

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cv.A No. 19 of 2000

Between

Norma Ramdeen, Sookdai Ramdeen, Alfred Ramdeen
Rampersad Ramdeen, Joseph Ramdeen,
Rosey Sewlal, Sumintra Edun

Appellants

And

Joseph Hansraj

Respondent

PANEL

L. Jones, J.A.
R. Nelson, J.A.
S. John, J. A.

APPEARANCES:

Mr. K. Harrikissoon
appeared on behalf of the Appellants

Mr. W. Seunath and Ms. L. Francis
appeared on behalf of the Respondent

Date of delivery: September 20, 2002.

Nelson, J.A. (at the invitation of Jones J.A.)

JUDGMENT

The appellants in the action sought possession of a lot of land at Pascal Road, Piparo, in the Ward of Pointe-a-Pierre, which is part of a larger parcel of land. The appellants claim damages and an injunction, and the defendant is the executor and sole beneficiary of the estate of Baboo Hansraj. The appellants claim that Hansraj was originally in possession of the lands as a licensee, but that his licence to occupy was determined and the defendant became a trespasser.

The defendant, who is the respondent in these proceedings, contended that he was a tenant of the lands. He alleged that on 16th July, 1980, Baboo Hansraj, his predecessor in title, had entered into an agreement in writing with Jodhan Ramdeen, the appellants' predecessor in title, and that by virtue of the Land Tenants (Security of Tenure) Act Chap. 59:54 as at the commencement date, June 1, 1981, Hansraj, that is to say, the respondent, became a statutory tenant. The respondent counterclaimed that he was a tenant under the Act and was entitled to the benefit of or statutory lease under the Act

In the proceedings below, the learned judge found for the respondent and declared that the respondent was entitled to possession of the lands and that the respondent held the lands as a tenant under the

Land Tenants (Security of Tenure) Act ("the Act"). He, therefore, gave judgment for the respondent and dismissed the claim of the appellants.

In the proceedings below, the substantive issue was whether the agreement of July 16th, 1980, amounted to a licence or a tenancy; and before us, that very issue has been raised. The appellants argue that the proper construction of the agreement was that it was, in fact, a licence, and Mr. Harrikissoon, for the appellants, referred to a number of clauses in the agreement which he said indicated that it was a licence rather than a tenancy. He further said that the Act does not apply to licences; it applies only to tenancies, and that the respondent had not established that there was a tenancy.

He referred to an endorsement on the Certificate of Title indicating that the property had been transferred by memorandum of transfer as early as 2nd September, 1980, but at the end of the day, that transaction was not registered until some time in July 1993. In the circumstances, I do not take any account of that transaction and the crucial issue in the case still is, what was the nature and character of the agreement of 16th July, 1980.

Mr. Seenath, for the respondent, supports the judgment of the learned judge. He says that a proper construction of the agreement shows that it was a tenancy; that Clause 4 of the agreement, read with Clause 2, suggested that there was rather a tenancy and that the right of

exclusive possession was thereby established. He relied, he said, on the use of the words "landlord" and "tenant" but he later on went on to say that those labels were not conclusive. He said that the intention of the parties was to be derived from a construction of the agreement in its entirety, and he said that if this Court did not accept that it was a tenancy, that there was a fall back position, and that is that the agreement amounted to a tenancy at will. That being the state of the contentions between the parties, I need to say that in the court below, no evidence was taken and that the parties relied solely on the proper construction of the agreement.

Perhaps, before we get into the agreement, it might be useful to say that licences can be of several kinds. If this is a licence, it would have to be a bare licence; and a bare licence is a personal permission granted usually otherwise than for consideration to enter upon and be present upon someone else's land. In respect of the present case, we are told that the occupation was to be free of charge, and clearly, it is highly material to determine whether the fact that it was free of charge would indicate a licence rather than a tenancy.

Now, the parties cited a number of cases, but none of them cited the case of Street v. Mountford [1985] A.C 809 (H.L.) Now, in that case, there is a dictum of Lord Templeman in which he went so far as to describe the payment of rent as one of the decisive hallmarks of a tenancy. That statement has not been totally accepted in later decisions

and there has been some retreat from that broad statement of the position.

In a later case, A G Securities v. Vaughan [1991] A.C, 417, at 430, Fox L.J. said that, "While, at least, a tenancy is granted usually in return for a periodic payment in money, this is not inevitably the case." However, it is nonetheless true that in the normal case, the payment of rent is still considered to be an indication of a tenancy or not, and it remains likely that the absence of any rent payment would be a powerful factor indicating a mere licence, rather than a term of years.

I refer to the case of Colchester Borough Council. In Colchester Borough Council v. Smith [1991] Ch. 448, 485 B-C, Ferris J said on the facts of that case: "Although, in this case, the counsel did, in my judgment, grant exclusive possession to Mr. Tillson, it did not do so at a rent; and only in a limited sense can it be said to have done so for a term. In my view, the rejection of Mr. Tillson's implied offer to pay a reasonable rent, the expression of the transaction in terms of non-objection to continued occupation, as distinct from grant, the insistence, ... that Mr. Tillson must occupy at his own risk and must give up possession at short notice if the land were required for other purposes, all point towards this being an exceptional transaction, not intended to give rise to legal obligations on either side." So that in the present case, while it is true to say that it does not follow as a matter of inflexible law that non-payment of rent would indicate a licence, or that payment of rent would indicate a

tenancy, it seems that the absence of a clause for payment of rent would be a powerful factor pointing towards a licence, rather than a tenancy. I think, in the present case, that is one of the factors that we have to take into consideration, that there is really no provision for payment of rent. That has to be taken in tandem with the other factors; one of them is Clause 7. Clause 7, reads:

"This agreement is for a period of 3 years and the tenant do agree that on receipt of a notice served on him at the above address, he will quietly quit and vacate possession of the said premises without any claims for compensation whatever".

