HUANG CHIU-FANG

A

v

ANDREW GUCAKE

[HIGH COURT 1994 (Fatiaki J), 11 October]

Civil Jurisdiction

B

Landlord and Tenant-summary proceedings for possession-relevance of condition of premises-notice to quit-whether valid if expressed to expire "within" rent period-Land Transfer Act (Cap 131) Section 169-Property Law Act (Cap 130) section 89 (2) (b).

C

In summary proceedings for possession the defendant contended that the premises were in want of repair and that the notice to quit was invalid by reason of its date of expiry and length. HELD: (i) want of repair does not confer a right to occupy (ii) a notice to quit may expire at any time (iii) a notice termed to expire "within" the rent period is equal in length to the period.

D

Cases cited:

Dukhi v Maganbhai Civil Appeal No. 51 of 1979
Hankey v Clavering [1942] 2 K.B. 326
Manorlike Ltd v le Vitas Travel Agency and Consultancy Services Ltd [1986] 1 All ER 573
Precious v Reedie [1924] 2 K.B. 149
Sewell v Donald & Sons Ltd [1917] NZLR 760

E

Summary proceedings for possession in the High Court.

H.M. Patel for Plaintiff
R.P. Singh for Defendant

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Fatiaki J:

This is an application under Section 169 of the Land Transfer Act (Cap. 131) for an order for vacant possession of a villa occupied by the defendant at Pacific Harbour, Deuba. More specifically the application is brought in terms of Subsection (c) which empowers a lessor to evict a tenant where a legal notice to quit has been given.

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In this latter regard the plaintiff as the last registered proprietor and lessor of the land has issued a notice to quit dated 22nd February 1994 through his solicitors demanding payment of arrears of rent and requiring the defendant to "... deliver up possession of the said premises within one month". The defendant however has ignored the notice and continues to occupy the plaintiff's villa.

In opposing the application the defendant filed a short affidavit in which he deposed :

> "2. THAT I deny being in arrears of rent as claimed in the notice and say that I have been always ready and willing to pay the rent provided the repairs to the premises was carried out by the Plaintiff or their agent. I have always complained about the dilapidated state of the premises as is evident from letters written by me which are exhibited herewith and marked with letters "A", "B" and "C" respectively. Yet no action was taken by the Plaintiff's agent to repair the premises."

In the absence of a written lease agreement I have no hesitation in holding that the above statement of the defendant is wholly incapable of establishing, much less supporting, any right which the defendant may have to the continued occupation of the plaintiff's premises.

In Chitty on Contracts (23rd ed.) Vol. 1 para. 1355 the law is clearly stated thus:

> "... it has long been established that a tenant's covenant to pay rent is independent of the landlord's covenant to repair the premises ; the tenant is not discharged from his obligation to pay rent merely because his landlord is unwilling to fulfill his obligation."

Indeed in my considered opinion even if the defendant could positively establish the nature and cost of any agreed repairs he carried out to the villa, at best that would only entitle him to some form of equitable set-off or cross claim against a monetary claim by his landlord. It would not also establish a right to the possession of the premises. So much then for the defendant's principal reason for refusing to give up possession.

The defendant has also deposed :

> "4. THAT the notice to quit dated 27th February, 1994 is defective."

In this regard learned defence counsel made 2 rather technical submissions. The first, was that the notice to quit was defective because the date on which it expired was on or about the 22nd of March 1994 and that did not coincide with the end of a complete month of the defendant's monthly tenancy which the plaintiff's solicitor's acknowledged began on the 16th of June 1993.

In other words in order for the notice to quit to be valid and effective it had to expire on or about the 16th of the month when presumably each month of the defendant's monthly tenancy also expired.

In support of this proposition counsel cited Precious v. Reedie [1924] 2 K.B.149. The headnote of the judgment which accurately summarises the Court's decision reads : A

> "In order that a monthly tenancy may be determined by notice to quit, the notice, in the absence of special agreement, must be a month's notice expiring at the end of a periodic month from the commencement of the tenancy."

