In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016 No: 47

ANTHONY LEADER

Appellant

-v-

(1) SABRINA STEWART

(2) LAUREN STEWART

Respondents

JUDGMENT

(In Court[1])

Rent Increases (Domestic Premises) Act 1978 section 47-alteration of premises-overpayment of rent- whether certification of new rent by Rent Commissioner extinguishes old rental limit for new tenants taking up occupation after alteration has occurred-importance of reasons for decision

Date of hearing: November 14, 2016
Date of Judgment: November 23, 2016

Mr Vaughan Caines, Marc Geoffrey Barristers and Attorneys Ltd, for the Appellants
Mr. Peter Sanderson, Wakefield Quin Limited, for the Respondents

Introductory

1. The landlord Appellant appeals against the July 7, 2015 judgment of the Magistrates' Court (Wor. Tyrone Chin) awarding the tenant Respondents $13,200 for overpaid rent (for the period April 2010 to March 2012) and $800 by way of repayment of a

[1] The present Judgment was circulated to counsel without a hearing to hand down Judgment.

deposit. The appeal sensibly viewed only related to the overpaid rent element of the Judgment.

2. The central finding was that the Rent Commissioner's Certificate dated June 4, 2001increasing the rent from $800 to $900 was still in force when the Respondents vacated the premises on March 30, 2012. They were awarded the difference between the rent they paid in the last two years of their 2008-2012 tenancy ($1600 per month from September 2008 to June 2011 and $1200 per month between July 2011 and March 2012) and the registered rent throughout their tenancy, which they only discovered after vacating the premises.

3. The Appellant's case that because of renovations carried out before the Respondents' tenancy began the $900 cap lapsed (because the premises were not the same to which the former certificate related) was rejected. The Appellant's main grounds of appeal were as follows:

    (1) the Learned Magistrate failed to adequately explain the conclusion he reached on the principal issue in issue;

    (2) the Learned Magistrate misdirected himself on the effect of the Rent Commissioner's June 15, 2012 letter.

The Magistrates' Court Decision

4. The Respondents did not positively dispute the Appellant's case at trial that he had renovated the premises after the rent was last registered in 2001 and before they moved in. However, in closing submissions Mr Sanderson argued that the changes mainly related to fittings which would not impact on the annual rental value ("ARV") or the level of registered rent. He also argued that the June 12, 2012 letter form the Rent Commissioner, heavily relied upon by the Appellant, was not sufficiently clear evidence of the rental status before that letter was issued.

5. Mr Caines pointed out that the Appellant had not been seriously challenged on his evidence that he spent more than $50,000 on renovations which was funded by a bank loan. He submitted that this evidence combined with the June 15, 2012 Rent Commissioner's letter together with a list it was agreed came from the same office, it was clear that the apartment rented by the tenants was not the same one to which the 2001 registered rent attached. He relied upon this Court's judgment in *Gabrielle Stewart-v- Shelia Aguiar* [2013] Bda LR 27.

6. The Learned Magistrate found that the Respondents were entitled to recover the rent paid in excess of the rent registered in 2001 for the premises because that amount was

not altered until a new certificate was issued after they had vacated the premises. He made no findings on the issues of (a) whether renovations carried out between 2001 and 2008 had altered the state of the premises, and/or (b) whether any such alterations had the effect that the premises were no longer rent controlled, and/or (c) whether or not the legal principles articulated in *Stewart-v-Aguiar* applied to the present case. He implicitly found that the Rent Commissioner's June 15, 2012 letter was insufficient evidence of the effect of any 2006 renovations. However, he appears to have accepted the landlord's evidence that he rented the premises immediately after the tenants vacated in April 2012 in ruling that this fact proved they were entitled to the return of their deposit.

Adjudication of appeal

7. It is unclear on what basis the Magistrates' Court declined to accept the combination of the Appellant's evidence and the Rent Commissioner's June 15, 2012 letter and "list" as establishing that significant renovations (including extensive landscaping, the erection of boundary walls and new parking areas) had materially changed the premises from their 2001 registered rent condition before the Respondents moved in. However, in my judgment the Learned Magistrate ought to have found that the renovations referred to in the Rent Commissioner's June 15, 2012 letter were carried out before 2008 because:

    (a) it was apparently common ground that no renovations were carried out between 2008 and 2012;

    (b) there was no reason for doubting the Appellant's evidence that the renovations took place in or about 2006 and they could not have been carried out between the end of March 2012 and June 15, 2012 since it was common ground (and the Court expressly found) that a new tenant moved into the premises in April 2012.

