



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2009: No. 2

B E T W E E N:

CAROLYN JEAN TODD

Appellant

-v-

WILFRED LEROY FURBERT

Respondent

REASONS

Date of Hearing: February 16, 2009

Date of Reasons: February 18, 2009

Both parties appeared in person

Introductory

1. The Appellant rented an apartment to the Respondent at a rent of \$1800 per month from November 2006 to May 2007, and in the reduced amount of \$1600 per month, from June 2007 until May 2008. After the Appellant issued eviction proceedings against him, the Respondent ascertained that the premises were subject to rent control and that the maximum lawful rent was in fact \$1200. He issued proceedings against the Appellant to recover the excess amount.

2. By a Judgment dated October 15, 2008, the Magistrates' Court (Wor. Tyrone Chin) granted the Respondent's claim in the amount of \$8670. The Appellant was unable to challenge the Rent Commissioner's Certificate dated September 9, 2008 to the effect that the lawful rent was \$1200, because this was issued in response to her own application to have the rent increased once she discovered on or about April 29, 2008 that this was required. The Appellant's only apparent response to the claim was that: (a) the Rent Commissioner in 1990 informed her that the apartment was not subject to rent control; (b) the controlled status which occurred by virtue of the 2000 amendment to the Rent Increases (Domestic Premises) Control Act 1978 ought to have been notified to her and other landlords; and (c) as she rented the apartment in good faith, it was unfair that she should have to repay any of the rent received.
3. Against this Judgment the Appellant appealed to this Court. On February 16, 2009, I dismissed the appeal and hereby give reasons for this decision.

The Judgment of the Magistrates' Court

4. The crucial part of the Judgment appealed against was the final paragraph, which states as follows:

“The Court having heard the evidence of Mr. Furbert and Mrs. Todd gives judgment in favour of the Plaintiff, Mr. Furbert, for \$8,600 which is the amended amount plus \$70 court fee, thereby totalling \$8670. The critical factor is that or the period that Mr. Furbert was in occupation the rent was certified and registered to be \$1200 a month and there was overpayment for each month that he paid rent. The Court is sympathetic that Mrs. Todd was not notified, as she claimed, and that she did not realize that her premises was once again under rent control and she indicated that various Government departments sent out flyers to inform the public. This is a policy adopted by each department and not a mandate. Acts and various amendments are published in the Official Gazette to which Mrs. Todd ought to be especially aware by virtue of her occupation.”

5. The quoted passage appeared to me to be a clear, concise and accurate application of the relevant law to the facts, having regard to the statutory provisions that are considered below.

The relevant statutory provisions

6. The Rent Increases (Domestic Premises) Control Act 1978 (a) prohibits landlords from renting controlled premises in excess of the prescribed maximum rent; (b) provides that a landlord may not lawfully recover rent in excess of the statutory limit, and (c) creates a statutory right of recovery in favour of tenants who have paid rent to an extent that is not lawfully permitted.

7. As of January 1, 2005, section 3(3) provided that the Act did *not* apply to any premises if:

“(b) the annual rental value of the premises as determined by the current valuation list prepared for the purposes of the Land Valuation and Tax Act 1967, exceeds \$24,600.”

8. Prior to this, the Rent Increases (Domestic Premises) Control Amendment Act 2000 had expanded with effect from August 22, 2000 the band of rent controlled premises from an annual rental value of \$9900 to \$16,200. By the Appellant’s own account, it was this latter legislative change which brought the premises in question in the present case into the band of rent controlled premises. But by 2006 when the Respondent took up occupation, there had been a second lifting of the bar in terms of which properties were *not* subject to rent control. There was no dispute that at the beginning of the tenancy, the rental value premises in question was \$1200 per month.

9. Section 12 in Part III of the Act provides:

“No rent ...shall be increased...save in accordance with this Part; and any increase which is not made in accordance with this Part shall be irrecoverable by the landlord.”

10. The remaining sections in Part III provide for increases in rent by agreement and increases in rent by application by the landlord, the procedure the Appellant herself pursued after the termination of her tenancy with the Respondent. The Rent Commissioner is involved in both procedures. So it is unlawful to increase the rent above the permitted level (in this case \$1200) and any rent agreed in excess of that level cannot lawfully be collected by the landlord.

11. Section 28 of the Act provides the tenant with the right to sue (within two years of payment) to recover any monies paid *“in excess of the amount permitted under this Act”* (section 28(1)). The strong policy intentions of the Act to ensure that rent above the permitted level is not collected and retained by landlords is illustrated by section 28(2), which provides:

“No court shall make an order for the recovery of the possession of any premises by reason of the non-payment of rent until and unless it is satisfied that the rent claimed does not exceed the maximum rent which may be claimed by virtue of this Act.”

12. At common law, a party who wishes to recover money paid under an illegal contract must themselves initiate legal action. The 1978 Act imposes a mandatory duty on the Court in eviction proceedings based on non-payment of rent to satisfy itself whether the rent claimed is within the permitted limits.

13. In these circumstances there can be no legally valid suggestion that the Magistrate had any discretion to dismiss the Respondent's claim to recover the excess rent monies received by the Appellant, based on any wider considerations of justice. Ignorance of the law is no excuse. The Act itself does not create any defences to a section 28 claim which is proved to be meritorious in the sense that a tenant proves that rent in excess of the permitted limit was paid to the landlord.
14. The main argument advanced by the Appellant on appeal was that it was unfair that the Rent Commissioner did not take positive steps to bring changes of valuation to the attention of property owners. Like the Learned Magistrate below, I have considerable sympathy with the Appellant who obviously acted in good faith and has apparently been put in an awkward financial position because she did not take the necessary steps to examine the relevant land valuation list. It seems likely that Land Valuation Act does not require flyers to be sent to individual property owners, something which would seemingly be a simple and citizen-friendly procedure to adopt.
15. These matters do not fall within the scope of the present proceedings, and the Appellant may wish to take them up with the responsible Governmental authorities and/or the Ombudsman. No basis for disturbing the Magistrates' Court decision was advanced.

Conclusion

16. For these reasons, the appeal was dismissed.

Dated this 18th day of February, 2009

KAWALEY J