JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 31 OF 1997

BEFORE: ***THE HON. MR. JUSTICE RATTRAY, PRESIDENT***
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON J.A.

BETWEEN	***C. BRAXTON MONCURE***	***APPELLANT/DEFENDANT***
A N D	***DORIS CAHUSAC DELISSER***	***RESPONDENT/PLAINTIFF***

Dennis Morrison QC, John Vassell, and Miss Paula Blake instructed by Dunn, Cox, Orrett & Ashenheim for the Appellant.

Dr. Lloyd Barnett QC. and Miss Carol Davis for the respondent.

June 6, July 1, 2, 4, and July 31, 1997

RATTRAY, P.:

By a Writ of Summons dated 26th of June 1996 with which was filed a Statement of Claim of the same date, the respondent/plaintiff Doris Cahusac Delisser claimed from the appellant/defendant C. Broxton Moncure possession of property situated in Bluefields Pen, Westmoreland, and registered at Volume 851 Folio 250 of the Register Book of Titles. The respondent/plaintiff is the owner of this property which she leased to the appellant/defendant on the 1st of June 1982. The property is residential. The term of the lease was for five years, renewable for successive five year terms up to a total period of forty-five years

conditioned on the exercise by the lessee of an option giving notice in writing not less than three months prior to the expiration of each five year term of his desire to renew the lease. The lease was duly renewed on the 20th of February 1987. The Statement of Claim maintained that thereafter the lessee failed to renew the option and consequently the lease terminated on the 30th of May, 1992. Appearance was entered by the appellant/defendant on the 3rd of December 1996. No defence having been filed judgment was entered for the plaintiff/respondent on the 17th of January 1997 and a writ of possession issued out of the Supreme Court on the 17th of February 1997. The execution of the writ of possession was stayed for a period of seven days consequent on an ex parte application made before Walker, J. in Chambers on the 20th of February 1997.

Consequently, on the 27th of February 1997 a summons to stay execution of the writ of possession, to set aside the final judgment, and for leave to extend the time within which to file the defendant's defence was filed by the appellant/defendant and came on for hearing contested before McIntosh, J. (Ag.) on the 3rd of March 1997. On the 7th of March 1997 McIntosh, J. (Ag.) in a written judgment refused the application as being without merit. It is this judgment which is the subject of the appeal before us.

The crux of the judgment appears in the following paragraphs:

> "A careful perusal of the affidavits and exhibits does not reveal any evidence that the Defendant did give notice of intention to renew the lease for the period 1992 to 1997 as required by the Lease Agreement.
>
> There is evidence that the Plaintiff through her Attorney as far back as September 1992 indicated that the lease was terminated.

> The Defendant did nothing upon receipt of this information indicating unequivocally that he accepted that to be the true position.
>
> The Affidavit of merit was not filed by any person alleging knowledge of the facts."

In this appeal the thrust of the submissions of Mr. John Vassell on behalf of the appellant is two pronged. Firstly, he challenges the assessment of the learned judge in Chambers on his finding of the lack of the existence of an arguable case on the part of the appellant. Secondly, he put forward an additional submission for which he sought leave to argue not having done so before the learned judge in Chambers and for which we now grant him leave. That submission is in the following terms:

> "That the final judgment in default was irregular, null and void, and the Registrar of the Supreme Court acted without jurisdiction in entering same as there had been no determination as required by s. 25 of the Rent Restriction Act that it was reasonable to give Judgment for recovery of possession."

With respect to the first submission reliance was placed heavily on the principles laid down by Lord Atkin in ***Evans v. Bartlam*** [1937] 2 All ER 646 upon which a Court would exercise its discretion in setting aside the default judgment. That discretion is unconditional in its terms. A careful reading of the case discloses that there is in fact only one rule, that is, "that the applicant must produce to the Court evidence that he has a prima facie defence." Even this rule in Lord Atkin's words, "could, in no doubt rare but appropriate cases, be departed from."

The Court will not allow a default judgment to stand if there is a genuine desire of the defendant to contest the claim supported by the existence of

some material upon which that defence can be founded. The determination of the truth of the facts is a function for the judge in the contested hearing.

The point of conflict between the parties is as to whether a notice of renewal of the lease was in fact received by the landlord so as to establish the exercise by the lessee of the option to renew. Dr. Barnett's submission on behalf of the respondent/plaintiff invites us at this stage to come to a determination on this crucial issue. We are satisfied that once the issue is raised, and there is sufficient material disclosed which indicates the existence of a triable issue on the facts, the default judgment should not be allowed to stand. There is some evidence contained in the affidavit of Miss Paula Blake dated 3rd March 1997 and sworn in accordance with section 408 of the Judicature Civil Procedure Code which exhibits several letters of correspondence concerning the parties, on the issue of the renewal. This requires an interpretation and evaluation at the trial stage. It is neither necessary nor desirable to have a final assessment of the evidence at this stage.

The second point raised by Mr. Vassell may be briefly condensed as followed:

> (a) the property is one to which the Rent Restriction Act applies and in respect of which there is no exemption order under the Rent Restriction [Exempted] Premises Order 1983.
>
> (b) section 25 of the Rent Restriction Act requires that before an order for possession can be made the Court or judge must be satisfied that it is reasonable to make the order.
>
> (c) a default judgment is an administrative act by the Registrar of the Supreme Court, and the question of reasonableness is not therefore determined prior to the making of the order.

In these circumstances Mr. Vassell maintains that the order for possession was irregularly obtained not having been subject to any enquiry to determine the reasonableness of the order. He relies upon the case of ***Smith v. Poulter*** [1947] 1 KB 339 to support the position for which he contends.

Dr. Barnett on the other hand submits:

> (1) that the Registrar has judicial powers;
>
> (2) that the issue had never been raised before, and is raised now only at the last moment.
>
> (3) that the English cases should not be followed because they rested upon the legislative policy of the English Parliament in this regard.

We hold that the Registrar's adjudicatory functions are not being exercised when a default judgment is entered by the Registrar as was done in this case. It was purely an administrative act.

The issue raised, however late, is of sufficient importance to merit a determination by the Court. Furthermore, section 25 of the Rent Restriction Act makes it abundantly clear that no judgment for recovery of possession can be made or given unless for specified reasons:

> "... and unless in addition, in any such case as aforesaid, the court asked to make the order or give the judgment considers it reasonable to make such order or give such judgment: ..."

Furthermore the statement of claim gives inter alia as one of the reasons for the landlord requiring possession that:

> "(a) the said premises are required by the landlord for occupation as a residence for herself.
>
> (b) the said premises are required by the landlord for use by her for business and/or trade."

The Act provides that in these circumstances:

> "... an order or judgment shall not be made ... unless the court is also satisfied that, having regard to all the circumstances of the case, less hardship would be caused by granting the order or judgment than by refusing to grant it; ..."

The need for adjudication before the making of the order for possession is manifest, and the legislative purpose is likewise transparent - the protection of the tenant in these circumstances.

There were many authorities and references cited to us by counsel on both sides and we are indebted to them for their industry and their lucid presentations. Our failure to refer to them in this judgment is no reflection on the assistance we have received from their perusal.

The appeal is allowed and it is hereby ordered as follows:

> 1. That the final judgment entered herein on the 17th of January 1997, and recorded in Judgment Book Binder 709 Folio 458 against the appellant/defendant is set aside.
>
> 2. The defendant is given leave to file his defence to the action out of time within seven days of the date hereof.
>
> 3. Costs of the appeal and of the proceedings before the judge in Chambers to be the appellant/defendant.

BINGHAM, J.A.

I agree.

HARRISON, J.A.

I agree.