[2020] JMCA Civ 30

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CIVIL APPEAL NO 10/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**LEICESTER GREEN**	**1ST APPELLANT**
BETWEEN	**GOLDSTAR MOTORS AND RENTAL LIMITED**	**2ND APPELLANT**
AND	**MAURICE LACEY YOUNG (Administrator ad litem for the estate of Owen Young, deceased)**	**1ST RESPONDENT**
AND	**BEVERLEY YOUNG-CROOKS**	**2ND RESPONDENT**

Debayo Adedipe for the 1st and 2nd appellants

Donald Gittens for the 1st respondent

Miss Audrey Clarke for the 2nd respondent

15, 19 November 2018 and 10 July 2020

PHILLIPS JA

[1] I have read in draft the judgment of my brother F Williams JA. I agree with his reasoning and conclusion and have nothing to add.

SINCLAIR-HAYNES JA

[2] I have read the draft judgment of my brother F Williams JA and agree with his reasoning and conclusion.

F WILLIAMS JA

[3] By notice of appeal filed on 17 November 2015, the appellants appealed against the decision of Her Honour Mrs D Alleyne dated 3 November 2015, made in the Parish Court for the parish of Manchester. The learned Parish Court judge (hereafter referred to as "the learned judge") thereby granted judgment against the second appellant, ordering recovery of possession of the subject premises forthwith and judgment for rental arrears.

[4] There were 14 plaints filed in the court below. In plaint number 450/2011, Mr Owen Young and Mrs Beverley Young-Crooks (hereafter referred to as "Mr Young" and "Mrs Crooks", respectively) were the plaintiffs, in a suit for recovery of possession against both appellants, who were the defendants. (The first appellant will hereafter be referred to as "Mr Green" and the second appellant as "Goldstar".) In the other 13 plaints numbered 65 to 78/2011, Mr Young was the named plaintiff in actions to recover various sums of rent alleged to be due and owing against Mr Green and Goldstar - the named defendants. Mrs Crooks, although starting her claim with Mr Young through the same attorney-at-law, later obtained separate legal representation and claimed, as registered owner of lot 7, to recover possession in her own right. She contended that Mr Young was not authorized to lease or otherwise dispose of lot 7.

[5] On 12 November 2018, we appointed Mr Maurice Lacey Young administrator ad litem for the estate of Mr Owen Young, the latter Mr Young having died before the appeal came on for hearing; and substituted the said Mr Maurice Lacey Young as the first respondent. This was done without objection from the other parties and was necessary in order for the matter to proceed. However, all references to "Mr Young" in this judgment will be to Mr Owen Young.

[6] The subject premises at the centre of the claims in the court below are lots 7 and 8 Grey Abbey, located at 14 Caledonia Road, Mandeville, in the parish of Manchester. These premises ("the leased premises") at the time of judgment formed a part of the estate of Malko Young (deceased). Mr Young is a son of his and obtained a grant of letters of administration with the will annexed in respect of his estate while Mrs Crooks, a daughter of the deceased, is a beneficiary under his will, with a beneficial interest in lot 6. Mrs Crooks was later also registered as proprietor of lot 7. Mr Green is the managing director of Goldstar, which is a company duly incorporated under the Companies Act of Jamaica.

[7] The main contention, in the various particulars of claims filed in the court below, was that premises were leased to Mr Green and Goldstar by way of two lease agreements for two three-year periods, commencing 1 April 1996 and 1 April 1999, respectively. However, since then, they defaulted on the payment of rent. Mr Young claimed that Mr Green and Goldstar refused to vacate the leased premises when he refused to renew the lease agreement with them and that they have failed to settle the

outstanding rent. As a result, the suits were initiated to recover possession of the leased premises and the rental arears.

