JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 135/2007

BEFORE: THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE G. SMITH, J.A. (Ag)

BETWEEN	MURIEL REID	1st APPELLANT
	EUSTACE CHISHOLM	2ND APPELLANT
AND	DENISE JOHNSON	1ST RESPONDENT
	AVIS HIBBERT	2ND RESPONDENT
	NICKOLE HOWDEN	3RD RESPONDENT
	DAVE COLQUHOUN	4TH RESPONDENT
	HAZEL GRANT	5TH RESPONDENT
	TENISHA LIGHTBODY	6TH RESPONDENT
	CAREN CATTERELL	7TH RESPONDENT
	G. GRANT	8TH RESPONDENT
	CLIFFORD THOMPSON	9TH RESPONDENT
	JANET DAVIS	10TH RESPONDENT

Dr Dennis Forsythe instructed by **Forsythe & Forsythe** for the appellants
Mr Leonard Green instructed by **Chen, Green & Co.** for the respondents

27, 28 October 2008 and 3 April 2009

HARRISON. J.A.:

I have read the judgment of Morrison JA. I agree with his reasoning and conclusion, there is nothing further that I wish to add.

MORRISON, J.A.:

1. This is an appeal from a judgment of Marsh J given on 28 November 2007, dismissing the appellants' claim for recovery of possession of

property and entering judgment for the respondents, with costs to be taxed if not agreed.

2. The appellants are, as the trial judge described them, "respectively Mother and Son, returning Jamaican migrants from the United Kingdom". By an agreement for sale dated 28 November 1985 they agreed to purchase 13 acres of land in the parish of Westmoreland and on 2 April 2002 they were duly registered as joint tenants at Volume 1342 Folio 975 of the Register Book of Titles. Their intention was to build on the land on their return to Jamaica.

3. On a visit to Jamaica in 2001, the first appellant discovered that the respondents were in occupation of the land, on which they had put up temporary structures and were farming small sections. Enquiries revealed that each of the respondents claimed to be entitled to occupy a portion of the land by virtue of a rental agreement dated 4 March 2001 entered into with a Mrs V. Reid, ostensibly as agent for the appellants. These agreements were all in the following identical terms:

"RENTAL AGREEMENT

> I, the undersigned declare that I am in full agreement with the terms of this contract and hereby agree to adhere to these terms. I understand that this rental agreement expires in two (2) years after the acquisition of the land. I further understand that no concrete structures

> should be erected on this property. I understand that I am expected to be an exemplary neighbour. My actions should in no way negatively affect my neighbour. I am also aware that termination of this contract may result at any time if my landlady is displeased with my actions.
>
> .....
> Signature of Tenant
>
> .....
> Signature of Landlord"

4. These agreements were purportedly signed by "Mrs M. Reid, c/o Mrs V. Reid". The respondents, who were the persons in occupation of the land, claimed to have paid yearly rental of $5,000.00 to Mrs Reid, as agent for the first appellant. The appellants denied signing any such agreement, giving Mrs Reid any authority to lease enter into leases of their land on their behalf or receiving any funds from her on behalf of the respondents. However, although this court did not have the benefit of any notes of the oral evidence taken at the trial of the matter, Marsh J does record in his judgment that in cross-examination at the trial the first appellant had said that "Verona Reid, was agent for the land while [I] was in England". Mrs Reid's true status would obviously be an important factor in the case.

5. It is common ground that three of the respondents approached the 1st appellant during the said 2001 visit "and begged us to sell them the lots

they occupy by virtue of the structures they had built thereon." There is also no dispute that these persons were advised by the first appellant that, if sub-division approval could be obtained for the purpose, they would be sold the said lots. The appellants maintained, and the respondents did not say otherwise, that in fact sub-division approval was not obtained and that it was "therefore impossible to sell them lots they occupied, even if we wanted to sell". At all events, no terms of sale to any of the respondents were ever agreed, neither was it alleged that any moneys were ever paid on account of a purchase by any of them.

6. In February 2005, the appellants instructed their attorneys-at-law to serve notices to quit the premises on the respondents and they were all in due course so served. The appellants maintained that these notices were served "as a matter of courtesy" and that although the respondents were referred to in the notices as 'tenants', they were not in law tenants entitled to protection under the Rent Restriction Act.