8. The Learned Magistrate also had no reason for doubting the following assertion in the June 15, 2012 letter upon which the Appellant relied:

> "*In light of the major renovations to and improvements made to the above apartment, we are satisfied that said apartment is not the same apartment previously subject to a tenancy from the point of view of the rent which might reasonably be charged therefore.*"

9. The main issue to be determined was what inference should be drawn in light of the applicable law from the June 15, 2012 Rent Commissioner's letter in light of the other evidence before the Court. The Learned Magistrate crucially found that the letter was only relevant to the position as its date and had no retrospective effect. He implicitly rejected the pivotal submission that *Gabrielle Stewart-v- Shelia Aguiar* [2013] Bda LR 27 applied without explaining why. The central factual and legal issue as I summarised it in that case was essentially the same as in the present 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).*"

10. The only difference is that the Rent Commissioner's letter in the present case did not explicitly mention when the change in the premises occurred so as to negate the effect of the old certificate. Nevertheless, the Learned Acting Magistrate in *Stewart* found, and this Court agreed, that the statutory scheme had the effect of enabling a landlord to negotiate a higher rent than the registered rent with a new tenant where the premises were not (by reason of changes) the same premises as those to which a previous registered rent applied. In other words, the registered rent ceased to apply once the premises were altered to a material extent. This followed from the fact that section 37 of the Act required the Rent Commissioner in considering an application to increase the registered rent to consider whether the premises had changed. I next stated in *Stewart*:

> "*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."

(2)…

(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."

11. The main conclusion that I reached in *Gabrielle Stewart-v- Shelia Aguiar* [2013] Bda LR 27 was as follows:

"*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.

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…"

12. It is to be noted that I expressly rejected in *Stewart* the argument advanced by Mr Sanderson that only structural alterations should be taken into account. *Bean-v-James* [1990] Bda LR 22 is a Court of Appeal decision which is binding on this Court. It is instructive because it demonstrates that the courts are entitled to look backwards from the date of the Rent Commissioner's certification of a new registered rent based on a change in the premises and determine whether that change took effect in the past. The facts of the *Bean* case were, in one important respect, even more similar to the facts in the present case. It is unfortunate that the judgment was not placed before the Learned Magistrate, albeit it that *Bean-v-James* was considered in *Stewart* which Mr Caines quite properly relied upon in the Court below.

13. The legal interpretation of section 47 of the Act combined with its application to a fact pattern where the new registered rent certificate does not itself speak to when the change in the premises occurred demonstrates perfectly the approach required in the legal and factual matrix of the present case. Sir Alan Huggins JA (with whom Harvey da Costa concurred) crucially held (at pages 5-6) as follows:

"*Under Section 37(1) a certificate of the Rent Commissioner on the question whether any premises subject to a tenancy are the same as premises previously so subject is conclusive in the absence of an appeal against it. It follows that the premises existing on the 14th December 1988 were not the premises let at a rent of $110. It was argued by the tenant, and held by the judge, that the certificate did not have retroactive effect so as to be conclusive that the premises let to the tenant on 1st November 1987 were not the premises let at a rent of $110. I do not understand counsel who appeared for the defendant Appellant at the trial to have argued that it was, although he relied upon the certificate as conclusive evidence that the premises existing on 14th December 1988 were what I shall call 'new' premises. However, if the premises existing on 14th December 1988 were new premises, there was clear evidence from which it could be deduced that the premises existing on the 1st November 1987 (those let to the plaintiff tenant) were the same premises. It necessarily followed that the premises let to the Plaintiff were new premises. I see no answer to that argument, and in my view it disposes very shortly of this appeal: the matter is capable of no elaboration.*" [Emphasis added]

