JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 41/90

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A
THE HON. MISS JUSTICE MORGAN, J.A
THE HON. MR. JUSTICE BINGHAM, J.A (AG.)

BETWEEN	OFFICE AND SECRETARIAL HOLDINGS LIMITED	PLAINTIFF/APPELLANT
A N D	DATA KEY PROCESSORS JAMAICA LIMITED	DEFENDANT/RESPONDENTS

Gordon Robinson for Appellants

Emile George, Q.C for Respondents

July 3 and September 27, 1991

WRIGHT, J.A

The point at issue in this appeal was whether a tenant who was ordered by the Court to quit and deliver up possession of rented premises thereupon became a trespasser so as to be liable for mesne profits up to the time for compliance with the Order of the Court. On July 3, 1991 the Court resolved that issue in the negative, dismissed the appeal with costs to the respondents to be taxed or agreed, affirmed the judgment of the Court below and promised to put our reasons in writing. This we now do.

The respondents were tenants of the appellants, the registered proprietor and landlord of premises situate on the 4th floor of 4 Duke Street, Kingston. On April 28, 1989 the appellant served the respondent with Notice to Quit dated 28th May, 1989 to expire 31st May, 1989, but the respondent did not quit. Accordingly, ejectment proceedings were taken before the Resident Magistrate for the parish of Kingston who

on September 28, 1989 ordered that the respondent quit and deliver up possession on or before March 31, 1990.

At some stage action had been taken by the respondent to test the validity and applicability of a Certificate of Exemption issued by the Rent Assessment Board on March 12, 1985 in respect of these premises, but such action left the position unchanged. On October 24, 1989, during the period allowed by the Court for the respondent to retain possession the appellant filed a Writ endorsed with a Statement of Claim as follows:

> "1. The Plaintiff was on the 28th day of April, 1989 the registered Proprietor and Landlord of premises situated on the 4th floor of 4 Duke Street, Kingston and occupied by the Defendant as a tenant.
>
> 2. On or about the 28th day of April, 1989 the Plaintiff served the Defendant with Notice to Quit dated the 28th of April, 1989 which said Notice expired on the 31st May, 1989.
>
> 3. The Defendant failed to deliver up possession to the Plaintiff on or before the 31st May, 1989 and has since the 1st June, 1989 retained possession wrongfully as a trespasser.
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> 4. The Gross Annual Value of the premises owned by the Plaintiff and occupied by the Defendant at 4 Duke Street, is $252,765.84.
>
> 5. The Plaintiff claims Mesne Profits at the rate of $692.50 per day from the 1st June, 1989 until the delivery by the Defendant of possession of the said premises to the Plaintiff.
>
> PARTICULARS
>
> Mesne Profits for period 1st June, 1989 to 18th October, 1989; that is 140 days at $692.50 per day $96,950
>
> $96,950
>
> AND THE PLAINTIFF CLAIMS
>
> (1) Mesne Profits from the 19th day of October, 1989 until possession is delivered to the Plaintiff.
>
> (2) Any other appropriate relief."

The Defence admitted paragraphs 1 and 2, denied paragraph 3 alleging trespass since possession was pursuant to the Order of the Resident Magistrate, contended that since the premises were commercial the appropriate notice should be not less than twelve months pursuant to section 26(2)(a) of the Rent Restriction Act, raised again the question of the Exemption Certificate, denied paragraph 4 of the Statement of Claim, insisted that the rental due was at the rate of $27,000; that rental had regularly been tendered since the month of June, 1989, but it had been refused. Finally, that the appellant was not entitled to the relief claimed or to any relief.

There was also a Counter-Claim seeking declarations that both the Certificate of Exemption and the Notice to Quit were illegal, null and void and that the proper rental was $27,000 inclusive of maintenance charges.

Application for Summary Judgement came before Harrison, J on 15th May, 1990 who after considering affidavits by Michael Nunes, attorney-at-law, for the appellant and Gresford Jones, attorney-at-law, for the respondent refused the application with costs to the respondents.

Before Harrison, J., Mr. Robinson had submitted:

(a) That as of 1.6.89 the occupation of the respondent was not as a result of the tenancy arrangements and so mesne profits payable from then.

(b) Rent Restriction Act does not apply to the premises.

(c) Onus on respondent to show "that there is an issue or question in dispute ..... a triable issue" McHardy v. Setion (1890) 24 QBD 504.

