

25-11-05

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CIVIL APPEAL NO. 5 OF 2005
(Grand Court #11/05)

IN THE MATTER OF SECTION 51 OF THE REGISTERED LAND LAW (2004 REVISION)
AND
IN THE MATTER OF A LEASE MADE IN OCTOBER 2003
AND
IN THE MATTER OF AN APPLICATION FOR AN INJUNCTION

BETWEEN:

DR. VICTOR LOOK LOY  **APPELLANT**

AND

STACEY ANN KELLY
OWEN POWIS **RESPONDENTS**

BEFORE: The Rt. Honourable Justice E. Zacca P
 The Honourable Mr. Justice M. Taylor, J.A.
 The Honourable Mr. Justice I. Forte, J.A.

Appearances: Norman Hill Q.C. instructed by Nervik & Company for the Appellant and Stephen Hall-Jones instructed by Associated Advocates Chambers for the first Respondent, Stacey-Ann Kelly.

Heard: 20th July, 2005 Delivered: 25th November, 2005

REASONS FOR JUDGMENT

ZACCA P.

On July 10, 2005 we allowed the appeal, set aside the judgment of Levers J. and made the following order :

"Court declares :

- (1) The respondent Stacey-Ann Kelly is not and never was a tenant of Dr. Look Loy.
- (2) the holding over by Owen Powis was a tenancy from month to month.
- (3) Costs to the appellant to be taxed if not agreed."

We promised to put our reasons into writing. This we now do.

At the hearing of the appeal the second respondent Owen Powis did not appear and was not represented by counsel.

The appellant was the proprietor of apartment #2 located at block 25 B, parcel 36 situated at Orange Drive, Prospect, Grand Cayman. A lease agreement for these premises was entered into between the appellant and the second respondent. It was for twelve months at rental of \$1000.00 per month. The agreement was signed by the appellant and the second respondent Owen Powis. The first respondent's name does not appear in the agreement, nor does her signature.

The case for the appellant was that the first respondent Stacey Ann Kelly was never a tenant. He became aware of the fact that she

was occupying the apartment with Powis and assumed that there was some kind of personal relationship between them.

The case for the respondents was that the first respondent was a tenant and the appellant knew this. In any event the facts give rise to an implied tenancy by virtue of the appellant acceptance of her occupation. It appears that there was an agreement between the respondents for the first respondent to pay \$500.00 towards the rental.

In his evidence the second respondent stated that this was an arrangement between them and that the appellant knew nothing about it. He also said that the appellant told him that he did not wish her to be a tenant and that he never got permission for her to live at the apartment.

The appellant conceded that on occasions he had spoken to the first respondent about arrears of rent but that this related to the second respondent's arrears of rent.

The Lease Agreement

The relevant clauses of the agreement are set out:

"This lease agreement is made on the first day of October 2003, between Victor Look Loy of

P.O. Box 229 Savannah Grand Cayman, Cayman Islands (hereinafter called "the landlord") of the one part and Owen Powis (hereinafter called the "the tenant" of the other part).

(1) The landlord hereby demises unto the tenant apartment # 2 situate at Orange Drive to hold the same unto the tenant from the 1st October 2003, for the term of 12 months at the rental of \$C.I. \$1000.00 per month payable by standing order to account #02-201-023979 at Bank of Butterfield.

(7) Not to assign, underlet or part with the possession of the demised premises or any part thereof without the written consent of the landlord the granting of which consent shall be in the absolute discretion of the landlord upon the landlord consenting to any assignment or hereunder the new tenant shall affirm in

writing to the landlord his responsibilities and the covenants as set out herein

Provided always and it is hereby expressly agreed as follows:-

- (4) "That if the tenant shall be with the consent of the landlord remain in occupation of the demised premises after the expiration of the term hereby granted the tenant shall unless it shall have been mutually agreed in writing to the contrary be deemed to hold the same upon the covenants, conditions and provisions as are herein contained."