[8] In response to the plaints claiming payment of rental arears, on 19 April 2011, Mr Green and Goldstar filed in the court below a "Notice of Special Defence and Set Off". They denied therein having acknowledged that there were any rental arears. Further, they claimed a right to set off any rental arears against the increased value of the developed leased premises, that, they claimed, came about as a result of their developing the premises. Mr Green and Goldstar averred that they had substantially developed the premises with Mr Young's oral agreement. They contended that, by that agreement, there ought to have been an abatement of rent and a further renewal of the lease. Accordingly, Mr Green and Goldstar claimed that Mr Young had acted wrongfully in refusing to renew the lease in 2001 and in further leasing lot 6 (which had originally been a part of the leased premises) to a third party in May 2010. Mr Green and Goldstar also alternatively claimed that the claims for rent were statute barred.

[9] In relation to the claim for recovery of possession, Mr Green and Goldstar also filed a defence in which they contended that no valid notice to quit had been served and that it was Goldstar that was the rightful tenant of Mr Young.

Summary of evidence in the court below

For Mr Young and Mrs Crooks

[10] Mr Young testified that in 1996 he had leased three lots (inclusive of lot 6) to Mr Green and Goldstar at a rental of $12,000.00 per month. He testified that in 1999 he

increased the rent to $30,000.00 per month. He stated that, while, admittedly, he did not have the permission of Mrs Crooks to lease lot 7, he had signed the two lease agreements prepared by Mr Green. He also testified that the rent was paid by Mr Green in person, with cheques that Mr Green signed. He conceded, however, that the cheques at times bore Goldstar's logo. It was also his evidence that, initially, rent was paid consistently, but thereafter, there was continued default in the payment of the rent with the excuse that "business was bad". He also gave evidence that a cheque paid by Mr Green was dishonoured by the bank. He stated that he had requested that the leased premises be delivered up but that Mr Green had instead sought to have him enter into a new lease agreement, which he refused to do. He testified that he later leased lot 6 to a third party but that (with Mr Green's agreement) he continued to charge the same rental for the two remaining lots, as he had charged for the original three.

[11] He also testified that Mr Green and Goldstar had been in possession from 1996 up to the time of trial. He denied, however, that he had consented to the development of the premises and, in cross-examination, maintained that Mr Green and Goldstar were, from a practical perspective, one and the same person. His evidence in this regard (to be found at pages 140 to 141 of the record of proceedings) was as follows:

> "Q: Is Goldstar you lease it to not Mr. Green?
>
> A: Is the same person.
>
> Q: Look at Exhibit 5- the 1999 lease?
>
> (**Witness reads document**)

Who and who made the lease agreement?

A: Me and Mr. Green.

Q. Who the document say enter into the lease?

A: Owen Young, Veronica Young, Janet Young, being beneficiary of the Estate of Malko Young.

A: [sic] Mr. Green is the tenant.

Goldstar Motors I see written there as the tenant- that is the same person."

[12] He also acknowledged that notices to quit had been served on both Mr Green and Goldstar.

For Mr Green and Goldstar

[13] Mr Green testified that he had entered into two lease agreements with Mr Young. Those agreements, he stated, related to lots 6, 7 and 8. He testified that the rental charged covered all three properties but that lot 7 was to be held in escrow. He further testified that the rental was initially $12,000.00 per month and then subsequently increased to $30,000.00 monthly. Mr Green stated that, without his permission, lot 6 was leased to a third party but that Mr Young had, unfairly, continued to charge the same rental for the other two lots as he had done for all three lots. He also asserted that Mr Young had consented to the development of the land and that there had been an agreement that he, Mr Green, and Goldstar would be given a first option to purchase the leased premises in the event that they were being sold.

[14] It was against the background of those pieces of evidence, among others, that the learned judge accepted the evidence on behalf of Mr Young and Mrs Crooks and made the orders referred to in paragraph [3].