(d) Defence pleaded was a sham.

(e) The order of the Resident Magistrate did not make the respondent a tenant.

(f) Validity and applicability of Certificate of Exemption settled by appeal in favour of the appellant.

On the other hand Mr. George had accepted that the appeal concluded against the respondent that by virtue of the Exemption Certificate the Rent Restriction Act does not apply to the premises. He had further submitted that the tenant who is permitted by a Resident Magistrate to remain in possession cannot be regarded as a trespasser, and accordingly the respondent for the period 1st June, 1989 to 31st March, 1990 could not be so regarded. Consequently, he was not liable for mesne profits.

The learned trial judge held as follows:-

> "...that on the termination of a tenancy - at Common Law defendant holding over on the same terms and conditions as the previously existing agreement - in the absence of anything to the contrary. In the instant case the order of the Resident Magistrate covering period 1.6.89 to 31.3.90 authorises the tenant to remain in "use and occupation" of premises.
>
> His presence does not make him a trespasser under the terms of the Resident Magistrate's order.
>
> The question of the status of the tenant is determinate as to the compensation payable whether,
>
> (a) Mesne profits or
>
> (b) Rental rate
>
> The plaintiff claims mesne profits - the defendant states rental payable.
>
> Court holds there is a triable defence - triable issue between the parties."

Against such findings the appellant appealed on five grounds as follows:-

> "(1) The Learned Judge erred in law in finding that at the termination of a tenancy at Common Law a Tenant holding over does so

"at the same terms and conditions as the existing tenancy when the correct position at law is that a Tenant holding over would only remain on the same terms and conditions if the Court can infer that the intention of the parties was for such to occur.

(2) The Learned Judge erred in holding that the Defendant's status as trespasser or not was determinate of the Plaintiff's claim for mesne profits upon the termination of the tenancy agreement and the Defendant's subsequent holding over.

(3) The Learned Judge erred in finding that the question of whether or not the Defendant was a trespasser was a triable issue.

(4) The Learned Judge erred in finding a triable issue in a situation where:-

(a) it was no part of the Defendant's Defence or any Affidavit filed by the Defendant that the Defendant was holding over upon the expiry of a tenancy or that any new tenancy was to be inferred; and

(b) the Affidavits filed by the Defendant failed to depone to any fact or point of law which could satisfy the Learned Judge that there was a triable issue.

(5) The Judgment of the Learned Judge was unreasonable in the light of the evidence."

In support of these grounds of appeal, Mr. Robinson submitted in summary that the attempt to satisfy the Resident Magistrate that there was a defence on the merits had not been made by the required affidavit. Accordingly, the trial judge had no option but to grant the application. Also he submitted that the Writ and Statement of Claim were not based on the presumption that the respondent was a trespasser although both documents so described the respondent. It was his contention that the appellant need not establish trespass to get the relief claimed. The respondent he said was holding over and as from 1st June, 1989 was in unlawful possession. The constant

refusal of the rent prevented the institution of a new tenancy. The learned trial judge, he contended, had confused the Statutory and Common Law positions. Finally, he criticised the defence as being based upon the premises being controlled and submitted that the denial of trespass did not in any way attack the appellant's claim.

In response to the submission that Mr. Gresford Jones was incompetent to make the required affidavit on behalf of the respondent Mr. George referred to sections 79 and 80 of the Civil Procedure Code which he maintained allow for an affidavit made by the defendant himself or "by any person who can speak to the facts"...

The relevant portions of these sections read:-

> "79. (1) Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under section 14 of this Law, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a Judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant satisfies him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."
>
> 80. The application by the plaintiff for leave to enter final judgment under the last preceding section shall be made by summons, returnable not less than four clear days after service, accompanied by a copy of the affidavit and exhibits referred to therein; and the defendant may show cause against such application, by affidavit made by himself or by any person who can speak to the facts, or (except) in

> "actions for the recovery of land) by offering to bring into Court the sum indorsed on the writ; or the Judge may allow the defendant to be examined upon oath."

Then after examining the impugned affidavit, he submitted that it contained all the relevant facts and that they would be in Mr. Jones' possession as the attorney-at-law for the respondent. We accepted this submission as correct. He also submitted that in an application under Order 14, even if there were no affidavit by the defendant the judge could dismiss the action on the plaintiff's case because no judge would find for the plaintiff on a bad case. This was by way of supporting the adequacy of Mr. Jones' affidavit, but a finding thereon was not necessary to this appeal.

