Privy Council Appeal No. 14 of 1990

Marcos Dabdoub T/A Marc's *Appellant*

v.

(1) Eli Saba and
(2) Carole Saba *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST MARCH 1991

Present at the hearing:-

LORD KEITH OF KINKEL
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE

*[Delivered by **Lord Ackner**]*

This is an appeal from the judgment and order dated 11th December 1989 of the Court of Appeal of Jamaica (Campbell, Forte and Morgan J.J.A.) which dismissed with costs an appeal from the judgment dated 10th May 1989 of the Resident Magistrate for the Parish of Kingston. The Resident Magistrate had ordered the appellant, who was the defendant in the action, to deliver up to the respondents, the plaintiffs in the action, possession of premises known as 90 Orange Street in the Parish of Kingston.

The material facts of this appeal can be stated quite shortly. The respondents are the owners of 90 Orange Street which is a shop in which the appellant carries on a retail fabric business, selling also accessories for upholstery. He held these premises on a monthly tenancy from 1978, until it was validly determined by a notice to quit dated 21st October 1988 which expired on 30th November 1988. This notice recorded that "the reason for the requirement to quit is that the premises are required by the landlords for use in their business trade or professional purposes".

[12] The appellant having failed to vacate the premises upon the expiry of the notice to quit, the respondents took proceedings in the Resident Magistrate's Court to

recover possession and obtained the order against the appellant which is the subject matter of this appeal.

The central question raised by this appeal is whether, upon the proper construction of sections 25 and 26 of the Rent Restriction Act of Jamaica ("the Act"), a notice to quit commercial premises can be valid for any purpose under the Act, unless it was a 12 months' notice as prescribed by section 26(2). The resolution of this question requires the consideration not only of the terms of those sections and in addition section 31, but also their historical background. Their Lordships are indebted to Carberry J.A. for his account of the history of the Act, which he set out in such helpful detail in his judgment in 1986 in the unreported case of *Golden Star Manufacturing Company Limited v. Jamaica Frozen Foods Limited* R.M.C.A. 13 of 1986.

The Act was passed in 1944, not only to restrict the rent which could properly be charged, but also to protect the occupation by tenants of rented accommodation. This latter protection was achieved by preventing landlords recovering possession upon the expiration of the contractual tenancy, unless and until they could satisfy certain specified requirements laid down by the Act.

Section 25, whose provisions provided the foundation of this protection, accordingly featured in the original Act. At the material time it provided:-

> " 25.-(1) ... 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 -"

There is then set out a series of contingencies such as non-payment of rent, a failure to comply with other obligations in the tenancy, conduct which is a nuisance or annoyance, special provision where the premises are reasonably required by the landlord, etc.

By reason of section 3 of the Act "controlled premises" include not only dwelling-houses but also public and commercial buildings.

Section 25 further provides that, in addition to satisfying one or more of the grounds specified in the section, no order for possession is to be made unless the court considers it reasonable to make such an order and further that in respect of certain specified grounds, the court is also satisfied that less hardship would be caused by granting the order than by refusing it.

It was not until some sixteen years later that there was introduced by Law 41 of 1960 section 26- "Termination of tenancy of public and commercial buildings". This provided:-

"26.-(1) Subject to the provisions of this section, the landlord of any public or commercial building may terminate the tenancy by notice in writing given to the tenant specifying the date at which the tenancy is to come to an end (hereinafter referred to as 'the date of termination').

(2) A notice under subsection (1) shall not have effect for the purposes of this Act unless it is given -

(a) not less than twelve months before the date of termination specified therein; and

(b) in the case of premises leased to the tenant for a fixed term of years, not more than twelve months before the date of expiration of the lease.

(3) The tenant may not more than nine months after the giving of the notice to quit -

(a) give notice in writing to the landlord of his intention to remain on the premises after the date of termination; and

(b) apply to the court for an order substituting for the date of termination a new date at which the tenancy is to come to an end (hereinafter referred to as 'the substituted date of termination').

(4) An application under subsection (3) shall be made by way of complaint upon oath before a Justice of the Peace and thereupon a summons shall issue to the landlord returnable before the Resident Magistrate for the parish in which the premises or part thereof are situated.

(5) An application under subsection (3) shall be dealt with summarily.

(6) An order granting an application under subsection (3) -

(a) shall fix a substituted date of termination which shall not be more than twelve months later than the date of termination;

(b) shall operate for all purposes as an order for the recovery of possession of the premises concerned on the substituted date of termination;

(c) may be made upon such terms and conditions and may include such order as to costs as the court thinks fit.