The appeal

[15] Mr Green and Goldstar filed eight grounds of appeal on 6 February 2017. They were framed in the following terms:

> 1. "The Learned Resident Magistrate erred in law in finding that there was a valid notice to quit as there was no valid notice either under the Rent Restriction Act or at common law."
>
> 2. "The learned Resident Magistrate erred in law and on the facts in finding that the 1st Plaintiff was entitled to recover possession of the land registered at Volume 1184 Folio 756 from the defendant Gold Star Motors and Rental Limited."
>
> 3. "The learned Resident Magistrate erred in law and on the facts in ordering that the 2nd Plaintiff recover possession of land registered at Volume 1309 Folio 636 of the Register Book of Titles From Goldstar Motors and Rental Limited as her claim to that land had been barred/extinguished by Owen Young pursuant to the provision of the Limitation of Actions Act."
>
> 4. "The learned Resident Magistrate erred in finding that the land subject of the actions was not controlled premises under the provisions of the Rent Restriction Act."
>
> 5. "The learned Resident Magistrate erred in finding that Mr. Young did not authorise, consent to or acquiesce in the construction of the building undertaken on the land by the tenant."
>
> 6. "The learned Resident Magistrate erred in finding that the land subject of the actions was not controlled premises within the provisions of the Rent Restriction Act

as the building on the land were [sic] erected before the second lease and the second lease was clearly for the continuing purpose of carrying on business in that commercial building."

7. "The learned Resident Magistrate erred in giving judgment for the total sum sued for because it exceeded the amount allowable under the provisions of the Rent Restriction Act and the rules made thereunder."

8. "The learned Resident Magistrate erred in law and principle in failing to award costs to the Defendant Leicester Green on all the Plaints."

[16] In the written submissions, counsel for Mr Green and Goldstar sought to introduce an additional ground of appeal (ground 3A), which is not included in the notice of appeal. The court records do not indicate that permission was sought or obtained to argue that ground, neither is there any record of an amendment to the grounds of appeal. Further, there is no reply in respect of that ground, on behalf of Mr Young or Mrs Crooks. In those circumstances, that ground will be treated as not having been properly before us for consideration.

Issues

[17] Having perused the grounds of appeal as framed, I find that these are the issues which arise for discussion:

(i) Was there a valid notice to quit? (Grounds 1 and 2)

(ii) Was Mrs Crooks entitled to recover possession? (Ground 3)

(iii) Were the leased premises subject to the Rent Restriction Act? (Grounds 4, 5 and 6)

(iv) Did the learned judge err in granting judgment for the total sums sued for? (Ground 7)

(v) Did the learned judge err in not awarding costs to Mr Green? (Ground 8)

[18] Grounds 4, 5 and 6 may fairly be considered to be critical to the disposal of this appeal, as they substantially give rise to issue (iii), the determination of which will have significant implications for the grounds of appeal that turn on the applicability of the Rent Restriction Act ("the RRA"). As such, I will begin the discussion with a consideration of issue (iii).

Issue (iii): were the leased premises subject to the Rent Restriction Act? (Grounds 4, 5 and 6)

Submissions for Mr Green and Goldstar

[19] Counsel for Mr Green and Goldstar argued that the learned judge had erred in not finding that the leased premises were controlled premises by virtue of being either "building land" or a "public and/or commercial building", and thus subject to the operation of the RRA. In that regard, counsel submitted that the learned judge had unreasonably accepted Mr Young's evidence that he had not acquiesced in the development of the leased premises and that the purpose of the lease was for Mr Green and Goldstar to park and sell cars. Additionally, counsel contended that in 1999, when

the lease was renewed, "the building", which, he submitted, had previously been erected on the leased premises, would have been in occupation by Mr Green and Goldstar for commercial and/or public purposes.

Submissions for Mr Young

[20] By written submissions filed on 29 January 2018, counsel indicated his reliance on written submissions filed in the court below on 30 October 2015. Therein, it was argued that, based on the court's acceptance of Mr Young's evidence that the property was let for the purpose of parking cars, the learned judge had correctly concluded that the land was not building land and accordingly fell outside the scope of the RRA. Counsel further submitted that the "structure" on the land was a chattel that was unlawfully erected and could not be regarded as a building within the meaning of the RRA.