7. The appellants subsequently brought proceedings for recovery of possession in the Resident Magistrate's Court for the parish of Westmoreland. However, after their evidence was taken at the trial of this action in September 2005, they were non-suited by the Resident Magistrate for reasons which are not known, but presumably have to do with his concluding that a dispute as to title had arisen in circumstances in which he had no jurisdiction under section 96 of the Judicature (Resident

Magistrates) Act. The proceedings in the Supreme Court that have given rise to this appeal were thereafter commenced by Fixed Date Claim Form for recovery of possession on 28 October 2005.

8. Defences to the claim in the Supreme Court were filed by eight of the ten respondents in very similar terms, though there were some differences in detail. Common to all the defences was an averment on the part of each that he/she "is a tenant in law and is entitled to be on the land under and by virtue of an agreement to rent land with the agent of [the first appellant], Miss V. Reid". The respondents also averred that they paid yearly rental of $5,000.00 to Miss Reid, as agent for the first appellant. While all the defences state that "there was a meeting with the Claimants and there were discussions about the sale of the land", there was no allegation by any of the respondents of an agreement by the appellants to sell them the land or any part of the land. Indeed, all assert that they remain "ready, willing and able to purchase, subject to the agreement of a fair market price."

9. The appellants filed a joint witness statement and all eight respondents on whose behalf defences were filed, also filed individual witness statements. A witness statement was also provided by Mr Ainsworth Dick, a Commissioned Land Surveyor, who spoke to making an unsuccessful application for sub-division approval of the property into five lots. For reasons which never became clear, the surveyor's instructions

from the appellants related not to that section of the land which was already occupied, but to "the opposite unoccupied section of the land."

10. Marsh J heard the action over three days, (during which the parties were cross-examined on their witness statements') and in a written judgment given on 28 November 2007 came to the following conclusions:

> "(i) That each of the respondents entered in an agreement to rent the land for an annual rent of $5,000.00 which had been paid to Miss V. Reid.
>
> (ii) That the first appellant had acknowledged that 'Mrs. V. Reid was agent of the land when I was in England' and that the respondents were therefore tenants of the appellants.
>
> (iii) That the land thus rented to the respondents was building land, within the meaning of section (2)(1) of the Rent Restriction Act.
>
> (iv) That there was no evidence as to the period of notice given by the appellants to the defendants and that in these circumstances the 'forthwith order for Recovery of Possession is not available to them'."

11. On this basis, the learned judge therefore entered judgment for the respondents. In so doing, however, the judge expressed the view that it was unnecessary for him to make any findings on the respondents' more sweeping contention that they had each acquired "an equity" in the

land on the basis of the appellants' acquiescence in its improvement by them.

12. The appellants filed a number of grounds of appeal from this judgment, but when the matter came on for hearing, Dr Dennis Forsythe, who had also appeared for the appellants at the trial, concentrated his efforts primarily on the following submissions:

(i) The learned trial judge was wrong to have found that Mrs Reid was an agent 'capable of leasing and selling land.'

(ii) In the alternative, even if the judge was correct in holding that the appellants were bound by the rental agreements, he failed to have regard to the terms of those agreements.

(iii) The judge erred in finding that the land was in fact building land and therefore fell within the ambit of the Rent Restriction Act.

(iv) In all the circumstances, the judge erred in declining to make the order for immediate possession sought by the registered proprietors of the land in question.

13. Mr Leonard Green, who had also appeared for the respondents in the court below, submitted that the land in question was building land, within the meaning of section 2(1) of the Rent Restriction Act, and that the respondents were accordingly entitled to all the protections given by

section 25 of that Act. In this regard, he relied heavily on the decision of the Privy Council (on appeal from this court) in ***Crampad International Marketing Co Ltd and another v Thomas*** (1980) 37 WIR 315 and submitted that the judge was correct in holding that the appellants were not entitled to an order for possession, the requirements of the Act with regard to notice and the reasons therefor not having been satisfied.

14. Mr Green concluded his submission in his skeleton arguments as follows:

> "14...It is submitted therefore that the failure of the Claimants/Appellants to comply with the statutorily designated procedure under the Rent Restriction Act is not remedied by an order to allow the appeal and give the Defendants/Respondents time within [sic] to vacate the property since the Defendant/Respondents would be unjustly deprived of an opportunity to fairly and justly deal with the issue of greater hardship on the one hand and the further and indeed more critical issue of whether the Claimants/Appellants acquiesced when they knowingly allowed the Defendants/Appellants to develop the land. The learned trial judge expressly declined to deal with these ancillary issues having ruled that as he did that he was dismissing the claim on the basis of the absence of evidence of a valid notice to quit. "

15. In their particulars of claim and in their witness statement the appellants were emphatic that they did not "give permission to Miss V. Reid or to anyone else to rent their land, nor did [they] appoint any agent to the land, other than Dennis Forsythe, Attorney-at-law". However, it is

not contended by the appellants that the judge's reference in his judgment to the first appellant having said in cross examination that "Verona Reid was agent for the land while she was in England" did not accurately reflect her evidence.