(7) An order under subsection (6) shall not be made unless -

(a) a notice under paragraph (a) of subsection (3) has been given to the landlord;

(b) the court considers it reasonable to make the order; and

(c) the court is satisfied that having regard to all the circumstances of the case, less hardship would be caused by the making of the order than by refusing to make it.

(8) In refusing to make an order under subsection (6) the court may make such order as to costs as it thinks fit.

(9) At the expiration of a notice by a landlord in accordance with the provisions of this section this Act shall cease to apply to the premises in respect of which the notice was given unless the tenant has given notice to the landlord and applied to the court in accordance with the provisions of this section."

Consequent upon the addition of section 26 to the Act, the opening words to section 25(1) were prefaced by the words "Subject to section 26".

The result of this amendment of the Act seems to their Lordships quite clear. An exception was made to the blanket provisions of section 25 in the case of a tenancy of any public or commercial building. In such a case the landlord is given an option to terminate the tenancy by serving a notice of not less than twelve months before the date specified in the notice in the case of periodic tenancies, and, in the case of premises leased for a fixed term of years, such a notice is to be given not more than twelve months before the date of expiration of the lease.

As is apparent from the terms of the section, the following consequences could flow from the service of such a notice:

1. A tenant might exercise his option under section 26(3) by giving, within nine months of the notice to quit, a notice in writing to his landlord of his intention to remain in the premises after the date of termination and then applying to the court for an order substituting for the date of termination a new date at which the tenancy is to come to an end.

If this application was successful, an order would be made fixing a substituted date of termination not more than twelve months later than the date of termination and operating for all purposes as an order for the

recovery of possession of the premises concerned on the substituted date of termination. However the court is not entitled to make such an order unless it considers it reasonable so to do, and is satisfied that less hardship would be caused by the making of the order than by refusing to make it.

2. The tenant might fail to exercise his option under section 26(3) or alternatively he might fail to achieve an order under section 26(6). In either event 26(9) comes into operation with the result that on the expiration of the notice which had been given by the landlord, the Act ceases to apply to the premises and they become thus deregulated.

It will be seen that section 26 mitigated to a significant extent the restrictions placed upon a landlord's entitlement to recover possession of public or commercial buildings imposed by section 25. In exchange, so to speak, for providing the tenant with the certainty of at least twelve months further security of tenure, the landlord did not have to satisfy any of the grounds for possession contained in section 25. The landlord was thus given a choice. He could attempt to obtain speedily under section 25 an order for possession, with the risk that he might not be able to satisfy the court that he qualified under one or other of the various grounds specified in section 25. Alternatively he could follow the more leisurely, but more certain course, now offered by section 26.

Nearly twenty years later, in 1979, section 26(9) was deleted, and at the same time a new section 31 was inserted into the Act. Section 31, as amended in 1983, reads as follows:-

> "31.-(1) No notice given by a landlord to quit any controlled premises shall be valid unless it states the reason for the requirement to quit.
>
> (2) Where the reason given in any notice referred to in subsection (1) is that some rent lawfully due from the tenant has not been paid, the notice shall, if the rent is paid before the date of expiry of the notice, cease to have effect on the date of payment.
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> (3) Where any notice referred to in subsection (1), other than a notice under section 26(1), is given after a tenant has, under section 19A(3) of this Act or under section 30 (now omitted) of the Rent Restriction (Amendment) Act, 1983 (which relates to exclusion of certain commercial buildings from this Act), applied to a Board to review a decision of the Assessment Officer the period of the notice shall, notwithstanding anything to the contrary in the notice, be deemed to be not less than one month and to commence -

(a) when the Board disposes of the review; or

(b) four months after the date of service of the notice, whichever is the earlier.

(4) Subject to subsection (2), where, in relation to any controlled premises, the landlord or tenant has given notice to quit, or the landlord has commenced proceedings for the recovery of possession of the premises or for the ejectment of the tenant therefrom, the acceptance by the landlord of payment of rent for any period during which the tenant remains in possession of the premises after the giving of the notice or the commencement of the proceedings shall not prejudice the notice or proceedings."

