

# **JAMAICA**

## **IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO: 13/98**

**COR: THE HON. MR. JUSTICE RATTRAY, P.  
THE HON. MR. JUSTICE GORDON, J.A.  
THE HON. MR. JUSTICE HARRISON, J.A.**

<b>BETWEEN</b>	<b>MAURICE FONG DULCIE FONG</b>	<b>PLAINTIFFS/APPELLANTS</b>
<b>AND</b>	<b>LLOYD BENT</b>	<b>DEFENDANT/RESPONDENT</b>

**Owen S. Crosbie instructed by Robertson, Smith, Ledgister & Co for appellants**

**Carol Davis instructed by O.G. Harding & Co for respondent**

**16th, 17th, 19th June & 31st July, 1998**

### **RATTRAY, P.**

On the 19th June, 1998 the Court of Appeal dismissed the appeal of the plaintiffs/appellants with costs to the respondent and promised to give its reasons in writing. We do so now.

On the 3rd February, 1998 Master Beswick in Chambers gave a judgment in respect of two summonses brought by the respondent to strike out the Writ of Summons and Statement of Claim filed in Suit C.L. 1997/F046 and to set aside the judgments in default of defence entered therein and the writ of possession issued as a consequence and which had been executed. The Master ordered inter alia as follows:

“1. That the Writ of Summons and Statement of Claim herein be struck out as an abuse of the process of the Court.

2. That the judgment in default of Defence dated 3rd November, 1997 and entered in binder 713 Folder 38 and all subsequent proceedings be set aside.

3. That the judgment in default of Defence dated 3rd November, 1997 and entered in binder 713 Folio 38 and all subsequent proceedings be set aside.

4. That the judgment in default of Defence dated 3rd November 1997 and entered in binder 713 Folio 38 and all subsequent proceedings be set aside on the ground of irregularity, in that the Registrar of the Supreme Court acted without jurisdiction in entering same as there had been no determination as required by s 25 of the Rent Restriction Act and it was reasonable to give judgment for recovery of possession.

5. That the writ of possession herein be set aside.

6. That the premises be restored to Lloyd Bent defendant in Suit No. CLF 046 of 1997 and plaintiff in Suit CLB 243 of 1994.”

In Suit CLB 243 of 1994 the respondent Lloyd Bent as plaintiff brought an action against the first named appellant for specific performance of a contract of sale between the respondent and the first named appellant of premises situated at Rhoads Corner in the parish of Manchester, and registered at Volume 815 Folio 55 of the Register Book of Titles. The respondent had entered into possession of the premises. The second named appellant, the wife of the first named appellant was later joined as a defendant in this action.

With respect to this very transaction and in the Suit filed but prior to the joinder of the female defendant, the plaintiff (Bent) by a judgment of the Court of Appeal delivered on the 27th of February, 1995 (SCCA 98/94) obtained inter alia:

“An interlocutory injunction restraining the defendant from dealing or disposing with lands registered at Volume 815 Folio 55 of the Register Book of Titles and in particular from registering a mortgage on the said lands until the trial of this action or until further orders.”

The appellants (the Fongs) then sought to have the Suit dismissed on the ground that the contract for which specific performance was sought by Mr. Bent had been terminated and replaced by a new contract between the parties for the sale and acquisition of the said property the subject matter of the Suit.

This Motion was denied by Harris J., and an appeal by the appellants was dismissed by the Court of Appeal in a judgment delivered on September 30, 1997 (SCCA 93/96) consequent on the hearing by the Court of Appeal on April 30, May 1, and July 14, 1996. The facts are fully disclosed in this judgment. The question was whether there was a novation of the original contract upon which the Suit had been brought as a result of discussions between the parties while the Suit was still pending and therefore as urged by the appellants (the Fongs) the original contract on which the Suit had been brought no longer existed and should be dismissed.

The Court of Appeal supported the finding of the trial judge Harris J., "that there are triable issues in the pleadings which can only be determined by the court when the matter comes for trial."

Indeed, an amended defence filed by the appellants (the Fongs) in the Suit CLB 243/94 and entered in the Registry of the Supreme Court on the 11th of June 1996 pleaded the novation of contract and reads as follows:

"12. And the defendants say that in any event, the aforesaid agreement dated 29th March, 1989 cannot be relied on, having been extinguished by the subsequent exchange of correspondence herein and in all relevant proceedings referred to, which gave rights to a novation (a new contract) replacing that of 29th March 1989; and the extension of the contract dated 29th March 1989 was further evidenced by exchange of correspondence subsequent to the formation of a new contract. The documents to be relied on in these connections and all other documents herein referred to by the defendants will at the trial be referred to for their full terms and effects."

