[2011] JMCA Civ 48

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CIVIL APPEAL NO 1/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MRS JUSTICE MCINTOSH JA (Ag)
THE HON MR JUSTICE BROOKS J (Ag)

BETWEEN	**MASSANDER REID**	**APPELLANT**
AND	**BENTLEY ROSE**	**1st RESPONDENT**
AND	**CYNTHIA ROSE**	**2nd RESPONDENT**

Mrs Kayann Balli for the appellant

Leighton Miller for the respondents

14 July 2010 and 20 December 2011

HARRIS JA

[1] This is an appeal from a decision of Her Honour Mrs Marcia Dunbar Green in favour of the respondents in which she ordered that the appellant pay to them the sum of $150,000.00 for arrears of rental.

[2] The appellant was the tenant of the respondents, he having rented property known as 10 Woodburn Place in the parish of Saint Catherine, together with certain equipment therein for the purpose of conducting business. The property is owned by a

company called Macro Finance Corporation Limited of which the 1st respondent is a director, and at the hearing on 8 November 2007 Macro Finance Corporation was added as a claimant. A contract for the lease of the property was prepared and sent to the appellant but it was never executed by the parties. The appellant, on 30 August 2004, paid the sum of $120,000.00 to the respondents for two months' rent and one month's security deposit for which he received a temporary receipt from the 2nd respondent, the contents of which are as follows:

> "Received from Mr Massander G Reid, box 402 Old Harbour St Catherine [sic]. The sum of One Hundred and Twenty Thousand Dollars ($120,000) being two months advance on rental of commercial property inclusive of building and equipments [sic] therein of which agreed rental is Forty Thousand Dollars ($40,0000) monthly.
>
> An understanding is agreed upon by both landlord and tenant that efforts are to be pursued to arrive at a rental purchase agreement amicable to both parties."

Appellant's Case

[3] The appellant was introduced to the 1st respondent by Oniel Carter o/c David. The property was rented for the purpose of manufacturing grills. It was orally agreed that the appellant would pay the sum of $40,000.00 monthly, commencing with an initial payment of $80,000.00 for one month's rent and one month's security deposit. However, at the request of the 2nd respondent, he paid $120,000.00 to cover a further month's rent. After making the payment to the 2nd respondent, he gained access to the premises by obtaining the keys from the respondents' agent David, who was then in possession of them.

[4] The appellant stated that he received the keys on 19 September 2004 at which time he entered into possession. He stated that he paid rent on the 19th day of each month. In March 2005 he requested that the 1st respondent reduce the rent by $10,000.00 monthly. The 1st respondent agreed to this proposal. He made a payment of $30,000.00 in March 2005 and was given a receipt. This payment, he asserted, covered the rental for 19 March to 18 April 2005.

[5] Prior to 18 April 2005 an extraordinary rainfall caused the grounds of the property as well as the floor of the building to flood. The rainfall also caused the roof in the working area of the building to collapse. These conditions, the appellant asserted, prevented him from using the building, it being uninhabitable.

[6] He further related that he made a report to the 1st respondent about the deplorable conditions of the property and informed him that if repairs were not carried out he would be vacating it. During this period he said that he had certain business contracts which he lost due to the poor state of the property. However, at the time he entered into the agreement to lease the property, he did not inform the respondents that he had these contracts which were dependent on the property being kept in a particular state.

[7] He then requested the return of the security deposit but it was not given to him, so he remained in the premises for another month, until 16 May 2005 to ensure that the amount paid as security deposit was applied to that month's rent.

[8] He related that he had notified the 1st respondent of his intention to quit the demised premises and this was orally given over the telephone but that during this conversation he did not give a specific time for ending the tenancy. He further stated that on 16 May he told the 1st respondent that he had left the property and he never went back there.

[9] He purchased zinc costing $200,000.00 for the roof but did not communicate this to the respondents.

[10] Oniel Carter testified on behalf of the appellant. He stated that he introduced the appellant to the respondents but he was not the respondents' agent. He was an employee of the respondents' former tenant and he remained on the property engaging in the manufacture of furniture after that tenant vacated the property.