Clearly the legislature had reversed its previous policy relating to public or commercial buildings by, for all practical purposes, removing what was no doubt a valuable option given to landlords. Following the deletion of 26(9) there was nothing to be gained by the landlord in availing himself of the provisions of section 26, save in the unlikely event that he could be sure that the tenant would exercise his option under section 26(3) and not only apply to the court for a substituted date of termination but also be successful in that application. Were he not to apply or to apply unsuccessfully, there was no provision left in this section, following the deletion of sub-clause (9), for the premises to be deregulated at the expiration of the landlord's notice. The provisions of section 26 had thus for all material purposes become a dead letter and as a result the landlord had to comply with the provisions of section 25. This was emphasised by section 31 providing that no notice given by a landlord to quit any controlled premises shall be valid unless it states the reason for the requirement to quit. This provision is clear and unequivocal and applies to all notices to quit. As Lord Oliver of Aylmerton, giving the judgment of the Board in *Crampad International Marketing Co. Ltd. and Another v. Val Benjamin Thomas* [1989] 1 W.L.R. 242 observed at page 252:-

"A 'notice to quit' is the common and ordinary description of any notice given whose purpose is to terminate the estate of a tenant in the land, whether the notice be given by the landlord or by the tenant, and the expression is clearly used in the Act in this sense. For instance, the notice given to 'terminate the tenancy' which is referred to in section 26(1) is described in subsection (3) of the same section as 'notice to quit'. It is furthermore quite clear that such a notice is a notice to which section 31(1) applies, for section 31(3) refers to 'any notice referred to in subsection (1), other than a notice under section 26(1). ... The clear purpose of section 31 is to put the tenant on notice of the ground upon which possession is going to be sought

> against him so that he can either rectify the breach, if breach there be, or at least can prepare to meet the case which the landlord is going to make at the hearing; and the provision makes no real sense unless 'the reason' is construed as meaning not only a genuine reason but a relevant reason."

Their Lordships cannot agree with the view expressed by Carberry J.A. in *Golden Star Manufacturing Company Limited* (*cit. supra*) that section 31(1), requiring reasons to be stated in any notice as a condition for its validity, does not apply to the notices under section 26. As part of his reasoning the learned judge sought to rely upon section 31(3), which has the effect of suspending the operation of a notice to quit which is given after a tenant has applied for a review of a decision of an assessment officer. By expressly providing that its suspensive provisions do not apply to a notice to quit under section 26(1), that is in relation to public or commercial buildings, so far from detracting, supports the view that the requirement to specify a reason contained in section 31(1) is applicable to notices under section 26(2). However it does not follow that because a notice to quit under section 26 must state the reason for requiring a tenant to quit, it also follows, as was submitted on behalf of the appellant, that sections 25 and 26 are inextricably linked and not independent provisions, with the result that the notice to quit, upon which proceedings under section 25 are founded, must in the case of public or commercial buildings also comply with section 26(2). Indeed Carberry J.A. in *Golden Star Manufacturing Company Limited* also observed that "it is of course still open for a landlord of commercial premises to proceed under section 25 *simpliciter*, for any of the reasons set out there" viz. without incorporating the requirement that a notice complying with section 26(2) must first have been served and expired. Their Lordships entirely agree with the Court of Appeal that this is the correct view. As the historical survey demonstrates so clearly, section 26 was enacted as an alternative procedure open to a landlord of public or commercial buildings. As stated above, notwithstanding the deletion of subsection (9), section 26 still provides an alternative procedure, albeit of little, if any, practical value. The deletion of section 26(9) and the enactment of section 31 in no way engrafts upon section 25 an obligation additional to those imposed on landlords prior to the enactment of section 26. Their Lordships accordingly agree with the Court of Appeal that the Resident Magistrate had jurisdiction to make the order.

Mr. Henriques Q.C. for the appellant, to whom their Lordships are indebted for his careful argument, had a further and, as he admitted, minor criticism of the decision of the Resident Magistrate. His complaint was that on the issue of the reasonableness of the order, a

subjective rather than an objective test had been applied. It is however clear from the Resident Magistrate's notes, both of the opening and the closing speeches, that the only issue raised, apart from the validity of the notice to quit, was the genuineness of the respondents' requirement for the premises for extending their business. Accordingly the Resident Magistrate, having heard the evidence, gave as one of his findings "that the plaintiffs genuinely feel the need to expand their operations at 88 Orange Street ...". In the notice of appeal there is no suggestion that the Magistrate erred in concluding that it was reasonable to make an order nor was such a contention advanced in the Court of Appeal. This was wholly understandable since, having concluded that there was a genuine requirement by the landlords for the use of the premises for their business, it would have been extremely difficult to contend that there would be anything unreasonable in making the order. True enough, the issue of hardship featured in the notice of appeal and was argued in the Court of Appeal but this was not raised again before their Lordships. Their Lordships are satisfied that there is no substance in this point and will accordingly humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondents' costs.