In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2011 No: 4

GABRIELLE STEWART

Appellant

-v-

SHEILA AGUIAR

Respondent

EX TEMPORE JUDGMENT

(In Court)

Date of hearing: April 12, 2013

Ms. Gabrielle Stewart appeared in person
Mr. Edward King, Edward Ishmael King, for the Respondent

Introductory

1. In this case the Appellant appearing in person appeals by Notice of Appeal dated February 1, 2013 against the decision of the Magistrates' Court (Worshipful Edward Bailey (Acting)) dated October 22, 2012 in a landlord and tenant dispute. The Appellant raises the following grounds of appeal.

2. Firstly, complaint is made that the Office of the Rent Commissioner erred in law and fact in granting a certificate to the effect that the premises rented by the Appellant from the Respondent were not the same that had a registered rent of $450;

3. The second ground of appeal is that the Learned Magistrate erred in failing to take proper account of the Respondent's failure to obtain a Certificate of Occupation for the renovations that were carried out in or about 1993, in breach of regulation 8(2) of the Building Code (Supplementary Provisions) Regulations 1976. It is submitted that the failure to obtain that certificate made it wrong for the Commissioner to grant the certificate that he did.

4. Thirdly, it is argued that the case of *Bean-v-James*, Court of Appeal for Bermuda Civil Appeal No. 16 of 1989; [1990] Bda LR 22, was wrongly followed by the Learned Magistrate. It is contended that the Learned Magistrate ought to have distinguished that case.

5. The appeal turns fundamentally on a controversy as to the meaning, terms and effect of the Rent Increases (Domestic Premises) Control Act 1978("the Act"). The crucial dispute is that the Appellant complains because the present premises had a registered rent the Respondent was required to apply for an increase of the rent. She contends that this obligation exists even if it was open to the Commissioner to grant a certificate under section 37(1).

The statutory scheme

6. Mr. King for the Respondent contends that the scheme of the Act is as follows. Where a property owner rents domestic premises for the first time or, alternatively, when they rent property for the first time after section 37(1) of the Act is engaged, then it is open to the landlord to negotiate a free market rent. The only obligation to apply to the Rent Commissioner to assess the reasonableness of the rent arises in respect of an increase of the rent that is initially agreed at arms' length between the landlord and the tenant.

7. The crucial provision in my view is section 12 of the 1978 Act. It appears in Part III which is headed "Increases in Rent". Section 12 provides as follows:

> "***Effect of Part III***
>
> *12 No rent payable under any tenancy in being on 1 July 1978, or which may thereafter subsist, shall be increased after that date save in accordance with this Part; and any increase which is not made in accordance with this Part shall be irrecoverable by the landlord.*"

8. This provision in my judgment makes it clear beyond serious argument, having regard to the remainder of the provisions in Part III to which I was referred in the course of this appeal, that the intent of the Act is to regulate increases of rent in relation to premises covered by the Act. It was common ground that the premises in question here are in fact covered by the Act.

9. And so the complaint of the Appellant which falls to be considered is merely whether or not the Rent Commissioner was properly able to grant the certificate under section 37(1) of the Act. If the Rent Commissioner was properly able to grant the certificate it follows that no appraisal of the reasonableness of the rent had to be carried out and

the Appellant was bound to pay whatever rent she contractually agreed to when she moved into the premises[1].

The requirements of section 37 of the Act

10. Understanding the merits of the application made by the landlord after a dispute arose, after the Appellant moved into the premises in or about 2010, requires reference to the timelines involved. The relevant renovations were carried out in or about 1993. It is true that the relevant completion certificate mandated by regulation 8 of the Building Code was not obtained. The premises were for ten years or so occupied by the Respondent's son and were not rented on the open market until approximately ten years after the renovations were completed. The premises were then rented and it is unclear on the evidence what the initial rent was but there is no evidence that the rent which the Appellant agreed of $2300 was an increase in the amount paid by any previous tenant.

11. So in 2010 when the Appellant rented the premises seemingly under an oral agreement the premises had been renovated for some seven years. By the time the application was made in 2011 for a certification under section 37(1) (a) of the Act, the renovations had been completed for some 9 years. It is also necessary to appreciate that the registered rent was only $450. At this time the premises were a studio and an application was made under the Act by the landlord to increase the rent from $375 to $450 and the increase was certified on December 15, 1983.

12. The relevant section which governs the application which was made by the landlord in response to the dispute which arose between her and the Appellant is section 37 of the Act. Section 37 (1) is the crucial subsection:

> "*37 (1) Where it becomes necessary to determine for the purposes of this Act —*
>
> *(a) whether any premises subject to a tenancy are the same as premises previously so subject…*
>
> *…,*
>
> *the landlord or tenant may make application to the Commissioner for his certificate in the matter, which certificate shall, subject to subsection (2), be conclusive evidence of the facts stated therein.*"

13. Subsection (2) gives a right of appeal against the Rent Commissioner's certification to the Magistrates' Court and it is that primary appeal which is now challenged in this Court. Subsection (3) of section 37 is the operative provision, in my judgment,

[1] For the avoidance of doubt, the present Judgment is entirely without prejudice to the pending proceedings before the Magistrates' Court which may involve the determination of what net sums are payable under the tenancy agreement.

defining what the Commissioner has to be satisfied of to grant a certificate under section 37(1) (a). Subsection (3) provides:

> "*(3) In determining whether any premises are the same as any others pursuant to subsection (1) premises shall be deemed to be the same if they are substantially the same from the point of view of the rent which might reasonably be charged therefor.*"

14. In the course of argument the Appellant sought to contend that section 37 was only properly engaged where there were substantial renovations of the sort that might include structural changes to the exterior of the premises. I find it impossible to extract any such meaning from the plain language of section 37(3). Section 37(3) in my view confers upon the Commissioner a fundamental duty to determine whether or not any changes have taken place in the premises which impact on the reasonableness of the rent charged.