On the question of liability for mesne profits he cited 4 Hals. Vol. 27 paragraph 255 in support of his proposition that mesne profits are due only for trespass so that the appellant must lose unless he could show that the respondent had no legal right to occupation. The cited paragraph reads:-

> "**Mesne profits.** The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land or, if he can prove no actual damage caused to him by the defendant's trespass, the landlord may recover as mesne profits that amount of the open market value of the premises for the period of the defendant's wrongful occupation. In most cases the rent paid under any expired tenancy will be strong evidence as to the open market value. Mesne profits, being a type of damages for trespass, can only be recovered in respect of the defendant's continued occupation after the expiry of his legal right to occupy the premises. The landlord is not limited to a claim for the profits which the defendant has received from the land, or those which he himself has lost."

The case of Swordheath Properties Ltd. v. Tabet and other (1979) 1 ALL ER 240 illustrates the principle regarding the trespasser's liability. The facts briefly are that the landlord had let a flat to Tabet for a fixed term beginning in April 1976 to 4th July, 1976. With the landlord's permission Tabet introduced A to live in the flat as a licensee, A in turn introduced B to live in the flat as a licensee and a further licensee was also introduced. However, Tabet left before the term had expired and so effectively brought the tenancy to an end. It was held that the licensees who remained in possession were trespassers and as such liable to pay mesne profits. They clearly had no legal claim once the tenant had departed.

The claim presented to Harrison, J and upon which he adjudicated was a claim in trespass so it did come as a surprise when Mr. Robinson made his volte face and submitted that it was not necessary for the appellant to prove trespass. Any other claim would represent a departure from his pleadings since there was no amendment to accommodate any other action. So there is merit in Mr. George's submission that Mr. Robinson had abandoned his Statement of Claim although Mr. Robinson attempted to down-play this by insisting that there is no magic in "trespass" which he claimed is used interchangeably with unlawful occupation. The problem is that that opinion was expressed for the first time in rebuttal without any amendment to his pleading.

It must be noted too that the validity of the Order made by the Resident Magistrate giving the time for the respondent to quit and deliver up possession was not an issue before us but in effect it is being challenged from a very acute angle. That must be so if it is being contended that the tenant during that period is no more than a trespasser. The Order would be rendered ineffectual. If that Order is to be assailed, let it be done by the appropriate appeal procedure and not in this oblique manner.

Neither statute nor any considered authority was cited before us in support of what I thought to be a novel proposition and when Mr. Robinson himself became disenchanted with his own proposition the writing was on the wall and the conclusion to which we came seemed inevitable.

MORGAN, J.A.

The point is, whether there is a good defence to the action or should the appellant obtain Summary Judgment in a matter where the issue is, whether an Order by a Resident Magistrate - not disturbed by the Court of Appeal - to remain in occupation for a fixed period makes the tenant a trespasser and liable to payment of mesne profits or is it a continuing lawful occupation making him liable to payment at rate of rental. The learned trial judge found that there was a good defence. We agreed and dismissed the appeal.

I have had the opportunity to read in draft the reasons which are fully expressed by my brothers Wright and Bingham, JJ.A with which I agree and find it unnecessary to add anything.

BINGHAM, J.A. (AG.)

On July 3, we heard submissions from counsel in this matter and following thereon we dismissed the appeal, affirmed the judgment of the Court below with costs to the respondents. We intimated then that our reasons would be put into writing and this we now do.

The appeal was from an order of Harrison, J., made on 15th May, 1990 in which he dismissed a summons for summary judgment brought by the appellant with costs to the respondent to be agreed or taxed.

The grounds being advanced against the order made below were that:-

"(1) The Learned Judge erred in law in finding that at the termination of a tenancy at Common Law a Tenant holding over does so at the same terms and conditions as the existing tenancy when the correct position at law is that a Tenant holding over would only remain on the same terms and conditions if the Court can infer that the intention of the parties was for such to occur.

(2) The Learned Judge erred in holding that the Defendant's status as trespasser or not was determinate of the Plaintiff's claim for mesne profits upon the termination of the tenancy agreement and the Defendant's subsequent holding over.

(3) The Learned Judge erred in finding that the question of whether or not the Defendant was a trespasser was a triable issue.