16. The question is therefore whether, on the strength of this evidence alone, the learned trial judge was entitled to find as he did that Miss V. Reid was the agent of the appellants, with authority to enter into tenancy agreements on their behalf. This was purely a question of fact. The relevant principle, which has been often stated and is not in doubt, is that an appellate tribunal should not upset findings of fact by a trial judge unless it is satisfied that, on the evidence, the reliability of which it was for him to assess, he had plainly erred in reaching his conclusion of fact; and the appellate tribunal should be even more cautious when it does not have the advantage of seeing a verbatim transcript of the evidence (see ***Industrial Chemical Co (Jamaica) Ltd v Ellis*** (1982) 35 WIR 303).

17. Applying this principle, it has not in my view been demonstrated that Marsh J plainly erred in his conclusion that, on the evidence before him, Mrs V. Reid was the appellants' agent and that on this basis the respondents were their tenants. The judge had the undoubted advantage of seeing the witnesses and in particular assessing the evidence of the first appellant, upon whose admission in cross-examination that Mrs Reid was her agent he primarily based his judgment.

In these circumstances I think it would be right to defer to his judgment on this point, there being in fact some evidence upon which he could have come to the conclusion that the respondents were tenants of the appellants.

18. But Dr Forsythe contends in the alternative that, even if the judge was correct in this conclusion, the terms of the alleged rental agreements must still be looked at to see whether the respondents are entitled to withstand the stated desire of the appellants, the registered proprietors, that they should vacate the land. Dr Forsythe relies in particular on the following provisions of the agreement:

> "I understand that this rental agreement expires in two (2) years after the acquisition of the land. I further understand that no concrete structures should be erected on this property".

19. On the first point, as I understand the argument, Dr Forsythe submits that the two year term of the tenancy had in any event expired (the document is dated 4 March 2001) by the time the appellants sought to recover possession and the rental agreements could not thereafter be a bar to their doing so.

20. However, in the light of the judge's clear finding that the respondents were tenants of the appellants, then, even if the agreements had expired, they remained in occupation of the land as, at the very least, tenants at will, as indeed Dr Forsythe himself submitted, or statutory tenants, as Mr Green contended (as to which, see paragraphs 21-29

below). In either case, it seems to me, the tenancy would not expire automatically, but would require to be brought to an end by notice of some kind.

21. Dr Forsythe's second point on his alternative submission is that the respondents are in breach of the prohibition against erecting concrete structures on the land. However, while it is true that several of the respondents spoke of having constructed "substantial" structures on the land, only Ms Avis Hibbert appeared to say in so many words that "I have constructed a board and concrete dwelling house on the property comprising of three bedrooms, living, dining and a kitchen." So that the evidence does not uniformly confirm that the prohibition against erecting concrete structures has been breached. However, even if it did, this would go to show in my view that the respondents were in breach of the terms of their tenancy and could not, by itself, entitle the appellants as aggrieved landlords to an order for possession. I nevertheless accept that the prohibition against concrete structures may be of some significance on the question whether the land in question was let as building land, upon which much of the respondents' case turns and to which I now come.

22. The Rent Restriction Act applies, subject to exclusions and exemptions not applicable for present purposes, to—

> "... all land which is building land at the commencement of this Act or becomes building

> land thereafter, 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 ..." (section 3(1)).

23. By section 2(1) of the Act, "building land" is defined 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".

24. Section 25 of the Act sets out restrictions on the right to obtain an order for possession of controlled premises. Section 25(1) provides that no order or judgment for the recovery of possession of any controlled premises shall be made unless, in the case of building land, the premises are reasonably required by the landlord for the purposes specified in sub –paragraph (f) (i) or (ii), or (iii), that is, the erection of a building to be used as a residence for himself or other specified person, use by him for business, trade or professional purposes, or a combination of both reasons.