15. It the present case it was a relatively straightforward matter for the Commissioner to decide that such a change had taken place because the registered rent had been fixed in 1983 and the application was being made in 2011, approximately 27 years later. In addition to the effluxion of time, the premises had been converted from a studio apartment into a two bedroom apartment, Mr. King urged. On any view, as the Appellant herself conceded, the reasonableness of the registered rent had ceased to exist by the time the application was made in December 2011.

16. The effect of the certificate is that the old registered rent falls away and the landlord is entitled to negotiate whatever rent a tenant is willing to pay. It was argued that the effect of the certificate was to make some form of retroactive determination. That argument in my view is based an erroneous view of the structure of the Act and ignores the fact that all that section 37 does is to determine whether or not the old rent is still operative from whatever date the facts before the Commissioner demonstrate that a material change occurred. It the present case it seems to me it was open to the Commissioner to find that the premises became effectively new premises before the Appellant occupied the premises and so the rent that she agreed was not subject to the benefit of the last registered rent of $450 which had been fixed in 1983.

The application of Bean-v-James

17. I find support for this proposition in the case upon which the Learned Magistrate relied which is in fact binding on this Court. *Bean-v- James* [1990] Bda LR 22 involved facts which were substantially the same as the facts in this case and the Learned Acting Magistrate was correct to find that he was bound to follow this decision. It is true that there was some argument about an occupancy certificate. That argument turned substantially if not exclusively on a provision of the Act which has now been repealed.

18. Section 3(a) provided that where a certificate of occupancy has been issued by the Department then the Act does not apply. In this case the landlord had initially sought to argue at first instance that the rent charged was not caught by the Act because there was a certificate of occupancy. The tenant was seeking to argue that the certificate of

occupancy did not apply to the tenancy in issue. But this issue was put to bed very firmly by the Court of Appeal and Huggins JA (at page 6 of his Judgment) made it clear that what the Court was deciding was whether or not it was open to the Commissioner to grant a certificate under section 37. And that the effect of the grant of the certificate was that the previously registered rent no longer had any binding effect.

19. For those reasons I find that the case of *Bean-v-James* does apply to the facts of the present case and the Learned Acting Magistrate was correct to follow it.

Effect of absence of occupancy certificate for 1993 renovations

20. The one outstanding question which falls to be determined is the complaint that the Learned Acting Magistrate failed to take into account the breach of the Building Code which was seemingly 'made out' in evidence at the hearing before him before him and this breach of the Code in some way vitiated the grant of the certificate under section 37(1) (a) of the Act.

21. The Learned Acting Magistrate dealt with this matter in a practical way. This is what he said at page 2 of his Ruling:

> "*There was evidence given by Mr. Sheldon Fox the Planning Enforcement officer who confirmed that he failed to locate an Occupancy Certificate from a Planning Department file. However he did find a Draft Certificate resulting from an incomplete electrical grounding. There was no further information as to a further inspection to determine whether or not the electrical grounding was corrected.*
>
> *Therefore the file was incomplete.*
>
> *The Court notes that some 19 yrs has now passed. Surely the landlord has to be given the benefit after such a long period of time and due to Planning Department's incompetence… either to update the file and or the failure of a follow up inspection. The Court can only assume…that the matter was resolved and the Commissioner was correct to issue the Certificate.*"[2]

22. Ms. Stewart quite rightly pointed out that the requirements of the Building Code are something that the Rent Commissioner should ordinarily have regard to. And certainly in the case of newly renovated property one would have thought that the Rent Commissioner would be astute to ensure that, before permitting a tenant to occupy the premises, the renovations had been completed to the satisfaction of the

[2] In other words, although there was no positive evidence that an Occupancy Certificate had been issued as required by the Building Code Regulations, the Court applied the presumption of regularity in relation to official acts.

Planning Department. In the present case, however, it seems to me that the passage of time made such an inquiry an extremely artificial and unrealistic one and it could not in all the circumstances constitute a basis for the Rent Commissioner to refuse to issue a certificate.

23. Section 37(1) (a) does not contain any mandatory requirement that the Rent Commissioner in granting a certificate must have regard to the safety of the premises to be occupied by the tenant. Because all that section is doing is creating a framework for the landlord to establish that he is no longer bound by the last registered increase so that:

    (a) he can enter into arms' length negotiations with new tenants; or

    (b) if he has already done so, he is not legally bound by the last registered rent.

24. In all the circumstances of the present case it would have been in my judgment a surprising approach for the Rent Commissioner to take to refuse to grant a certificate under section 37(1)(a) on the grounds that some 19 years previously no occupancy certificate had not been obtained.

Conclusion

25. And so, for those reasons, I find that the only just result is that the appeal should be dismissed with costs to the Respondent to be taxed if not agreed on the standard basis.

Dated this 12th day of April, 2013 _____

IAN R.C. KAWALEY CJ