Findings of the learned judge

[21] The learned judge considered the submission of counsel for Mr Green and Goldstar that the leased premises were controlled premises under the RRA by virtue of being building land. Accordingly, she directed the focus of her attention at section 3 of the RRA, which stipulates that land that satisfies the definition of "building land" falls within the purview of the Act; and specifically at section 2, which defines "building land". In deriving the true purpose for which the land was let, the learned judge accepted Mr Young's evidence that he had not let the land for the erection of a building but, rather, simply to park and sell cars. The learned judge thereby concluded that the leased premises were not building land within the meaning of the RRA and, accordingly,

not subject to its provisions. She also accepted Mr Young's contention that no building had lawfully been constructed on the land by Mr Green and Goldstar.

The law

[22] Section 3 of the RRA, which is subject to exemptions that are not applicable to this case, sets out the type of premises which fall under the regulation of the RRA. It provides that:

> "3-(1) This Act shall apply, subject to the provisions of section 8 to all land which is building land…and to all dwelling-houses and public or commercial buildings whether in existence or let at the commencement of this Act or erected or let thereafter and whether let furnished or unfurnished."

Further section 2 defines "building land" as:

> "land let to a tenant for the purpose of the erection thereon by the tenant of a building used, or to be used, as a dwelling or for the public service or for business, trade or professional purposes, or for any combination of such purposes, or land on which the tenant has lawfully erected such a building, but does not include any such land when let with agricultural land."

Section 3(2) makes the following provision:

> "All building land, dwelling-houses or public or commercial buildings to which this Act for the time being applies are hereafter referred to as 'controlled premises'."

Discussion

[23] During the hearing of this appeal, counsel for Mr Green and Goldstar conceded (and, in our view, rightly so) that the issue of whether the leased premises had been let as a building for a commercial and/or public purpose had not been put before the

learned judge for her consideration. In keeping with that observation, counsel retracted submissions relating to that issue. Counsel for Mr Green and Goldstar also acknowledged that the question of whether Mr Young had acquiesced in the development of the leased premises was a question of fact that fell within the fact-finding duty of the learned judge. He conceded that, in light of the evidence which unfolded before the court below, any possible merit in the ground of appeal against that finding of fact would fade away.

[24] In attempting to resolve the question of whether the learned judge was correct in her finding that the leased premises were not building land, it becomes apparent that the purpose for which the premises were let is of critical significance. In **Muriel Reid and Eustace Chisolm vs Denise Johnson and others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 135/2007, judgment delivered 3 April 2009, Morrison JA (as he then was) at paragraph 28, emphasized the importance of the purpose for letting in determining whether leased premises constitute building land within the meaning of the RRA. He opined:

> "Building land, by definition, is land 'let to a tenant for the purpose of…building…' with the effect, in my view, that the purpose for which the land was let must be clearly established by the evidence. It is therefore not enough to show that the land in question may be or is actively being used for the purpose of building: what is required is that it must have actually been let for that purpose."

[25] Thus, in order to have been able to have arrived at a finding that the leased premises were in fact "building land", the learned judge ought to have been satisfied, on the evidence, that the leased premises were let for the erection by the tenant of a

building to be used as a dwelling or for public service, business, trade, a professional purpose, or a combination of those purposes; or land (exclusive of agricultural land) on which the tenant has lawfully erected such a building. Therefore, regard must be had to the evidence before the court below concerning the purpose for which Mr Young had let the land.

[26] Since the finding of the learned judge in this regard would have been based on her acceptance of one party's evidence over the other, it appears that any scrutiny of the learned judge's findings of fact must be conducted against the background of the guidance of the Judicial Committee of the Privy Council in **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21. In essence, the relevant dictum in that case is to the effect that, in order to warrant interference by the appellate court, the finding of the learned judge that is being challenged must be shown to be "plainly wrong".

[27] At page 147 of the record of proceedings, Mr Young responded in the following manner to questions about the letting that were asked during cross examination:

> "Q: You observed from shortly after the lease began that the land was being improved?
>
> A: Yes
>
> Q: You saw the land was being paved?
>
> A: Yes
>
> Q: You saw the land being fenced?
>
> A: Yes

Q: You saw an office building being erected?

A: Yes

Q: This was from the year 1996?

A: About that time.

Q: You made no objection?

A: I told him I don't rent it for that purpose

Q: Why you rent it?