25. In addition to establishing by evidence one of the statutory reasons, the claimant for recovery of possession of controlled premises must satisfy the court that it is reasonable to make an order for recovery of possession and that, "having regard to all the circumstances of the case, less

hardship would be caused by granting the order or the judgment than by refusing to grant it."

26. Section 31(1) provides that no notice given by a landlord to quit controlled premises shall be valid unless it states the reason for which the premises are required and in ***Crampad International*** (supra) the Privy Council held that the effect of sections 25(1) and 31(1) taken together is that a notice to quit controlled premises must, in order to be a valid notice, state one of the statutory reasons (see page 327, where Lord Oliver observed that the "clear purpose of section 31 is to put the tenant on notice of the ground upon which possession is going to be sought against him...").

27. The upshot of all of this, Mr Green submits, is that, these premises being controlled and subject to the Act, no valid notice to quit has been served by the appellants and they are therefore not entitled to an order for recovery of possession from the respondents. In any event, the submission goes, the court, even if minded to make such an order, would be obliged to consider the questions of reasonableness and hardship.

28. In my view, this argument, thoughtful and not without attraction as it may be, falters at its very foundation, which is that the land in this case is building land. 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 actually being used for the purpose of building: what is required is that it must have actually been let for that purpose. In the instant case, not only do the agreements themselves expressly prohibit the erection of concrete structures (which suggests that the land was not let for the purpose of building), but, as Dr Forsythe pointed out, the evidence coming from the respondents themselves was that, prior to their going on the land and improving it by dumping marl on it, it was "swampy and unfit for residential use".

29. I would therefore hold that there is no evidence that the land was in fact let for the purpose of the erection on it of a building of any kind and that in these circumstances these premises are not controlled premises within the provisions of the Act. It follows from this that the appellants were not required either to give a notice to quit in reliance on, or to prove, one of the statutory reasons for requiring possession and the questions of reasonableness or hardship do not necessarily arise as a matter of law.

30. The remaining question is therefore whether the appellants were entitled to an order for possession against the respondents. The appellants pleaded, and the respondents admitted that a notice to quit had been served on each of them. However, as Marsh J, observed no copy of the notice was produced, neither was any evidence given as to

the length of the notice given. Although it is not altogether clear from his judgment, it appears that the judge then took the view that, given that in the case of a tenancy from year to year a minimum of six months notice to quit would be required to terminate the tenancy (Evans and Smith, The Law of Landlord and Tenant, 5th edition, pages 232-3), the appellants were therefore not entitled to the order for immediate possession sought by them.

31. The soundness of this conclusion turns, in my view, on whether Marsh J was right to treat the respondents as having held over on a tenancy from year to year or whether Dr Forsythe is correct in his submission that upon the expiry of the term of the rental agreements the respondents became, at best, tenants at will.

32. The editors of Hill & Redman's Landlord and Tenant (18th edition, 1988, Issue 39, June 2002) describe the position of a tenant holding over in this way (at paragraph A[168]):

> "A lessee who, with the consent of the lessor, remains in possession after his lease has expired, by effluxion of time and otherwise than in reliance on some statutory provision protecting him from eviction, is tenant at will until some other interest is created, until, for instance, the tenancy is turned into a yearly tenancy by payment of rent".

33. Subject to the provisions of the Rent Restriction Act, if applicable, a tenancy at will simpliciter "is determinable by either party on his expressly or impliedly intimating to the other his wish that the tenancy should be at

end", whereupon "the tenant at will has a reasonable time to remove himself and his chattels after determination" (Hill & Redman, paragraph A[170]-[180]).

34. An implied tenancy from year to year in fact developed out of the earlier concept of a tenancy at will which, as Lord Bridge of Harwich observed in ***Hammersmith and Fulham London Borough Council v Monk*** [1992] 1 All ER 1, 3, "gave the tenant no security of tenure"). Thus, as Atkin LJ put it in ***Cole v Kelly*** [1920] 2 KB 106, 132:

> "...a holding over with the consent of the landlord prima facie gives rise to a tenancy at will, which by subsequent payment of rent may be converted into a tenancy from year to year; or the parties may by their acts or by agreement convert the tenancy at will into a tenancy of a more fixed duration, as a weekly, or a monthly, or a yearly tenancy".