On a Writ of Summons dated 7th May, 1997 along with a Statement of Claim bearing the same date and during the Court of Appeal hearing in Suit CLB 243/94, the appellants brought in the Supreme Court an action against the respondent numbered CLF 046 of 1997 claiming recovery of possession of the said premises from the respondent on the basis of the purported new contract between the parties

with respect to the same property, and which in fact was the very novation urged when the appellants unsuccessfully sought to dismiss the Suit CLB 243 of 1994.

This new action in the Statement of Claim maintained that by correspondence between the parties there was an agreement to settle the Suit CLB 243 of 1994 on terms which included the payment of certain sums of money and by virtue of the respondent breaching this agreement the contract was terminated.

On this basis the plaintiff was claiming inter alia an order for recovery of possession in respect of the said premises and payment of certain sums to the plaintiffs (the Fongs) by the respondent Bent.

It is to be noted that:

1. That the new action was filed during the hearing of the appeal in Suit CLB 243 of 1994;
2. the submission in respect of the existence of this novated contract was the basis of the Fongs seeking to dismiss Suit CLB 243 of 1994;
3. the Court of Appeal decision in SCCA 93 of 1996 was that all the issues should be tried in that Suit.

The defendant Bent duly entered appearance in Suit CLF 046 of 1997 on the 1st July, 1997 and on the 18th of July 1997 took out a Summons to strike out the Writ of Summons and Statement of Claim as an abuse of the process of the Court. This Summons was set for hearing before the Master on the 21st of January, 1998. It is a matter of concern that a much earlier date was not afforded for the hearing of this Summons. Notwithstanding this the appellants proceeded on the 3rd day of November, 1997 to enter the judgments in Default of Defence for recovery of possession and mense profits complained of by the respondent.

In purported execution of these default judgments on the 19th of January, 1998 the bailiff, armed with a writ of possession obtained by the appellants entered the premises which are occupied by the respondent as a grocery/bar and haberdashery as to one building, and as to the other as a dwelling house occupied by a tenant of the

respondent, threw out the contents and locked up the building. The respondent additionally maintains that the building was subject to the provisions of the Rent Restriction Act and therefore possession was not summarily recoverable.

The respondent consequently on the 20th of January, 1998 took out a Summons to set aside the judgments and all subsequent proceedings as an abuse of the process of the Court. These proceedings came before Master Beswick on the 21st January 1998 and several days thereafter. On the 3rd of February 1998 the Master made the Order complained of by the appellants.

In her written judgment Master Beswick found inter alia:

"... that the issues in the instant Suit are substantially the same as those pleaded in the earlier Suit. The effect of this is to make this action an abuse of the process of the Court since the plaintiff would effectively have two live actions in relation to the same subject matter."

She further found:

"... that the first plaintiff to this action is currently restrained by an undischarged injunction from Court dealing or disposing of lands registered at Volume 815 Folio 55 in the Register Book of Titles until the trial of this action or until further order."

Her reference was to Suit CLB 243 of 1994. We fully agree with her findings and her judgment.

Mr. Crosbie for the appellants has attempted to argue that because the appearance was unconditional the default judgment could not be thus set aside. We find no merit in this submission. The facts disclosed an outrageous abuse of the process of the Court for the reasons given by Master Beswick in her judgment. The new action flew in the face of the directions of the Court of Appeal in respect of the first action brought.

The skeleton arguments of counsel before us and which were repeated in his oral presentation in his challenge to the judgment of the Master stated:

**"The Court also referred to the effect of the judgment of the Court of Appeal in Civil Appeal No. 13 of 98 on the bringing of the Suit CLF 046/97. The judgment of the Court of Appeal was wrong and apart from being wrong it would have fettered the powers of the trial court which power was given to it by statute and which powers could be exercised lawfully."**

**This submission highlights the intransigence of the appellants and their counsel and the failure of counsel to understand that the determination of the Court of Appeal must be followed until such time as it may be varied or set aside by a higher Judicial body.**

**Consequently, we dismissed the appeal with costs to the respondent.**