SAINT \/INCENT & THE GRENADINES

IN THE COURT OF APPEAL

MAGISTERIAL APPEAL NO.4 OF 1995

HOUSING & LAND DEVELOPMENT CORPORATION

Appellant

and

CORNELIUS JOSEPH

Respondent

Before:
The Hon. Mr. Justice Dennis Byron - Justice of Appeal
The Hon. Mr. Justice Satrohan Singh - Justice of Appeal
The Hon. Mr. Justice Albert Matthew - Justice of Appeal [Ag]

Appearances:
S. Commissiong for the Appellant
A. Williams for the Respondent

1996:July 25th
Sept. 16th

JUDGMENT

BYRON J A.

This is an appeal against the decision of His Worship Errol C. Mounsey pronounced on 16th September 1994 in which he awarded the respondent $6000.00 and costs for the value of a chattel house unlawfully broken down by the appellant. The basis of his finding was that a parcel of land was rented from the appellant by the respondent's father, who gave the respondent permission to erect a chattel house on the land. The Manager of the appellant corporation told the respondent by telephone more than once to remove his chattel house otherwise the corporation would break it down. When the respondent failed to remove his house the appellant sent men to break the house down. The

Magistrate rejected the appellant's contention that the respondent was a trespasser on the ground that the contract of tenancy being silent there was an implied term at common law enabling the tenant to sublet to the respondent.

Counsel for the appellant submitted that the learned Magistrate was wrong and his decision should be overturned because

1. The landlord had a right to use reasonable force to re-enter and regain possession of the land at common law;

   and

2. The landlord was entitled to terminate the lease because [a] the respondent's father was in arrears of rent and [b] there was a statutory prohibition against subletting without the consent of the appellant.

FORCIBLE ENTRY

Counsel for the appellant submitted that in addition to recovering possession by order of the Court, a landlord had a right at common law to use reasonable force to recover possession from a trespasser. He relied on the case of **Hemmings and Wife v The Stoke Poges Golf Club [**1920] KB 70.

In that case the plaintiffs, a man and his wife, lived in a cottage belonging to the defendants, the man being in their service and being required by them to live in the cottage as part of his service and for the performance of his duties. He left their service, but refused to give up the cottage after notice to quit duly given. Thereupon by command of the defendants several persons

entered the cottage and removed the plaintiffs and their furniture using no more force than was necessary for that purpose. In the action brought by the plaintiffs for assault, battery and trespass it was held that the defendants were not liable, their right of entry at common law being a defence to civil proceedings for the acts complained of, despite the fact that those acts would have infringed the statutes which enacted that such a forciable entry was a punishable criminal offence.

Scutton L.J. explained the rationale at p.746.

> "……it is with regard to the civil actions under both statutes that it is held that they do not lie if the defendant had a right of entry against a plaintiff. They do lie if he had no right of entry. It appears to follow that the right of entry when forcibly exercised was not made ineffective or civilly unlawful by the force. Ordinarily a criminal prohibition would give a right of action to any person specially injured by the prohibition. It does not in this case because against the person damaged the entry was not wrongful, but rightful, and he therefore suffered no special damage. The wrong was against the king.....
> It will still remain the law that a person who replies to a claim for trespass and assault that he ejected a trespasser on his property with no more force than was necessary may be successfully met by the reply that he used more force than was necessary if the jury can be induced to find it."

I share the learned Magistrate's reservations about the extent of force employed by the appellant particularly as I am not persuaded that the destruction of the chattel house was necessary to accomplish the objective of re-entering the land and regaining its possession.

THE RIGHT TO ENTER

The essence of the learned Magistrate's decision, however, was that the appellant did not have a right to enter the land and that consequently the principle in the case of Hemmings was of no assistance to the appellant.

There was very little evidence adduced on this issue.

The manager of the appellant gave evidence. He said:

"The land was rented to Mr. Wellington Joseph. It was a yearly tenancy.

> It was $4.00 per year and increased to $60.00 per year. The Plaintiff put his house on part of the same land."
>
> The respondent said:
>
> "I owned Chattel House at Largo Heights. It was [on] Crown lands. My father rented the lands from Housing and Land Development Corporation."