A: For him to park motor vehicle." (Emphasis added)

[28] Also of relevance is the evidence of Mr Young, recorded at page 136 of the record of proceedings, in which Mr Young denied having given any permission to build. Mr Young testified that:

"Q: When you sign the lease with Mr. Green did you make him any promises what he can do at the place?

A: No

Q: Did he ask permission to do any building or construction work at the pace?

A: Nothing like that.

Q: Did you have any conversation with him about any building or construction work he did at the place?

A: No."

[29] On the other hand, Mr Green gave evidence that he had acted as Goldstar's agent in obtaining a place to run a "car dealership business". He stated that while the premises were unsuitable for the required purpose (in that it had very tall trees), Mr Young agreed for the business to be conducted on the leased premises and further agreed that (at page 159 of the record of proceedings):

> "it should follow through with necessary preparation for business."

[30] Mr Green further testified (recorded at page 160 of the record of proceedings) that works, including the following, were done:

> "Works needed to put in a condition to sell cars were done. We had bulldozer bulldoze the section 6 to 8 ft high and to level the property, so we have proper car storage area, customer parking area office and storage area and car service bay to include pit.
>
> The land was levelled for that purpose. It was properly marled, put in retaining wall for low section and asphalted for the purpose. Office was put in 3 containers put together and opened up on the inside to form one large area and then it was partitioned with sheet rock in different offices and storage area. The pit was excavated with heavy equipment and block and steel used to form the pit-one pit…. We put chain link fence around the entire property these works were done between 1996 and 1997….During that period I saw Mr Young … He never expressed any disapproval of the works done."

[31] The learned judge accepted Mr Young's evidence over that of Mr Green in determining that the lease was not granted for the erection of a building for commercial purposes and in finding that neither had the structure on the land been lawfully erected. Those findings, against the background of the evidence, were open to have been made by her.

[32] Further, counsel's contention that Mr Young had not objected to the erection of "the building" must be viewed in tandem with what was, on the basis of the evidence in the case, found by the learned judge to be the purpose for which he had let the leased

premises. Page 359 of the record of proceedings (paragraph 33 of the reasons for judgment) reflects that, on this issue, the learned judge stated: _

> "The court finds that the Rent Restriction Act does not apply to this case as the plaintiff Owen Young testified that he did not let the land to the defendants for the purpose of the erection of a building for business purposes. It was to park and sell cars. Further, the plaintiff made it clear that the tenant did not lawfully erect the buildings. He did not agree to the erection of the buildings as he had his own plans for the premises. The Court observed the demeanour of both Mr Young and Mr Green during their testimony and believes Mr Young's evidence. The court therefore is of the view that it did not have to await the findings of the Rent Assessment board as to whether the rent was valid before hearing the matter."

[33] Clearly, it was a matter of whose evidence the learned judge chose to accept and she accepted that of Mr Young. As stated by the learned judge, in arriving at her findings and ultimate decision, she had the advantage of observing the witnesses and their demeanour. It is significant to note as well that the learned judge also visited the leased premises and looked at the structures thereon in order to aid her in arriving at her decision. Her finding, in all the circumstances, cannot reasonably be held to be unjustified or as lacking an evidential basis. Accordingly, I can discern no reasonable ground on which to interfere with her finding that the leased premises did not constitute building land. Therefore, the leased premises not being "building land" would not have constituted controlled premises under the RRA; and so would not have been governed by its provisions.

Issue (i): was there a valid notice to quit?

Submissions for Mr Green and Goldstar

[34] Counsel for Mr Green and Goldstar argued that, if the leased premises are controlled premises, it follows that, by virtue of section 30 of the RRA, a valid notice to quit would be required to terminate the tenancy. Counsel submitted that, contrary to having the requirements of a valid notice to quit, as explained in **Re Bebington's Tenancy; Bebington v Wildman** [1921] 1 Ch 559, in this case there was no valid notice to quit, as the notices served did not refer to all the leased premises.