[11] He related that he told the 1st respondent that the keys were given to him by the appellant but was told that he should get a letter from him. He further asserted that on 18 June 2005 he attempted to deliver the keys to the 2nd respondent who refused to accept them for the reason that there was no letter from the appellant.

[12] Miss Jennifer Crosby also testified on the appellant's behalf. She said she worked for the appellant on a 'part time' basis as a quality control supervisor. The appellant, she said, conducted business on the respondents' property for between three and four months, and he left on 16 May in 2004 or 2005. She further stated that, one day, heavy rains caused the property to flood and "apart from the pit breaking out

inside the building flooded. Housing furniture and steel. All of that flooded out. I was there. We lift some equipment to higher ground; not to damage by water".

Respondents' Case

[13] The respondents stated that the rental fell into arrears and the appellant was owing rental of $10,000.00 for March and $40,000.00 monthly from April to September 2005 as he remained on the property until September. The appellant made payments regularly until 18 March 2005 when he paid $30,000.00 instead of $40,000.00. Attempts to obtain the outstanding sum were unsuccessful.

[14] The building which was rented to the appellant was a concrete structure designed and built as a factory. The 1st respondent said that the appellant did not inform him that the roof was damaged nor that the property had flooded nor did he tell him that he would be leaving the premises nor that he had left it on 16 May 2005. The 2nd respondent stated that she visited the premises in June 2005 and saw grills in the yard.

[15] The 1st respondent stated that no one acted as an overseer while the premises were rented to the appellant and although David introduced the appellant as a tenant, he had no authority over the property. David, he said, was neither their agent nor representative. David did not occupy any part of the property; neither did he have the keys to the property. The 1st respondent said his wife acted on his behalf to collect the

keys and to write receipts during the tenancy. Both respondents denied that David had made any attempt to deliver the keys to either of them.

[16] On 4 July 2005 the respondents brought a claim against the appellant for the recovery of $130,000.00 for three months' rental from 19 April to 19 June 2005 and continuing. The appellant filed a defence and counterclaim. In the defence he denied owing rent and he averred that the property was flooded by reason of a heavy down-pour of rain which caused it to become unfit for its intended purpose. The counter-claim stated as follows:

> "1. By way of Counter claim the Defendant says that he entered into possession in expectation of obtaining a lease from the Plaintiffs which lease the Plaintiffs held themselves out as having the capacity to grant.
>
> 2. At all material times the Defendants [sic] well knew that the Plaintiff [sic] as an engineer required the premises to be fitted up as a workshop for the conduct of his business and in particular manufacture of grills for orders received from customers including the Government Inner City Initiative.
>
> 3. In the events that happened the Defendant discovered that the Plaintiffs had no capacity to grant the lease.
>
> 4. Further the premises was not watertight, the floor was uneven and unable to accommodate the Defendants [sic] machinery.
>
> 5. The Plaintiffs promised to rectify the defects and/or give the Defendant opportunity so to do but never did so.
>
> 6. In the premises the said premises became useless and worthless to the Defendant who lost the benefit of present and future contracts.

7. Wherefore the Defendant Counterclaims [sic] damages for breach of contract, misrepresentations and economic loss in the sum of $250,000.00."

[17] The learned Resident Magistrate found that the appellant was liable to pay rent from April to September 2005 and found that the counterclaim was not proved. She said at page 13 of her judgment:

> "The court finds that the rent amount had been reduced as at March 2005. This was evidenced by a receipt for rent in the sum of Thirty Thousand Dollars ($30,000.00) without any acknowledged balance. In the circumstances, the plaintiffs are entitled to rent for April to September at $30,000 per month less the security deposit of $40,000.
>
> The claim for payment of utilities fails for the reason that it was not proved."

