

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO: 19/89

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Downer, J.A.

BETWEEN VANCLIFF, HAMMOND DEFENDANT/APPELLANT
A N D NAOMI PRYCE PLAINTIFF/RESPONDENT

Berthan Macaulay Q.C. & Rudolph L. Francis for Appellant

Gordon Robinson for Respondent

March 12 & 26, 1990

CAMPBELL, J.A.

The respondent claimed against the appellant recovery of possession as owner of and as entitled to possession of 66A Duke Street. Default judgment was entered against the appellant in the Resident Magistrate's Court for the parish of Kingston on May 29, 1989.

An application to set aside the default judgment was filed and in the affidavit in support thereof the appellant deposed so far as is relevant that:

- (i) in the year 1965 the property 66A Duke Street was purchased by one Constantine Augustus Pryce and he entered into a new tenancy agreement with this gentleman thereby becoming a tenant of his in respect of this property;
- (ii) in the year 1983, Constantine Augustus Pryce died and after his death he continued to pay rent to the respondent as representative or agent of the estate of the said Constantine Augustus Pryce;

- (iii) Prior to March 1989 when he received the summons claiming recovery of possession he had received no notice requiring him to give up possession and a fortiori no reason for requiring him to give up possession;
- (iv) there was a mistake as to the adjourned date fixed for trial but in the light of the above facts he had a good defence.

The respondent who is the widow of Constantine Augustus Pryce in resisting the appellant's application deposed so far as is relevant that -

- (i) In 1986 the appellant left the island to reside abroad, he left the restaurant business then carried on by him at 86A Duke Street, to be operated by his servants or agents. At the time of departure several months rent were due and owing to her.
- (ii) She was unable to collect any rent from the appellant's agents and within a few months of the appellant's departure the restaurant was closed down.
- (iii) After a few months more, not having heard from the appellant she no longer regarded him as her tenant. She accordingly removed the locks left on the door of the premises and replaced them with her own locks. This was done in 1986 and the premises remained locked for over two years.
- (iv) In December 1988 the appellant removed her locks from the premises and revived operations of the restaurant business.

The factual situation which could hardly be disputed by the appellant was that he had abandoned the premises when his servants and agents closed down the restaurant. For over two years thereafter he was neither in physical possession nor were his agents or servants nor had he paid or tendered rent. He had equally registered no complaint against the

re-possession by the respondent for over two years.

The learned Resident Magistrate found as a fact that the reason given by the appellant for not appearing in court on the day when default judgment was pronounced was a fabrication. With this finding we see no reason to disagree.

The learned Resident Magistrate also found that the previous tenancy of the appellant was at an end and there was no evidence that he had ever been granted a new tenancy by the respondent. The learned Resident Magistrate expressed himself thus:

"The picture the Defendant seeks to portray is a subsistence of the original contract of tenancy commenced during the lifetime of Constantine Pryce (now deceased). This picture in my opinion has been completely demolished by the copy of the letter mentioned in paragraph 8 of the affidavit of Naomi Pryce. I interpret the letter to be an admission by the Defendant that on the 13th day of December, 1988 the Plaintiff had re-occupied the premises and effectively terminated the tenancy."

The letter which the learned Resident Magistrate interpreted in the manner above-mentioned is to the following effect:

"66 Duke Street,
Kingston,
December 13, 1988
Telephone 92-22998

Mrs. Naomi Pryce,
66a Duke Street,
Kingston

Dear Mrs. Pryce,

I am writing you this letter regarding my tenancy on your premises 66A Duke Street, Kingston.

You will recall me visiting your home in Hope Pastures to discuss the matter of rent due to you.

"On each occasion on the phone, on my visit to your home or at your office at Duke Street you promised to look up receipts and let me know how much rental was due.

I still have not heard from you concerning the matter to enable me to pay my debt promptly and continue being your tenant, as I need the shop urgently to continue doing business. As you know I have lost earnings having my furnitures (sic) locked up since 1986, because you have placed a lock on the door of the shop preventing me from entering the shop.

My appliances in the shop which includes Refrigerator, Stove, Utensils, Cash-Register, Stools etc., are now wholly or partially destroyed.

I shall be grateful if you would remove the lock you have placed on the door and allow me to enter and clean up and continue my business.

With best wishes for the holiday.

I remain

Yours truly

/Sgd/ V.A. Hammond"

The affidavit evidence of the respondent considered with the appellant's letter established clearly that he had determined the tenancy agreement with Constantine Pryce by abandoning possession. The respondent on behalf of the estate had accepted the determination of the tenancy by re-possessing the premises. As there was thereafter no new tenancy created between the respondent and the appellant but at best only an effort on the part of the latter to negotiate for a revival and continuance of the abandoned tenancy the learned Resident Magistrate in our view was right in concluding that a retrial of the plaint would be an exercise in futility as no triable issue arose in the matter. This is so because without a subsisting landlord and tenant relationship, the appellant had no right to be on the premises. He was clearly a trespasser and the respondent would be entitled to recover possession under section 89 of the Judicature Resident Magistrates Act.

Before us, Mr. Macaulay submitted that the premises were controlled premises within the definition of controlled premises in sections 3 and 4 of the Rent Restriction Act. That being so, a tenancy of such premises created an interest in the premises which endured even though the tenant may not be in a possession. That tenancy could only be determined as provided in sections 25 and 26 of the before-mentioned Act and subject to the prescriptions therein stated. In effect his submission was that tenancy in the sense of the interest in controlled premises could not be terminated by abandonment of possession by the tenant.

The short answer to Mr. Macaulay's submission is that sections 25 and 26 of the Rent Restriction Act speak of recovery of possession and if a tenant has voluntarily given up possession recourse to sections 25 and 26 by a landlord is unnecessary.

As we were of the opinion that Mr. Macaulay's submission was plainly without merit and that the reasoning and conclusion of the learned Resident Magistrate could not be faulted, we dismissed the appeal on March 12, 1990 and promised to put our reasons in writing which we have now done.