Submissions for Mr Young

[35] Counsel submitted that the learned judge had correctly found that the RRA was inapplicable to this case and, consequently, the notices served on Mr Green and Goldstar were sufficient to have conveyed Mr Young's intention to terminate the tenancy. Further, counsel sought to distinguish the case of **Bebington v Wildman** on the basis that, in that case, the property was let as a whole, but notices to quit were served pertaining to different subdivisions of the property in accordance with how the property was sold to individual purchasers. Counsel argued that the circumstances were different in the case at bar since the leased premises were referred to by lot numbers which had always been recognised by Mr Green and Goldstar. On that basis, counsel submitted that Mr Green and Goldstar would not have been prejudiced; neither could they have reasonably misunderstood the extent of the property that was being sought to be recovered.

Submissions for Mrs Crooks

[36] Counsel submitted that, in circumstances in which the learned judge had properly accepted Mr Young's evidence that he had let the leased premises only to allow Mr Green to park motor cars, her finding that the property was not subject to the RRA is unimpeachable. As an alternative position, it was argued that, in the circumstances of this case, Mr Young would have had no authority to lease lot 7. Consequently, Mr Green and Goldstar would have been, at the most, tenants at will, if not trespassers.

Findings of the learned judge

[37] The learned judge relied on notices to quit, namely: (i) exhibit 7, dated 23 April 2009, served on Mr Green to quit and deliver up lot 8, Grey Abbey Caledonia Road, Manchester on or before 30 June 2009; and (ii) exhibit 8, dated 7 February 2011 served on Goldstar to quit and deliver up possession of the said lot and address on or before 30 March 2011. On the basis of the entire circumstances; the evidence and the submissions for Mr Green and Goldstar, the learned judge rejected the submission that the notices to quit were invalid. She found that a tenancy at will had been created at the expiration of the lease agreements when Mr Young refused to renew the lease. In those circumstances, Mr Young's unequivocal intention to end the tenancy at will would have been communicated by the notices to quit.

Discussion

[38] Since, as has already been demonstrated, the RRA does not apply to this case, and there has been no appeal against the learned judge's finding that a tenancy at will

had been created, the only question that falls to be determined is whether that tenancy was properly terminated. In her judgment, the learned judge relied on the case of **Muriel Reid and Eustace Chisolm vs Denise Johnson and others**, in which Morrison JA addressed the manner of lawfully terminating a tenancy at will by stating that (at paragraph 39):

> "… [tenancy at will], as already indicated, is terminable by any unequivocal indication of the landlord's will…".

[39] Further, in the case of **Martinali v Ramuz and another** [1953] 2 All ER 892 Denning LJ (as he then was), at page 893, opined that:

> "It is elementary that a tenancy at will is determined by a demand for possession, not by a notice to quit."

[40] Also, Halsbury's Laws of England, Landlord and Tenant, volume 64 (2016), paragraph 197, addresses the requirements for the determination of a tenancy at will by a landlord. It states that:

> "Anything which amounts to a demand for possession, although not expressed in precise and formal language, is sufficient to indicate the determination of the landlord's will or desire to end the tenancy….The tenancy is impliedly determined by the landlord when he does any act on the premises which is inconsistent with the continuance of the tenancy."

[41] It would stand to reason, therefore, that, while no formal notice to quit was required in these circumstances, the notices to quit would have communicated to Mr Green and Goldstar, Mr Young's desire to bring the tenancy to an end. The intention to end the tenancy would also have been evident by the institution of legal proceedings by

Mr Young, to recover possession of the leased premises. The learned judge's decision in this regard was, therefore, sound. The order for recovery of possession, accordingly, could not, in these circumstances, be successfully challenged based on the contention of an invalid notice to quit.

Issue (ii): was Mrs Crooks entitled to recover possession? (Ground 3).