[18] The appellant's grounds of appeal are as follows:

> "a. That the finding of the Learned Resident Magistrate that the Plaintiffs were unaware of the fact that the Defendant had vacated the premises was against the weight of evidence in the case
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> b. The Learned Resident Magistrate erred in law in that having found that the 2nd Plaintiff was aware of the Defendant having vacated the premises she failed to find as a matter of law that the Plaintiffs could have exercised their right to re-entry.
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> c. That the Learned Resident Magistrate misdirected herself in that she did not consider the Plaintiffs' duty to mitigate their loss upon being advised and later finding that the Defendant had in fact vacated the premises.
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> d. The Learned Resident Magistrate erred in law in not considering the Plaintiffs' failure to exercise their right to re-entry and their duty to mitigate their loss.

e. The Learned Resident Magistrate's finding that the tenancy was terminated in September 2005 was wrong in law and against the weight of the evidence.

f. That the Learned Resident Magistrate failed to appreciate the evidence of the Defendant that he was relying on the fact of the Plaintiffs' knowledge that he intended to and did in fact vacate the premises and not on the status or nature of the relationship between the Plaintiffs and O'Neil Carter.

g. The Learned Resident Magistrate failed to appreciate the nature of the evidence as to the true character of the relationship between the parties and David Carter and misdirected herself by relying solely on the nomenclature used by the parties in describing the nature of their relationship."

Submissions

[19] Mrs Balli in her written submissions stated that the evidence does not support the findings of the learned Resident Magistrate as it points to the appellant having vacated the property long before September 2005 and thus with reasonable effort, the respondents knew or ought to have known and the learned Resident Magistrate ought to have been more circumspect in her assessment of the appellant's evidence and of their credibility. If there had not been in fact the existence of an agency between David and the respondents she ought to have taken into account the special relationship between them. Had the learned Resident Magistrate given consideration to the respondents' duty to mitigate their loss, she would have found that they were in breach of such duty.

[20] Counsel argued that the appellant had surrendered the property in May 2005 after giving the respondents notice of his intention to quit the premises. The learned Resident Magistrate, she argued, erred in finding that even if it were accepted that there was indeed a notice to quit, it would have been invalid because there was no certain date on which the notice would have become effective and there was no certain date on which the rent was due. In the alternative, she argued, the Resident Magistrate having found that there was no valid notice to quit; there was adequate evidence that the respondents would have known that the premises had been vacated. The keys to the property, she contended, had been delivered to David who did odd jobs and who had a "special relationship" with the respondents (though admittedly, not being the respondents' agent), the existence of that relationship, coupled with the delivery of the keys, would have amounted to a surrender of the property by the appellant.

[21] Mr Miller submitted that the findings of the learned Resident Magistrate that there was cogent evidence to show that the respondents were unaware that the appellant had vacated the property was correct. She had a right to consider all the evidence in order to decide whether a valid notice had been given by the appellant and to take into account any material inconsistencies to determine where the balance of probabilities lay, he argued. The respondents, he submitted, acted quite properly in observing the covenant of quiet possession despite the fact that the 2nd respondent, on her visit to the property in June 2005, had seen grills lying in the yard. The fact that the

respondents brought a claim for the recovery of rent, it could not be inferred that they had knowledge that the appellant had abandoned the premises, he argued.

The Law

[22] A periodic tenancy is terminable by proper notice given by the landlord or the tenant and does not expire without notice at the end of the first week of each period or the end of each succeeding period - see ***Bowen v Anderson*** [1894] 1 QB 164. It is a settled rule that unless otherwise provided for, the notice should be at least one rental period. Such notice must be a valid notice to quit to expire at the end of a complete tenancy period - see ***Lemon v Lardeur*** [1946] 1 KB 613. Although desirable, it is not necessary that the notice should be in writing. A notice given orally is sufficient.

[23] The essential requirement is that a tenant must give the requisite notice of his intention to quit the demised property to the landlord or the landlord's duly authorised agent. This means giving notice to the landlord or his agent with at least the minimum notice period required by law, commensurate with the type of tenancy. A tenant must adhere to this prerequisite in satisfaction of the law. Accordingly, in this case, a tenant would be required to give the landlord one clear month's notice of his intention to deliver up the property. While the notice need not be in writing, the party alleging that he had given the requisite notice must show that he had done so. Thus he must prove that notice was given, specifying the date on which it was given and that it expired on the correct date - see ***Lemon v Lardeur***.

