JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 20/2005

BEFORE:	**THE HON. MR. JUSTICE PANTON, J.A.** **THE HON. MR. JUSTICE SMITH, J.A.** **THE HON. MR. JUSTICE COOKE, J.A.**

BETWEEN:	**SYLVIA GREY**	**APPELLANT**
AND:	**FREDEL BUCHANAN**	**RESPONDENT**

Miss Judith Clarke for the appellant.

Miss Kay Reuben for respondent.

February 27, 28, March 14 & April 7, 2006

PANTON, J.A.

1. This is an appeal from a decision of His Hon. Mr. George Burton, Resident Magistrate for Hanover, wherein he made an order for the recovery of possession of shop number 6 at Midtown Mall, Lucea, from the appellant, a tenant of the respondent. The judgment was handed down on March 21, 2005, and possession was to be delivered up on or before August 21, 2005. However, on August 9, 2005, the learned Resident Magistrate stayed execution of the judgment pending the hearing of this appeal. It is commendable that within a matter of days after the reasons for judgment were filed by the Resident Magistrate, the record was received in the Registry of the Court of Appeal. As a result of this welcome situation, this Court was placed in a position to hear and

dispose of the appeal with expedition. It is hoped that other Resident Magistrates' Courts will follow this good example of preparing and dispatching records of appeal without delay.

2. It is undisputed that the respondent is the registered proprietor of the property in question. This property, which is better known as the Midtown Mall, consists of thirty-three shops. The respondent's niece Sonia Claire-Bucknor manages all the shops, including shop number 6 which is the subject of this suit. The task of management involves, among other things, renting and selling the shops as well as the engaging of personnel to generally see to the proper operation of the mall.

3. During the course of her duties, Mrs. Claire-Bucknor, acting on the instruction of the respondent, gave a written notice to quit to the appellant. The respondent was unable to say when he gave the instruction, but the notice is dated 30th June, 2004, and therein the reason is stated thus:

> "That the tenant has breached the terms of the tenancy in that she has demolished a wall in the shop".

Another notice dated 31st August, 2004, was given on the advice of the respondent's attorney-at-law. That notice stated two reasons, namely:

> "1. That the landlord requires the premises for his own purposes.

2. That the tenant has carried out building work at the premises without permission".

4. So far as the basis for the notices is concerned, it needs to be stated that the appellant is the owner of two of the shops in the mall, namely, shop number 7and shop number 23. She gave evidence that she had had discussions with Mrs. Claire-Bucknor in relation to the purchase of shop number 6. This is disputed. However, there is no doubt that she sought and received permission to open a new door leading from shop number 6 to shop number 7. The first notice to quit was given when Mrs. Claire-Bucknor noticed construction activity which she regarded as going beyond that for which permission had been given. The nature of the activity was the opening of an additional door as opposed to the "small door" for which permission had been granted. No specifications had been given to the appellant by the respondent in respect of the door to be opened.

5. The learned Resident Magistrate made no finding which could even remotely be interpreted as saying that the order for possession was made because of the building activity carried out on the premises without permission. On the contrary, the specific finding was that "there was a genuine present need on the part of the plaintiff to use the shop as a meat shop for his own business" (p.29 of the record). The learned Resident Magistrate said that he considered the relevant circumstances, in particular whether other accommodation was available for the respondent. His conclusion was stated thus:

> "The evidence as interpreted by the court points to the conclusion that it would be easier for the defendant to integrate and amalgamate goods located in shop 6 with those of shops 7 and 23 than for the plaintiff to find other accommodation for his proposed meat business. The merchandise in shop 6 could easily be combined with that of shops 7 and 23 without too much inconvenience and loss of present or potential customers". (p. 29)

6. Four grounds of appeal were argued. Grounds 1 and 2 were taken together as were grounds 3 and 4.

Ground 1

Having regard to the evidence, the learned judge erred in finding that the reasons given in the notice to quit were bona fides and/or valid or that there was no "lack of bona fides".

Ground 2

The learned judge erred in his findings of fact in that there was no sufficient evidence upon which it could properly be found that "there was a genuine and present need on the part of the plaintiff to use the shop as a meat shop for his own business".

Ground 3

The learned judge erred in concluding that the balance of hardship weighed in favour of the plaintiff.

Ground 4

The findings of the learned trial judge did not accord with the evidence.

7. Miss Judith Clarke, for the appellant, submitted that there was no evidential basis for the findings made by the learned Resident Magistrate. She also pointed to the apparent inconsistency displayed by the respondent in the reasons advanced in the notices to quit. This, she submitted, was evidence of the absence of bona fides on the part of the respondent. So far as the question of hardship was concerned, she submitted that the respondent had not proven that there would have been less hardship if the order for possession were made, than if it were refused. On the other hand, Miss Reuben, for the respondent, submitted that the reason given for the notice was not invented as the respondent genuinely needed the premises for a meat shop. On the question of hardship, she submitted that hardship should be distinguished from inconvenience so far as the tenant was concerned. The appellant, she said, would not lose any business as she was not being required to move from one location to the other.