(4) The Learned Judge erred in finding a triable issue in a situation where:-

(a) it was no part of the Defendant's Defence or any Affidavit filed by the Defendant that the Defendant was holding over upon the expiry of a tenancy or that any new tenancy was to be inferred; and

(b) the Affidavits filed by the Defendant failed to depone to any fact or point of law which could satisfy the Learned Judge that there was a triable issue.

(5) The Judgment of the Learned Judge was unreasonable in the light of the evidence."

The appellants are the owners of a four storey office complex known as Century House situated at 4 Duke Street, Kingston. The respondents were the tenants in respect of office space contained in one of the floors on this building.

Certain differences arose between them with respect to increases in the rent and the appellant then sought to determine the tenancy agreement by a notice to quit served on 28th April, 1989 to take effect by 31st May, 1989.

The respondent remained in occupation after May 1989 tendering the rent which was refused by the appellant's agent.

By a subsequent action for recovery of possession the appellants obtained an order in the Resident Magistrate's Court for Kingston. By this order the respondents were ordered to vacate the demised premises on or before 31st March, 1990.

There was an unsuccessful appeal by the respondents against this order. The judgment of this Court in that matter was handed down on 5th April, 1990.

In the interim, on 24th October, 1989 by virtue of a specially endorsed writ filed in the Supreme Court, the appellants sought to claim mesne profits in respect of the 1st June, 1989 to the date of delivery up of possession. This claim was brought under section 79 (1) of the Civil Procedure Code. The affidavit sworn to by Michael Nunes, a Director of the appellants disclosed that this claim was founded on the basis, so they contended, that by remaining in possession after 31st May, 1989, the date that the notice to quit expired, the respondents were in unlawful occupation of the premises and as such were trespassers. They were therefore entitled to claim and recover by way of summary judgment, the loss of profit by being kept out of possession being the open market rental to which the premises now became subject by virtue of becoming exempt under the provisions of the Rent Restriction (Public and Commercial Buildings - Exemption) Order 1983.

It is common ground that by virtue of the certificate of exemption from a rent assessment officer, the said premises would cease to be subject to rent control.

The Submissions

The Court was the beneficiary of written submissions furnished by the appellant. For this the Court expresses its indebtedness.

Learned counsel for the appellant in developing his arguments based upon the written submissions, contended that:-

1. The tenancy had been lawfully determined by the notice to quit which took effect on 31st May, 1989.

2. The respondent by continuing to remain in possession were in unlawful occupation of the premises and accordingly liable for rental based on an open market assessment.

3. The mere fact that the period while they remained in possession was extended by the Court to 31st March, 1990 did not affect the legal right which the appellant had to such rental while the respondents remained in occupation of the said premises.

4. The onus of proof was on the respondent to establish that they had a triable defence to the claim for summary judgment.

5. The affidavit of Mr. Gresford Jones was not evidence upon which the learned judge below could rely as he was not one who could speak to the facts in order to satisfy section 80 of the Civil Procedure Code.

6. In the circumstances there was no response to the appellants claim for summary judgment and the learned judge was therefore obliged to enter same.

Mr. George for the respondent submitted that:-

1. The appellants had wrongly construed sections 79 and 80 of the Civil Procedure Code. Under Order 14 Procedure (U.K.) the respondents merely had to show the Court that they had a good defence

on the merits. This meant a triable issue both on the law and on the facts. Although the appellants were obliged to satisfy certain requirements to qualify for an order for summary judgment, the respondents had no such obligation placed on them.

2. All the requirements of both sections of the Code referred to do, is to enable the learned judge to assess the merits of the case.

3. Under section 79 of the Code, the learned judge could grant or refuse the application for summary judgment.

4. As the respondent was a corporation, there was no better person to swear to the facts on its behalf than the attorney-at-law acting on its behalf. No one was in a better position to depose to the true facts surrounding the application than Mr. Gresford Jones himself.

5. Even if the appellant was right in contending that the affidavit of Mr. Jones was not admissible then the requirement of section 80 of the Code would have been satisfied.