Submissions for Mr Green and Goldstar

[42] Counsel submitted that the learned judge could not properly have ordered that Mrs Crooks was to recover possession of lot 7, as her claim to possession had been defeated by operation of section 30 of the Limitation of Actions Act. Counsel argued that her title to the property had been extinguished in favour of Mr Young. The existence of that state of affairs, counsel submitted, was demonstrated in the fact that Mr Young had let the premises without Mrs Crook's permission. Additionally, Goldstar's occupation would be attributed to the possession of Mr Young, which would amount to in excess of 12 years. Counsel submitted that, moreover, although Mrs Crooks had initiated a claim in the court below in relation to her ownership of lot 7, that claim would have been ineffective to stop the running of the limitation period against her. Counsel submitted that time would have continued to run as those matters were prematurely concluded. Counsel concluded that title to lot 7 would have been extinguished in favour of Mr Young.

Submissions for Mrs Crooks

[43] Counsel submitted that there had been no evidence led in the court below of any competing interest to lot 7. Accordingly, the issue of the extinguishment of Mrs Crook's title did not properly arise for consideration below.

Finding of the learned judge

[44] The learned judge dismissed the argument that Mrs Crooks was barred from recovering lot 7 on the basis of the expiration of the limitation period, in favour of a possessory title accruing to Mr Young. The learned judge found that Mrs Crooks had, throughout 1998 to 2003, actively asserted her right to possession in the form of claims filed in the Supreme Court and that no intention to dispossess her had been established on the evidence.

The law

[45] Sections 3 and 30 of the Limitation of Actions Act, respectively stipulate that:

> "3. No person shall make any entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or to bring such suit, shall have first accrued to the person making or bringing the same."
>
> "30. At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."

Discussion

[46] The learned judge relied (and, I am of the view, rightly so) on the dicta in **Powell v McFarlane** (1977) 38 P & CR 452, wherein it was opined that:

> "The animus possidendi was also necessary to constitute possession and involved the intention in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title, so far as was reasonably practicable and so far as the processes of the law would allow: and that the courts would require clear and affirmative evidence that the intruder, claiming that he had acquired possession, not only had the requisite animus possidendi but made such intention clear to the world."

[47] Mr Young was making no claim or contention that he had obtained lot 7 by effluxion of the limitation period or by the extinction of Mrs Crook's title in his favour. In contrast, his evidence was that he had leased lot 7 in his capacity as administrator of his father's estate. Furthermore, there was no evidence to demonstrate that the requirements to prove adverse possession of lot 7 had been satisfied. Mr Young was not, on the evidence, seeking to dispossess Mrs Crooks. There was, therefore, no factual basis for advancing the limitation-period point. In these circumstances, Mr Green and Goldstar could not successfully advance such a contention, in the absence of any such claim or evidence. It seems to me to be a novel proposition for a defendant to an action for recovery of possession to seek to advance a limitation defence that is based, not on its own possession and animus, but which could peradventure fall to be relied on by another claimant, in circumstances in which that other claimant is not advancing any such defence. There is, on my finding, no merit in the contentions of Mr Green and Goldstar on this issue.

Issue (iv): did the learned judge err in granting judgment for the total sums sued for? (Ground 7)

Submissions for Mr Green and Goldstar

[48] Counsel submitted that the rental increase charged by Mr Young from $12,000.00 to $30,000.00 was in contravention of section 3(1) of the Rent Restriction (Percentage of Assessed Value) Order. Further, it was submitted that Mr Young's act of reclaiming one of the lots, while continuing to charge the same rental for the remaining two lots was impermissible and in contravention of the RRA. Relying on the provisions of section 20 of the RRA, counsel submitted that what he referred to as the excess rent charged by Mr Young could be deducted from the rent properly due. Counsel also argued that there is no satisfactory evidence of the exact amount of rent owing, and, as such, the claim for rent ought to have been dismissed for want of proof.

Submissions for Mr Young

[49] Counsel submitted that, even if the court was to find that the rent had been unjustifiably increased, that increase was not an automatic bar to the recovery of rent. In such circumstances, counsel argued, the court could disregard any increase found to have been wrongfully requested and order the recovery of the remaining portion.