The twelve months expired at the end of September 2004. There was a holding over as of October 2004 and rent was accepted by the landlord in November 2004 in the sum of two thousand dollars. It is not in dispute that there was a holding over as a result of the landlord's acceptance of two thousand dollars for rent.

The learned trial judge held that the appellant had accepted the occupation of the first respondent and that he had discussed matters

of rent with her and did nothing to terminate the lease. On the basis of this finding Levers J held that the first respondent had an implied tenancy and that the appellant was estopped from denying the tenancy. Levers, J. held that his conduct and acceptance of her occupation was a clear indication that he knew that she was in occupation with the second respondent as a tenant.

On the issue of the holding over, Levers J. held:

“I can only hold that in the absence of a proper notice being given at the termination of the first year’s lease, that the word “provisions” in the lease, which must include the duration make the holding over periodic tenancy a year to year tenancy.”

Two issues were argued before the Court. These were:

- (1) Was the learned trial judge correct in holding that the first respondent was an implied tenant?
- (2) Was the holding over a year to year tenancy or a month to month tenancy?

Implied Tenancy

It is necessary to examine the Judge's note of some of the evidence:

The evidence of Owen Powis:

"Stacey was with me when we looked at the apartment".

"He said – he don't want her to be a tenant, so I must get rid of her".

"Never got permission for Stacey to live there. He first met her when she complained. He did not say she should move".

Under Cross-Examination:

"Stacey dealt with the agent"

"only I signed"

Q. "Did Dr. Look Loy know about the arrangement that Ms. Kelly was to stay with you and to pay \$500."

A. "Between the two of us made the arrangement."

Dr. Look Loy knew nothing about it."

"It was not a problem for me to pay the full rent."

Evidence of Dr. Look Loy :

“Have spoken to her about the rental. I called her on her cell phone.”

“I repeatedly told her about arrears of rental.”

“Even, if I knew, assumed paying it on behalf of Mr. Powis.”

“Had discussion about apartment number not being put on. Deposit slips, that is I spoke to Ms. Kelly.”

Cross-Examination

“When I assumed someone living there – did not consult an attorney.”

“I found who she was and I thought it was his friend.”

“I got her cell phone when she called me.”

“If she is there I want you to get rid of her.”

“I said she can’t stay there.”

Re-examination:

“Spoke with her only to give a message to my tenant.”

The evidence is clear that the lease agreement was between the appellant and the second respondent, both of whom signed the lease agreement. There is no evidence that the appellant was

informed that the first respondent was to be a co-tenant or that she was present when the lease agreement was signed.

The learned trial judge held that there was an implied tenancy in relation to the first respondent on the basis of her occupation of the apartment with the second respondent. Also the knowledge of the appellant that she occupied the apartment with the said respondent and that the appellant spoke with her about the arrears of rent.

It is not unusual for others to occupy premises along with a person who has entered into a lease agreement. The mere occupation and knowledge of such occupation and conversations about arrears of rent with the appellant in our view is not sufficient evidence to establish an implied tenancy. There was therefore no sufficient evidence to establish a finding of an implied tenancy or a tenancy.

We therefore hold that Levers J was in error in holding that the first respondent was an implied tenant.

The Holding Over

At the time of the hearing of the appeal the Court was told that both respondents had vacated the apartment.

Counsel however, asked the Court to pronounce on the issue as to whether the holding over created a yearly or a monthly tenancy.

Levers J. considered the clause in the lease which stated :-

“That if the tenant shall with the consent of the landlord remain in occupation of the demised premises after the expiration of the term hereby granted the tenant shall unless it shall have been mutually agreed in writing to the contrary be denied to hold the same upon the covenants, conditions and provisions as are herein contained.”

Having referred to the case of *Adler v Blackman* [1952] 2 All E.R. 945 which was relied on by counsel for the appellant, Levers J. distinguished that case from the present case and held that the word “provisions” in the above clause included the provision concerning duration of the lease, making the holding over a periodic tenancy, a yearly tenancy.