14. Even assuming in the Respondents' favour that the June 15, 2012 letter from the Rent Commissioner was not strictly a section 47 certificate (which was conclusive evidence of the fact that the premises had undergone a sufficient change so as to

justify a new registered rent, and which in substance the letter was), I find that the Learned Magistrate ought to have reached the following findings:

(a) the legal finding that the Appellant was free to charge a market rent once he carried out the renovations described in the rent Commissioner's June 15, 2012 letter because the old registered rent ceased to apply;

(b) the primary factual finding that the said renovations were carried out in or about 2006 and in any event, because any contrary finding would have been against the weight of the evidence; and

(c) the conclusory factual finding that old registered rent did not apply to the Respondents' tenancy because the relevant renovations were carried out before their tenancy began in 2008.

15. It follows that the appeal must be allowed and the Judgment of the Magistrates' Court in favour of the Respondents in the amount of $14,000 (and the consequential costs order) should be set aside as regards the overpaid rent element of $13,200, with the result that judgment in the amount of $800 (for the return of the tenants' deposit) is substituted instead.

16. This conclusion does not enable landlords to thumb their nose at the Act merely by carrying out renovations because there are other statutory mechanisms to protect tenants from being charged in excess of the appropriate rental rate. As Sir Alan Huggins on behalf of the Court of Appeal for Bermuda observed in *Bean-v-James* (at page 6)*:*

> "*...this conclusion in no way construes Section 37(1) as enabling the making lawful of something which had been unlawful: it was never unlawful for the landlord to charge the tenant a rent higher than $110, because that was never the rent of these 'premises'. Secondly, when the Rent Commissioner in his letter dated 14th December 1988 containing his determination that the premises were new premises advised the Appellant that under the circumstances he might 'fix the initial rental on the above said apartment', he was clearly unaware of the letting of the premises by the Appellant in 1986 at a rent of $950 a month. The tenant was also unaware of it, because the Appellant had failed to furnish her with a written statement under Section 25(1) (b) when he made a second letting of the premises. It may be that such failure constituted an offence under Section 25(2), but the Act does not provide that it should have any effect on the rent recoverable...*"

17. These governing legal principles were summarily rejected without even being mentioned let alone explained in the reserved trial Judgment, despite the fact that they were relevant to the only plank of defence advanced at trial. The importance of express reasons being given by the Magistrates' Court on the most important points in controversy in a case which has been seriously contested cannot be over emphasised. This is an important part of the judicial function, both in terms of explaining to the parties and an appellate court the basis for a significant decision. As the Judicial Committee of the Privy Council recently opined in *Smith-v-Molyneaux* [2016] UKPC 35 (Dame Mary Arden):

> "*36…It is an important duty of a judge to give at least one adequate reason for his material conclusions, that is, a reason which is sufficient to explain to the reader, and the appeal court, why one party has lost and the other has succeeded: see, generally, the decision of the Court of Appeal of England and Wales in English v Emery Reimbold & Strick Ltd [2002] EWCA 605; [2002] 1 WLR 2409, especially at paras 15 to 21. The judge does not have to set out every reason that weighed with him, especially if the reason for his conclusion was his evaluation of the oral evidence:*
>
> > *'… if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon. (English v Emery Reimbold & Strick, para 19 per Lord Phillips MR, giving the judgment of the court)'*
>
> *37. If an appellate court cannot deduce the judge's reasons for his conclusion in a case, it will set aside the conclusion and either direct a retrial or make findings of fact itself: see English v Emery Reimbold at para 26.*"

Conclusion

18. Unless either party applies within 11 days by letter to the Registrar to be heard as to costs and/or the terms of the Order giving effect to the present Judgment, the appeal shall be disposed of on the following terms:

(1) the appeal is allowed;

(2) the Judgment of the Magistrates' Court in the amount of $14,000 in favour of the Respondents is set aside and substituted with a Judgment in the amount of $800 in favour of the Respondents;

(3) the Order for costs in the Magistrates' Court in favour of the Respondents is set aside and the Appellant is awarded 90% of his costs in the Magistrates' Court to be taxed if not agreed;

(4) the costs of the appeal shall be paid by the Respondents to be taxed if not agreed.

Dated this 23rd day of November 2016 _____

IAN RC KAWALEY CJ