It seems to me, contrary to the submission of Mr. Seenath, that this is really an occupation that is planned to expire in 3 years' time. But, on the other hand, it is subject to prior determination at any time before and it does not specify what the grounds are to be. So that it is an occupation determinable at any time for any reason. That, in my view, is a clear indication that this was merely a licence; merely a permission, a personal permission which was being given to Baboo Hansraj. No exclusive right of occupation is given to any defined part of the land.

Now, what is important in that clause is that upon that notice being given, the occupier was guaranteeing or, rather, was undertaking that he would vacate possession immediately without any compensation. So that there are two things: one is that he would vacate without presumably having any recourse to the courts, and secondly, that he would not claim

any compensation. This is a very significant factor, this lack of compensation, since what we have here is a typical situation in which an occupier is invited to put up a building, in this case, a chattel house, upon land of the landlord. And, usually, what would happen when he leaves is that he either takes the structure with him i.e. he breaks and removes the structure, or he leaves the structure upon the land. Whatever is done in this particular case, he is to get no compensation for either breaking or removing, or leaving the structure on the premises. So it seems to me, again, that this is not an indication of a tenancy. It seems more to indicate, in my view, that what we are dealing with is a licence.

Also related to Clause 7 is Clause 5. In Clause 5, the tenant is prevented from erecting any concrete building. So that from the start, what is contemplated is a structure which is not permanent; which is not let into the land; which is not affixed to the land, but a structure which can be carted away and removed. That, again, indicates that this is not meant to be a permanent situation. It is meant to be a situation which ties in with the provision in Clause 7, that the occupier is to be prepared to leave at short notice.

Then there is Clause 4. In Clause 4, there is a provision that "the tenant" is not to sublet or underlet. In other words, this is a covenant against assignment without written permission of the owner. Now, clearly, this is a provision which is more appropriate to a tenancy, and that much

has been conceded by Mr. Harrikissoon. I think he quite properly made this concession. However, when one looks at the agreement as a whole, it seems to me, having regard to Clauses 2, 5, 7, which are the main operative of provisions, and the fact that the landlord continues in possession, that what we have here is more in tune with a licence rather than a tenancy. It seems to me that insofar as the judge construed the agreement as a tenancy, that construction was wrong in law for the reasons which I have given.

If indeed, as I hold, the agreement is a licence, then the second point which was raised, that is to say, as to the applicability of the protection of the Act next arises; and as I indicated, Mr. Seenath sought to say that if this was not a tenancy, it was a tenancy at will. But that particular proposition comes up against the very weighty dicta of Lord Millett in the case of Goomti Ramnarace v. Harrypersad Lutchman [2001] UKPC 25. In that case, at paragraph 16, Lord Millett said, "A tenancy at will is of indefinite duration, but in all other respects it shares the characteristics of a tenancy."

Now, pausing there, to show a tenancy at will, one must show that it has all the characteristics of a tenancy. I have held, on the basis of my interpretation of the agreement, that the indicia of licence are more present in this agreement than any indication of tenancy. So that based on that finding, it seems to me that the respondent will not be able to establish that this is a tenancy at will. In the present case the

occupation is of limited though uncertain duration and the occupier does not have exclusive possession. The permission to occupy was an act of bare generosity: see Goomti Ramnarace (supra) at para. 17.

Mr. Harrikissoon submitted that since this was a licence, it would not be covered by the provisions of the Act.

Section 2 of the Act reads:

"Tenant means any person entitled in possession to land under a contract of tenancy, whether expressed or implied, and whether the interest of such person was acquired by original agreement or by assignment, or by operation of law or otherwise, and includes a tenant at will and a tenant at sufferance and tenancy shall be construed accordingly."

In the light of that definition and, indeed, the provisions of Section 5 of the Act which provide for the terms and conditions of any existing tenancy to be incorporated into the statutory lease, including rent, payment of rent would be one of the necessary provisions if the Act were not to convert a 3-year rent free occupation into a 30-year rent free occupation. That would be the case since the agreement says that the tenancy is to be free of charge.

So that I agree with the submission of Mr. Harrikissoon that licences are not covered by the Act. Nor was the respondent a tenant at will. Section 5 of that Act seems to suggest that rent free occupation is not

covered. That being the case, it seems to me that the appeal must be allowed and the judgment of the learned judge must be set aside.

I order that the respondent pay the costs of the appeal and the costs below of the claim and counterclaim. Possession of the subject property is to be suspended for one year from the date of this judgment by consent of the parties.

Rolston, F. Nelson,
Justice of Appeal.

Jones J.A.: I agree with the decision of my learned brother and I have nothing to add.

John J.A. : I too agree with the decision of my brother and I have nothing to add.