8. The learned Resident Magistrate, in determining this matter, was required to consider first and foremost whether the respondent had a genuine need for the premises. The evidence in this regard came primarily from Mrs. Claire-Bucknor. However, the respondent himself gave evidence and during his examination-in-chief, he said nothing whatsoever as to his need for the premises to operate a meat shop. It was during what may be described as ill-advised cross-examination that he stated his need of "the shop to use as a meat shop",

and confirmed that he had instructed his niece to give the appellant notice (p.9). That was all that was said by the respondent on the need for the premises to be used as a meat shop.

9. Mrs. Claire-Bucknor elaborated during her examination-in-chief. She said:

> "Yes, landlord wishes to use premises as a meat shop. I had given defendant permission to open a new door leading from the shop # 6 to another shop adjoining which she owns herself. That shop is shop # 7. I observed that there was construction going on in shop # 6. I went inside and saw the workmen chopping at some of the walls. I asked what is happening and said that can't be because I have not given permission. I did not see Mrs. Grey that day but I saw her the following day and I asked her about it. Her reply was that that was her shop too. I reminded her that she was only renting and please return the wall to its original condition. I spoke to my uncle Mr. Buchanan and he said I should give her notice. She had taken the door entrance from where it was over to the end of the adjoining wall. The entire opening she had made was just about the same size of the original door-way". (p.10).

10. From this passage, it is quite clear that the respondent's "need" for the premises arose from the report made to him by Mrs. Claire-Bucknor as to the activities in relation to the opening of the door leading from shop # 6 to shop # 7. Mrs. Claire-Bucknor was obviously annoyed by what the appellant had done, and so she spoke to her uncle who advised her that she should terminate the tenancy. That accounts for the first notice being given. In cross-examination, Mrs. Claire-Bucknor confirmed this;

> "No, I did not know my uncle needed the shop for a meat shop when I gave her permission to open the additional door. Can't say when my uncle needed the shop to use as a meat shop. Yes, Mr. Buchanan told me to give her notice. Yes, that was why he told me to give her notice – because she was widening the opening" (page 11).

11. The evidence adduced by the respondent concentrated heavily on the partition door between shops 6 and 7. The learned Resident Magistrate made no findings on that aspect of the case. Instead, he grounded his decision on the need by the respondent for the premises to operate as a meat shop. Alas, there was no evidence to support that "need". There was no evidence of the respondent being, or planning to be, in the business of selling meat; nor was there any indication that he had any plan to operate this shop through a third party. In the light of those circumstances, there is merit in Miss Clarke's complaint that bona fides was lacking so far as this reason for the giving of the notice was concerned.

12. There being no genuine need for the giving of the notice, it follows that the question of it being "easier for the defendant to integrate and amalgamate goods located in shop 6 with those of shops 7 and 23 than for the plaintiff to find other accommodation" (as the Resident Magistrate found) is irrelevant. However, quite apart from its irrelevance, there was no evidence on which the learned Resident Magistrate could have formed an opinion as to the easier option. Both parties prayed in aid of their respective cause the case **Thomas v. Walker**

(1984) 21 J.L.R. 376. In that case, the learned Resident Magistrate accepted that the respondent had been truthful in asserting that she had been given notice to quit at premises that had been rented to her, and he found that she needed the premises in question as a residence for herself. He found that the appellant had not made any realistic enquiries to obtain alternative accommodation, and "had not discharged the onus placed upon her". Rowe, J.A., in delivering the judgment of the Court, said that had it not been for that statement by the learned Resident Magistrate, "the appeal would not have merited a written judgment". After referring to the Trinidadian case of **Quinlan v. Phillip** (1965) 9 W.I.R. 269, and the Jamaican case of **McIntosh v. Marzouca** (1955) 6 J.L.R. 349, Rowe, J.A. said:

> "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". (p.380H)

The appeal was dismissed, notwithstanding the error made by the Resident Magistrate as the Court of Appeal applied the proviso to section 251 of the Judicature (Resident Magistrates) Act which provides for the dismissal of an appeal in circumstances where it was felt that the judgment of the Resident Magistrate had effected substantial justice between the parties. In the matter before us, we are not only of the view that there was no genuine need shown by the landlord, but we also think that in any event there was no evidence that less hardship would have been caused by granting the order for recovery of possession. The appeal is accordingly allowed, the judgment of the Court below is set aside and the appellant is awarded costs of $15,000.00 against the respondent.

SMITH, J.A.

I have read the judgment of Panton, J.A. and I agree with his reasoning and conclusion.

COOKE, J.A.

I have read the judgment of Panton, J.A. and I agree with his reasoning and conclusion.

PANTON, J.A.

ORDER

The appeal is allowed. The judgment of the Court below is set aside. The appellant is awarded costs of $15,000.00 against the respondent.