In the case of *Adler v Blackman* a weekly tenant entered into an agreement with his landlord for a tenancy for one year of shop premises at a rent of £3 per week. At the end of the year he held over at the same rent and later was given notice to quit on the basis that he held a weekly tenancy. The tenant claimed that the holding over created a yearly tenancy.

Ormerod J. held that essential to the presumption of a yearly tenancy on the determination of a letting for a year or for a term of years is that the rent should be expressed as an annual sum; that presumption was rebutted where, as there, the rent was expressed to be payable as a weekly rent and not as an installment of the rent fixed for the one year's tenancy; the tenancy, therefore, was a weekly one.

On appeal to the Court of Appeal, the decision of Ormerod J. was upheld and the appeal dismissed.

Somervell L.J. stated at p. 946:

“At one time the tenant here was, admittedly, a tenant by the week. Then there was the agreement for a year to which I have referred and we are concerned with the period after that year has come to an end. It is an agreement for the year that the tenant relies. It will be noted that the rent as expressed in that agreement was so much per week. The decided cases when a yearly tenancy has been implied are cases where the rent is stated as a rent per year, though of course, such a rent may be payable half yearly, quarterly, monthly, or, in one of the reported cases, weekly.

The first question is whether the fact that rent is not paid yearly leads to the conclusion that the presumption would now apply in the absence of some other circumstances on which it could be based. That point came

before Maugham J. in *Ladies Hosiery and Underwear Ltd. V Parker*. The learned judge decided that case on another point, but, as this question had been argued he gave his views on it. The lease in that case was for a term of three years commencing from October 12, 1914 at a weekly rent of £2 payable weekly. The learned judge referred to the principle which I have stated, and to *R v Herstmonceauk* (Inhabitants) (2) where the principle was applied to a yearly rent of twenty guineas weekly. He goes on to say (1930 1 Ch..328):

“In the present case, the lease or agreement is one for three years at a rent of £2 a week. It is not a lease for three years at a rent of £104 per annum payable weekly: and it is observable that £2 a week is a rent which as we all know, is not exactly devisable into the number of days either of an ordinary year or of a leap year. I cannot find, and counsel have been unable to find any case exactly in point; but I have come to the conclusion that there is no reason for extending the views, which are binding on me, as to the terms which justify the inferences that a tenancy is from year to year, and that in this case, narrow as the distinction is, the holding over of the premises after the expiration of the agreement of October 10, 1914, would have resulted only, and did result only, in the tenants being a tenant from week to week.”

Having referred to the quote from the judgment of Maugham J.,

Somervell J. at p. 942 stated:-

“I agree with that. I think that when, as here, a term comes to an end one has to consider

what inference are properly to be drawn from the payment and acceptance of rent. That is the basis of the presumption. In the cases in the books the rent is expressed to be so much per year, and in the extreme case, where the rent being so expressed is to be payable weekly, when the landlord accepts a weekly sum what he is accepting is an instalment of the agreed figure for a yearly rent. One sees from that the form of the document which has led the court in those cases to presume a tenancy for a further year, but in a case like the present, where the rent is expressed to be per week, I think that when the fixed period has come to an end one should not presume anything but a weekly tenancy for the period in respect of which the rent is expressed.”

Both Jenkins L. J. and Hodson L.J. agreed with the judgment of Somervell L.J.

In the present appeal the agreement was for a term of twelve (12) months from the 1st October 2003 at a rental of \$1000.00 per month.

We see no reason for distinguishing the case of ***Adler v Blackman***. In our view Levers J was in error in so doing.

The rent was not expressed to be payable yearly. It was clearly expressed to be payable monthly. The learned trial judge was in error in holding that the holding over created a year to year tenancy.

We agree with the decision and reasons in the judgments in *Adler v Blackman* and hold that although the agreed term was for a period of twelve (12) months, the rent was expressed to be payable monthly. The holding over therefore created a monthly tenancy.

Zacca, P.

Taylor, J.A.



Forte, J.A.