35. But it is a question of fact in every case whether there has been consent by both parties, or whether one it may be implied, that the tenant holding over should continue on the same terms as the expired lease (***Wedd v Porter*** [1916] 2 KB 91, 98, per Swinfen Eady LJ). Whereas there was once a presumption at common law that a tenancy arose by implication of law in favour of a tenant who remained in possession after expiration of a lease and paid rent, the modern position is that "all the circumstances must be examined to see whether the parties have reached an agreement for some further tenancy" (Hill & Redman, paragraph A[206]). So that holding over or holding pending a

negotiation were described by Scarman LJ in ***Hagee (London) Ltd v A B Erikson & Larson (a firm)*** [1975] 3 All ER 234, 237 as "the classic circumstances" in which a tenancy at will would exist, and ***Cardiothoracic Institute v Shrewdcrest Ltd*** [1986] 3 All ER 633 is an example of a case in which it was held that a tenancy at will and not an annual or other periodic tenancy arose, despite the payment and acceptance of rent for some considerable time after the expiration of a fixed term lease. "Ultimately", as Knox J put it (at page 641), "it is the intentions of the parties in all the circumstances that determines the result of the giving and acceptance of rent".

36. Against this background, therefore, the question is whether, the original two year term having expired, the respondents held over as tenants at will or, as the judge found, tenants from year to year.

37. Payment and acceptance of rent, as has already been seen from the foregoing discussion, is usually regarded as, without more, one of the strongest indicators of the intention of the parties that the expired period should be followed by a periodic tenancy measured in accordance with the period with reference to which rent is determined. It is not entirely clear on the evidence whether and to what extent rental payments were made to Mrs Reid by the respondents, or any of them, after the expiry of the original two year period (and the appellants insisted that there were no payments beyond the first year's payment). However, the receipts

attached to at least two of their witness statements (Denise Johnson and Hazel Grant) do suggest that Mrs Reid had accepted rent in respect of subsequent period (March 2004 to March 2005).

38. But what is known on the evidence is that at least three of the respondents approached the first appellant in 2001, asking her to sell the plots occupied by them to them, that instructions were given to a Commissioned Land Surveyor to canvass the possibility of obtaining sub-division approval. In this regard the terms of a letter dated 9 March 2005 written by Forsythe & Forsythe, as attorneys-at- law for the appellants, to one of these respondents, Ms Nickcole Howden, are significant:

> "Dear Madam
>
> **Re: Possession of land owned by Muriel Reid and son**
>
> Your letter of March 1, 2005 is acknowledged. I have already extended the time within which to receive proposals for purchase. The time was extended to allow you and others who presently occupy lots to put in your bids to purchase the property. You pay $5,000.00 a year with the expressed warning not (sic) put any concrete structure. I do not know what further details you require. Either you have the deposit now or you don't. And after the deposit you would need to pay the balance within 60 days. I am satisfied that Mr. Lopez gave you the chance to pay your deposit and you failed. It seems that neither you, nor your neighbours have the funds to buy the land.
>
> Mrs. Reid's willingness to sell you the land is not matched by your capacity to pay for the land. Moreover, Mrs. Reid was not able to get sub-division

> approval and would thus not be able to sell the lot you occupy.
>
> The Notice served on you is therefore binding.
>
> We regret this situation, but there is now no option but for you to vacate the premises as soon as possible."

39. This letter, which was attached by Ms Howden to her witness statement, confirms her evidence, and that of all the other respondents, that there were discussions between them and the appellants' attorneys-at-law with a view to their purchasing the portion of the land occupied by each of them. In my view this evidence suffices to negative any implication that the parties intended to create a tenancy from year to year after the expiry of the original two year term and demonstrates, to the contrary, that the respondents' continued possession of the land during this period remained as tenants at will. Such a tenancy, as already indicated, is terminable by any unequivocal indication of the landlord's will and, in my view, the admitted service of notices to quit in 2005 on the respondents on behalf of the appellants and the subsequent institution of proceedings in the Resident Magistrate's Court were sufficient for this purpose.

40. I would therefore conclude that the appellants are in fact entitled to an order for recovery of possession from the respondents and the only remaining question would be within what period. In all the circumstances

of the case, I would regard a period of six months as reasonable and I would therefore allow the appeal and make an order in favour of the appellants for recovery of possession against the respondents on or before 3 October 2009. The appellants are to have the costs of the appeal, to be taxed, if not sooner agreed.

G. SMITH, J.A. (Ag):

I too agree.

HARRISON J.A.

ORDER:

The appeal is allowed. An order for recovery of possession on or before 3 October 2009 is hereby entered against the respondents. Costs of the appeal to the appellants to be taxed if not sooner agreed.