[24] At common law, the delivery up of possession by a tenant to the landlord and the acceptance of the landlord operates as a surrender - see ***Cannon v Hartley*** (1850) 9 CB 634. It follows that one party to a contract of lease can terminate the contract where he obtains the assent of the other party. The termination of lease by way of surrender by the tenant must be made to the immediate landlord who accepts the surrender. A surrender effectively discharges all parties from all future obligations under the lease but not from liabilities which had been previously incurred - see ***Torminster Properties v Green*** [1983] 1 WLR 676. It follows therefore that a surrender can only be effective where the tenant delivers up possession of the property which is accepted by the landlord. However, possession must be given up completely, and even with the consent of the landlord if a tenant remains in the property there can be no surrender. Where the landlord, with the intention of retaining possession of the demised property, accepts the keys which are delivered to him by the tenant, that is sufficient to effect a surrender (***Mines Royal Societies v Magnay*** (1854) 10 Exch 489 at 493).

[25] At common law, a landlord may have a right of re entry to his property. He may exercise such right if the lease contains express provisions for forfeiture on the occurrence of certain events, for example, on the tenant's failure to pay rent. He may also re-enter where the tenant has served a valid notice within the prescribed period for the service of such notice, or there has been an effective surrender of the demised premises. However, the tenancy continues until the landlord carries out some act to indicate his intention to terminate the lease - ***Davenport v R*** (1877) 3 App Cases 115

(PC). Rights available at common law, have, in some instances been removed by statute particularly the Rent Restriction Act.

[26] The main issues arising in this appeal are:

(1) Whether a valid notice to quit had been given by the appellant to the respondents of his intention to vacate the property;

(2) Whether the delivery of the keys to David amounted to a surrender of the property by the appellant; and

(3) Whether the respondents had a right of re entry and failed to take up same in order to mitigate any loss of rental to which they may have been entitled.

[27] In considering the question relating to the notice to quit, it is first necessary to address Mrs Balli's complaint with respect to the commencement date of the tenancy. She contended that a valid notice to quit had been given by the appellant. Such notice would have had to be given to expire on a specific date, namely one month from the "anniversary" of the commencement of the tenancy. Interestingly, the appellant declared that he had given a valid notice, yet he was unable to state the date on which he had given such notice.

[28] It is acknowledged that the learned Resident Magistrate stated that there is some uncertainty as to the precise date of the commencement of the tenancy. She, however, did not make a finding as to this issue. Although she had not done so, there

was sufficient evidence from which she could have arrived at a commencement date. The receipt of 30 August 2004 shows that the sum of $120,000.00 was paid to the respondents for three months' rental. It also specifies that further steps would have been taken to arrive at a rental and purchase agreement to the satisfaction of all parties.

[29] Despite the fact that such an agreement did not materialize, it was accepted by all parties that a tenancy agreement was in force. There was evidence that the appellant entered into occupation of the property in or about 19 September 2004. This was not challenged. He was unable to do so earlier as the previous tenant was still in occupation of the property. He paid rent on the 19th of each month and made regular payments of rental of $40,000.00 monthly up to February and although on 18 March 2005, he paid $30,000.00, this payment would no way affect the operative initial date of the tenancy. Obviously, the 19th September date must be taken as the commencement date of the tenancy. As a consequence, the learned judge's failure to have made a specific finding as to the commencement date of the tenancy would not have precluded her from deciding whether a valid notice had been given to the respondents. Nor would it have prevented her from making a determination as to outstanding rent, if any.

[30] The appellant, in contending that he had in fact given due notice to the respondents of his intention to vacate the premises, sought to rely on ***John Laing Construction Ltd v Amber Pass Ltd*** [2004] 2 EGLR 128. The learned Resident

Magistrate, in finding that he had not given the requisite notice, said at page 8 of her judgment:

> "The Court finds as a fact that there was no certain date on which the alleged Notice to Quit was given to the plaintiffs. Based on the defendant's evidence, the heavy rains occurred in the first week of April and he left the premises shortly, returning twice within a week thereafter 'to see the situation'. Furthermore, he gave evidence that the plaintiffs were advised of his intention to leave 'two weeks after the heavy rains.' The court distills from this that the alleged Notice would have been given either in the second or third week of April. This uncertainty, coupled with the uncertainty surrounding the date when rent was payable, raises doubt as to the validity of any Notice, particularly in the context of a monthly tenancy needing to be determined by a minimum of thirty days notice."