Mr. George cited in support Volume 27, 4th edition of Halsbury's Laws of England, paragraph 225 which states:-

> "255. **Mesne profits.** The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land or, if he can prove no actual damage caused to him by the defendant's trespass, the landlord may recover mesne profits the amount of the open market value of the premises for the period of the defendant's wrongful occupation. **Swordheath Properties Ltd. v. Tabet** (1979) 1 All E.R. 240, (1979) 1 W.L.R. 285, CA." (Emphasis supplied)

This case is cited by the learned Editor as being the authority for the above proposition. The headnote to the case reads:-

> "Where a person remains as a trespasser on residential property the owner is entitled to damages for the trespass without bringing evidence that he could or would have let the property to someone else if the trespasser had not been there. The measure of damages will be the value to the trespasser of the use of the property for the period during which he has trespassed which in a normal case will be the ordinary letting value of the property."

Based upon the above extracts, Mr. George submitted that unless the appellants could show that the respondents had no legal right to be on the premises, then the appeal must fail.

While it is clear that a squatter or a tenant holding over after a lawful notice to quit premises has taken effect can be termed a trespasser and so in unlawful occupation of premises thus enabling the landlord to claim mesne profits, this was not the factual situation in this case in so far as the respondent was concerned as:-

> 1. The respondent had through their attorney-at-law from the receipt of the notice to quit, strenuously objected to not only the legality of the certificate of exemption and by virtue of this to the legality of the notice to quit.
>
> 2. These questions were not resolved until the matter was adjudicated upon in the Resident Magistrate's Court on 7th November, 1989.

In the interim, the parties in my opinion remained landlord and tenant. The order for possession made by the learned Resident Magistrate for delivery up of possession of the demised premises on or before 31st March, 1990 did not alter that status. In the circumstances, in my opinion, it would be idle for the appellants to contend that after 31st May, 1989 the occupation of the premises by the respondents was otherwise than lawful. They were in occupation with the sanction of the Court.

Harrison, J., below in dismissing the application for summary judgment under section 79 (1) of the Civil Procedure Code, however, needed only to be -

> "satisfied that the respondent had a good defence to the action on the merits." (emphasis supplied)

or that the affidavit sworn to by someone on their behalf who could speak to the facts relating to the matter was such as may be deemed sufficient to entitle the respondent to defend the action generally.

The underlined words above which are extracted from the section of the Code referred to, meant that the respondent was required to establish on a preponderance of probability by the allegations as set out in their defence that they had a good defence to the claim in fact or that a difficult point of law was involved which fell to be determined.

Paragraph 4 of the defence and counter claim in so far as it alleged that:-

> "4. Further with respect thereto, the Defendant says that it is entitled to remain in possession of the said premises until the 31st day of March, 1990, pursuant to the Order of the Honourable Resident Magistrate for the parish of Kingston made on the 28th day of September, 1989. The Defendant therefore contends that it is not wrongfully in possession of the subject premises as a trespasser, as is alleged in the said paragraph 3."

in my opinion, provided a basis for the latter in that it raised the serious question to be determined as to the effect of the learned Resident Magistrate's order in staying execution of possession until 31st March, 1990.

The affidavit of Mr. Gresford Jones, the Attorney-at-law acting on behalf of the respondents sworn to on 29th January, 1990 deponed at paragraph 9 that:-

> "9. **The Writ is based on the assumption** and/or pretext that the above Defendant is a trespasser, but the attention of the Court is particularly directed to paragraph 4 of the Defence and Counter-claim which avers that the Defendant is entitled to remain in occupancy of the subject premises to 31st March, 1990, pursuant to the Order of His Honour, Mr. A.S. Huntley, Resident Magistrate for Kingston, made on the 28th day of September, 1989, in the Civil Resident Magistrate's Court Plaint No. 914 of 1989. This Order entitles the Defendant to remain in possession of the premises as a lawful tenant until 31st March, 1990."

This paragraph in so far as it sought to traverse the allegation of Mr. Michael Nunes at paragraph 13 of his affidavit sworn to on 6th December, 1989 in which he deponed:-

> "13. That in the circumstances, it is my opinion that the Defence as filed is a sham and I believe that the Defendant has no defence as to this action and I humbly pray that this Honourable Court grant the Plaintiff the relief sought in the Summons herewith."

equally raises an important question touching on the same matter adverted to at paragraph 4 of the defence and counter claim (referred to supra). Mr. Gresford Jones as Attorney-at-law for the respondent was someone who was qualified to speak to the facts on their behalf.

This would, in my opinion on either premise have afforded a valid ground for the learned judge below to have come to the decision that he did in dismissing the application for summary judgment.

It was for these reasons that I concurred with my brethren in dismissing the appeal with the order for costs as proposed in the judgment of Wright, J.A.