Findings of the learned judge

[50] In relation to the rental arears, the learned judge found that it was not disputed that the amounts claimed were owed. She further rejected Mr Green's contention that there was an oral agreement that he would be able to set off the costs of developing and improving the property against the sum of overdue rent. The learned judge

accepted that lots 6, 7, and 8 were let in 1996 at a monthly rental of $12,000.00, which was increased to $30,000.00 when the lease was renewed in 1999. Further, lot 6 was subsequently leased to a third party. However, she found that, the limit of 7½ per centum annual increase of rental, stipulated by the Rent Restriction (Percentage Assessed Value) Order, was inapplicable to the facts of this case, since the leased premises were not subject to the RRA.

Discussion

[51] It is clear that, for the simple reason of the non-application of the RRA to the leased premises (having regard to the particular facts and circumstances of this case), this issue has no reasonable prospect of being resolved in favour of Mr Green and Goldstar. The appellant's claim was anchored on the contention that the increase was prohibited by the RRA. The learned judge did not make an express finding that the rent of $30,000.00 per month was reasonable; but this conclusion might reasonably be inferred from the competing arguments that were advanced in the court below and her eventual decision. It is important to note, as well, that Mr Green is recorded (at page 178 of the record of proceedings) as saying that he was not objecting to paying the outstanding rent. He also stated that, by his calculations, the outstanding rent that he owed amounted to some $3,000,000.00 (a sum that actually exceeded the amount claimed for rent of $2,460,000).

Issue (v): did the learned judge err in not awarding costs to Mr Green? (Ground 8)

Submissions for Mr Green and Goldstar

[52] Counsel submitted that the learned judge erred in failing to award costs to Mr Green, as he had been successful in the claim to the extent that that no judgment had personally been awarded against him; but only against Goldstar.

Submissions for Mrs Crooks

[53] It was counsel's argument that the costs order was properly made as the learned judge had taken into consideration all the circumstances of the case.

Discussion

[54] The award of costs payable in any litigation is always within the discretion of the court. The case of **Goldsworthy v Brickell and Another** [1987] 2 WLR 133 is useful as offering some assistance in how a court made orders for costs in a matter concerning two defendants where the plaintiff had been unsuccessful. In that matter, an 85-year-old farmer had sought, on the basis of undue influence, to set aside a disadvantageous agreement which he had executed. Accordingly, he sued Brickell, with whom he had entered into the agreement, and also joined his solicitors to the suit on the basis that they had failed to advise him that he could have sought to rescind the agreement. Goulding J dismissed the claim, ordered the plaintiff to pay the solicitor's costs but made no orders as to costs in respect of Brickell.

[55] On Brickell's cross appeal to the Court of Appeal, seeking to vary the costs order so as to require the plaintiff to pay his costs, it was held that, due to the nature of the

allegations, which included fraudulent misrepresentation and long-term dishonest conduct, which were correctly rejected by Goulding J, the making of no order as to costs was wrong. The Court of Appeal ordered the plaintiff to pays Brickell's costs.

[56] Whilst the case at bar stands to be distinguished on several bases, it is helpful to note that in **Goldsworthy v Brickell and Another**, the nature of the allegations against Brickell was a consideration in the variation of the costs order. In the case at bar, the action was one for recovery of possession and payment of outstanding rent. Mr Green was, for all intents and purposes, the managing director and face of Goldstar. While a duly incorporated company enjoys separate legal personality from its individual members, it could not be considered unreasonable for Mr Green, as managing director, to have been made a party to the suit. The learned judge, in making no orders as to costs in respect of Mr Green, would have considered the total circumstances of the case, especially that: (i) Mr Young's claims were successful against Goldstar; (ii) in filing those claims, it might not have been possible for Mr Young to have been certain which person or entity was in charge of the premises (there was evidence of another company operating from the premises); (iii) in attending court on behalf of Goldstar, as its managing director, Mr Green would not be likely to have incurred any additional expense or costs by attending in his personal capacity. The decision of the learned judge, therefore, ought not to be disturbed.

[57] I therefore recommend that the appeal be dismissed with costs to Mr Young and Mrs Crooks.

[58] Finally, on behalf of the court, I also apologize to the parties and their counsel for the delay in the delivery of this judgment.

PHILLIPS JA

ORDER

i. The appeal is dismissed.

ii. Costs to the respondents, to be agreed or taxed.