[31] She also found that the 1st respondent's refusal to accept the keys would be inconsistent with the respondents' contention that they were unaware of the appellant's intention to vacate the property. She rejected the appellant's evidence that he had spoken to the 1st respondent about the deplorable condition of the property, and found that he, having stated that the respondents and himself enjoyed a good relationship, failed to relate the nature of the respondents' response to his complaint. She also found that his assertion that his reason for terminating the lease was due to the state of the property was at variance with his evidence that he "had lived" out the security deposit for one month after the roof collapsed.

[32] The appellant having asserted that the tenancy had been terminated, he having given the respondents a notice to quit, it was for him to show that he had given a valid notice. He, being unable to give a date on which he had given the notice, laid heavy

store on the fact that, given the circumstances, the respondents must have known that he was no longer in occupation of the premises. This is clearly not a factor which could be considered supportive of his assertion that he had given the requisite notice.

[33] Much emphasis had been placed on the fact that the 2nd respondent visited the premises in June 2005 and that she ought to have known that the appellant had abandoned the property. At that time, the appellant argued, he had vacated the property and the 2nd respondent should have realized that it was vacant. In our judgment, it would be unreasonable to infer that, on this visit, she would have assumed that the appellant was no longer in possession of the property. There was grill work lying in the yard. The appellant made light of this fact by suggesting that the 2nd respondent should somehow have realized that the grills were abandoned. Given that the appellant's business related to grill work and that he was the only person who did grill work on the premises, the learned Resident Magistrate found that the appellant was still in possession at that time at which the 2nd respondent visited the premises and observed the grills lying in the yard. I cannot say that she was wrong in making that finding.

[34] The appellant has, undoubtedly, failed to establish that due notice had been given and that the tenancy had been terminated. As a consequence, I cannot say that the learned Resident Magistrate was incorrect in her findings and conclusion that a notice to quit was not delivered by the appellant to the respondents.

[35] The case of ***John Laing*** is distinguishable from the present case. In ***John Laing,*** the tenant gave proper notice under the break clause of a rental contract, but had left security barriers and security guards in place because of a perceived security risk. The landlord contended that the tenant had not formally yielded up the premises as the barriers and guards were still there.

[36] The court held that the landlord had received proper notice and the security paraphernalia would not have prevented him from asserting his rights in respect of the property. This case, therefore, is unhelpful to the appellant. In ***Laing,*** an effective notice to deliver up possession of the property had been given to the landlord. It cannot be said that this is true in the case under review as the appellant did not serve a notice on the respondents.

[37] I will now turn to the question of surrender of the property. The appellant argued that the keys were given to David for their return to the respondents and this was an act of surrender of the premises. The learned Resident Magistrate found that David was not the respondents' agent and that the delivery of the keys to him did not amount to a surrender of possession. She went on to state:

> "The second plaintiff, who was never alleged to have had a conversation with the defendant about his leaving, was the one to whom David said he had attempted to give the keys on June 18… It is the court's view that if such an attempt were made, the second plaintiff would have been quite correct in refusing to accept the keys, without more…"

[38] In an effort to support the contention that the handing over of the keys was an act of surrender, the appellant relied on the case of ***Jamaica Pre-Mix Limited v Meikle*** (1970) 12 JLR 174. This case does not offer him assistance. There is a marked distinction between ***Jamaica Pre-Mix*** and the case under review. In ***Jamaica Pre-Mix***, the parties agreed to terminate the tenancy even before the tenant took physical possession of the property. The tenant retained the keys and the landlord attempted to recover rent for the period during which the keys were in the tenant's possession. The court held that the landlord could not recover rent because the tenancy had been previously terminated by mutual agreement and the fact that the tenant retained the keys was not sufficient to prove that the tenancy subsisted. It was further held that the landlord should have anticipated his loss either by attempting to secure the return of the keys or by simply changing the locks.

[39] Clearly, in that case, the lease was terminated by mutual consent and would have been treated as falling within the concept of a surrender of the lease. The circumstances of the instant case are vastly different. In the absence of proper notice, the landlord is entitled to operate as if the tenancy subsists. Bearing in mind that the efficacy of a surrender is grounded in the mutual consent of the parties, or the service of a valid notice to quit, there being no agreement to deliver up possession and in the absence of a proper notice, in the instant case, the respondents could not have been expected to have formed the view that the premises had been surrendered, as contended for by Mrs Balli.