During the trial there was a reference in a letter written by the appellant to the respondent's counsel, to the fact that the respondent's father was in arrears of rent. This letter made reference to correspondence indicating an intention to repossess the land but it did not allege that the tenancy was determined by notice to quit.

The evidence indicates that Mr. Wellington Joseph was a yearly tenant under the Agricultural Small Tenancies Act Ch.29. There was no evidence that his contract of tenancy was reduced to writing as required by Section 3 or that it was registered as required by Section 5. Consequently, it was deemed to be a tenancy from year to year and included the terms and conditions set out in the Third Schedule in accordance with Section 14.

The appellant's first challenge to the conclusion of the learned Magistrate was that the tenant was in arrears of rent, and the landlord was entitled to determine the tenancy. However, the case was not presented on that basis before the learned Magistrate and he made no findings on that issue.

This statutory tenancy is not determined when a tenant is in arrears of rent unless and until the landlord exercises his rights in accordance with the Agricultural Small Tenancies Act Ch.29 Section 8[1][b][iii] which provides for a yearly tenancy to be determined by six months notice to quit for non payment of rent. I think it is important to note the policy of the legislation as expressed in the proviso as follows:

> "Provided that in the case of rent in arrears, if the tenant pays such rent to the landlord within the period of notice, then and in such case the notice to quit shall be deemed to be cancelled and shall be of no force and effect."

No evidence was adduced to the effect that Mr. Wellington Joseph's tenancy was terminated by notice to quit for non payment of rent or for any other reason. In the absence of such evidence the learned Magistrate was obliged to conclude that there was no allegation, and consequently no proof, that the tenancy was determined by reason of non payment of rent.

The second challenge to the learned Magistrate's finding was that he was wrong to conclude that there was an implied term at common law permitting a sub letting.

The Agricultural Small Tenancies Act Ch.29 Section 11 states:

> "A tenant shall not sublet a small holding without the consent in writing of the landlord previously obtained."

The terms and conditions in the third schedule incorporates this as a covenant of the tenant. This statutory prohibition makes it clear that there could be no implied term at common law permitting a subtenancy. Section 8 [1][a] [ii] empowers the landlord to determine the tenancy without notice where the tenant sublets or assigns without the landlord's prior written consent. There was no allegation that the tenancy was determined without notice on this ground. However, the real issue is that the Magistrate's finding of fact that the respondent's father gave him permission to erect a chattel house on the land, which was totally consistent with the evidence, does not support his legal conclusion that there was a subtenancy.

The legal position is explained in the case of **Chaplin v Smith** [1926] 1 K.B. 198 by Scrutton L.J. at 210 as follows:

> "The learned trial Judge seems to have proceeded thus: He found the company in occupation; he treated it as being in exclusive occupation and therefore in possession, and concluded that the lessee must have parted with possession and so incurred a forfeiture. The flaw in this

> reasoning is that the occupation was merely that of a licensee. Such an occupation is not necessarily exclusive. In truth there was no evidence of exclusive occupation, and so no evidence of possession by the company; and if in law the lessee did not part with possession there was no breach of the covenant. In my opinion the following passage from Foa on Landlord and Tenant, 6th ed. (1924), p.323, is a correct statement of the law: "The mere act of letting other persons into possession by the tenant, and permitting them to use the premises [or their own purposes, is not, so long as he retains the legal possession himself, a breach of the covenant."

The nature of a licensee's holding is explained in 4th Halbury's Volume 27 paragraph 8:

> "A licence is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession of them, or the circumstances and conduct of the parties show that all that was intended was that the grantee should be granted a personal privilege with no interest in the land."

On the evidence before the court, therefore, there was no basis for concluding that the respondent was a sub tenant. There was no allegation that he was in exclusive possession of the land. The evidence indicates that his father gave him permission to put his house on a part of the land which created no more than a licence. I would conclude that there was a subsisting contract of tenancy between the appellant and Wellington Joseph, and the respondent as a licensee of Wellington Joseph was lawfully on the land and could not be removed as if he were a trespasser.

In the circumstances I would dismiss the appeal with costs.

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C.M.DENNIS BYRON
Justice of Appeal

I Concur.

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SATROHAN SINGH
Justice of Appeal

I Concur.

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ALBERT MATTHEW
Justice of Appeal [Ag.]