decision in Forster makes plain, without prejudice to the right of either party, if so advised, to apply to the Judicial Committee for special leave from it.

Authorities

The Appeal.

Forster -v- Harbours and Airport Committee (24th January, 1990) Jersey Unreported, C. of A.

Le Nosh -v- Sterling (30th April, 1990) Jersey Unreported.

Racz -v- Perrier & Labesse (1979) JJ 151.

Loi (1887) autorisant l'expulsion de locataires réfractaires.

Loi (1891) sur la Cour pour le recouvrement de menues dettes.

Loi (1919) sur la location de biens-fonds.

Loi (1946) concernant l'expulsion de locataires réfractaires.

Wood -v- Establishment Committee (15th May, 1989) Jersey Unreported.

American Cyanamid Co. -v- Ethicon Ltd. (1975) 1 All ER 504; [1975] A.C. 396.

Pirouet -v- Pirouet & Ors (1985-86) JLR 151.

York Street Pharmacy Ltd -v- Rault (1974) JJ 65.

Symes -v- Couch (1978) JJ 19.

4 Halsbury 16 paras. 1271-1272.

Thames Launches -v- Trinity House (1961) 1 All ER 26.

Supreme Court Practice (1988) Vol. 1 Order 29.

The application for leave to appeal to Her Majesty in Council.

Court of Appeal (Jersey) law, 1961: Article 14.

The Judicial Committee (General Appellate Jurisdiction) Rules Order 1982: Rule 2.

Forster -v- Harbours and Airports Committee (6th April, 1990) Jersey Unreported C of A.