[40] I now turn to the question of re-entry. In addressing the question of re-entry, the learned Resident Magistrate found that there was doubt that the appellant had given a valid notice to quit and she found that the respondents had not been given the keys. Those factors along with the presence of the grills on the premises in June, would have militated against lawful re-entry by the respondents. Mrs Balli, has however, raised the issue of the mitigation of loss. She said that the respondents had a duty to mitigate the loss of rent, which could be done by their entering into a rental agreement with a new party. In so doing she is contending that the respondents had a right of re-entry and this they ought to have exercised in order to have mitigated their loss. The respondents had no such duty. They were never served with a notice to quit, nor was there any agreement for the surrender of the property. In the Australian case of ***Maridakis v Kouvaris*** (1975) 5 ALR 197, a tenant attempted to end the contract of an unexpired lease by handing the keys back to the landlord who took them but refused to permit withdrawal from the lease. The court held that simply handing over the keys was not sufficient to amount to a surrender, neither was receiving the keys enough to mean an acceptance of surrender. The court further held that the landlord was under no obligation to re-let the premises to mitigate the loss. In the present case, even if the keys were handed over to the respondents, the mere handing over would not have been sufficient to show that the appellant had surrendered the property and there was no acceptance by the respondents. As a consequence, it would not have been obligatory on the part of the respondents to have sought a new tenant

to mitigate their loss, as there was nothing to show that the appellant was no longer in occupation of the property. Accordingly, rent would have been due from him.

[41] The appellant has conceded that David was not the respondents' agent. It follows that, the appellant, having conceded that fact, any connection between David and the respondents pales into insignificance. However, Mrs Balli, in order to support her submission that the respondents were in breach of their duty to mitigate, attempted to reintroduce the existence of agency between David and the respondents by stating there was a "special relationship" between David and them. This proposition is clearly misconceived.

[42] The appellant was liable to pay rent as he was still in occupation of the property as the tenancy had not come to an end up until the date of the delivering up of the keys. To have replaced the appellant would have required the respondents giving him due notice. Surely, they, having not been aware that he had given up the tenancy, could not have simply installed a new tenant. If they had done so, they would have been in breach of the law by derogating from the covenant of quiet enjoyment to which all tenants, including the appellant, are entitled.

[43] In dealing with the counterclaim the learned Resident Magistrate stated that the claim for misrepresentation was not pursued and found that the loss was not proved, the evidence as to the damage suffered by the appellant being inconsistent. She rejected the appellant's evidence, that when he took possession of the property, he

had bought zinc at a cost of $200,000.00 and found that this was never communicated to the respondents. She also found that there was no evidence that he had informed the respondents that he had contracts which were dependent upon the property being in a state of good repair. She also found that although the appellant spoke of the property becoming uninhabitable due to the flood rains, his witnesses, David and Jennifer Crosby, testified as to a broken pit which caused some flooding. David stated that the problem was corrected the day after the flood. No evidence was given by any of the witnesses that the roof had caved in. Although in dismissing the counter-claim the learned Resident Magistrate said that the claim for utilities failed, her findings clearly show that she had considered the allegations in the counterclaim and made findings in keeping with them. I am of the view that the learned Resident Magistrate was correct in dismissing the counter claim, there being no credible evidence in support thereof.

[44] An appellate court is slow to disturb the findings of fact of a trial judge. Being reluctant to do so, the court will only intervene if the judge is found to be palpably wrong - see ***Watt v Thomas*** [1947] 1 All ER 582; ***Industrial Chemical Company (Jamaica) Limited v Ellis*** (1986) 35 WIR 303; and ***Clarke v Edwards*** (1979) 12 JLR 133. We cannot say that the learned judge was plainly wrong when she found that the appellant was indebted to the respondents for outstanding rent and dismissed the counterclaim.

[45] I would dismiss the appeal, with costs of $15,000.00 to the respondents.

McINTOSH JA

[46] I have read in draft the judgment of my sister Harris JA and agree with her reasoning and conclusion. There is nothing further I wish to add.

BROOKS JA (Ag)

[47] I too agree with the reasoning and conclusion of my sister Harris JA.

HARRIS JA

ORDER

[48] Appeal dismissed. Costs of $15,000.00 to the respondents.