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That decision however reflects the old common law position and is of no application to the particular circumstances of this case which is governed by the provisions of Section 89(2) of the Property Law Act (Cap.130), which clearly provides:

> "(2) In the absence of express agreement between the parties, a tenancy of no fixed duration in respect of which the rent is payable weekly, monthly or yearly ... may be terminated by either party giving to the other written notice as follows : C
>
> (b) Where the rent is payable for any recurring period of less than one year, notice for at least a period equal to one rent period under the tenancy and expiring at any time, whether at the end of a rent period or not." D

Indeed I would go so far as to say that with the enactment of the above provision the strictness of the old common rule as to the date of expiration of a valid notice to quit has been substantially if not wholly abated by the words underlined above. E

I am fortified in my view by the judgment of the Fiji Court of Appeal in Dukhi v. Maganbhai Civil Appeal No. 51 of 1979 (unreported) in which the Court said at p.7 :

> "... since the passing of the Property Law Act, 1971, and in the absence of express agreement the matter of notice to quit is no longer governed by the common law ..." F

and more specifically at p.8 where the Court said :

> "The former common law requirement that the notice must expire at the end of a rental period no longer applies." G

This submission of learned defence counsel is wholly without merit.

The second defect in the notice to quit revolves around the form of words used in notice itself in particular, where it says :

> "TAKE NOTICE therefore that unless the said sum of $2,158.68 is paid to us forthwith and that you deliver up the possession of the said premises within one month, we will have no alternative but to institute Court proceedings against you with costs incurred therein."
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> (my underlining)

Counsel submitted that in requiring the defendant to deliver up possession within one month the plaintiff had failed for the purposes of Section 89(2)(b) of the Property Law Act, to give "... notice for at least a period equal to one rent period under the tenancy".

In other words counsel's simple straightforward submission is that the plaintiff's notice to deliver up possession within one month is not the same as giving one month's notice nor is it complied with by the tenant vacating the premises after the expiration of one calendar month or even on the last day of the month.

No authority was advanced for this proposition which on the face of it appears self-evident. There are supporting dicta in a decision of Chapman J. in Sewell v. Donald & Sons Ltd. [1917] N.Z.L.R. 760 where the learned judge in upholding a notice to quit "in a month" observed at p.766: "... It would have meant something different if it had said `within' a month ...", which is the particular form of words used in the plaintiff's notice in this case. Unfortunately the learned judge did not go further and suggest what meaning the expression would have had.

I confess that when I first heard this submission I was unimpressed by its pedantry, but I remind myself of the dicta of Lord Greene M.R. in Hankey v. Clavering [1942] 2 K.B. 326 where the learned Master of the Rolls said at pp.329, 330 :

> "Notices of this kind are documents of a technical nature, technical because they are not consensual documents, but, if they are in proper form, they have of their own force without any assent by the recipient the effect of bringing the demise to an end. They must on their face and on a fair and reasonable construction do what the lease provides that they are to do. It is perfrectly true that in construing such a document, as in construing all documents, the Court in a case of ambiguity will lean in favour of reading the document in such a way as to give it validity, but I dissent entirely from the proposition that, where a document is clear and specific but inaccurate on some matter such as that of date, it is possible to ignore the inaccuracy and substitute the correct date or other particular because it appears that the error was inserted by a slip."

Learned counsel for the plaintiff, equally unsupported by authority, asserted that "within one month" means after one month from the day the notice is served. He

A

also pointed to the absence of an expiry date in the notice as a relevant factor for the Court to consider.

> My own researches however have turned up a recent decision of the Court of Appeal (U.K.) namely, Manorlike Ltd. v. Le Vitas Travel Agency and Consultancy Services Ltd. [1986] 1 All E.R. 573 in which the Court upheld a notice to quit which required the tenant to vacate "within a period of three months" under a lease which required the tenant be given "not less than 3 months previous notice in writing".
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> Kerr L.J. in dealing with the meaning of the form of words used in the landlord's notice to quit and rejecting an argument not dissimilar to defence counsel's second submission, said at p.575:
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> "To my mind the word `within', used in the context of a period of time, is capable of meaning before, or at the expiry of' that period, ... ; it is not necessarily shorter than the period itself."
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> D

Then after referring to the Oxford English Dictionary his lordship continued :

> "If a person is required to do something within a week, or in a week, he has the full week to do it, as it seems to me, including the last moment of that week, and he is not required to complete the task in less than a week. To construe the wording of this notice so that it connotes a period of less than three months, because possession must be given `within' three months with the consequent failure to allow a full period of three months, appears to me to strain the language in a hair-splitting and wholly artificial manner."
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> F

In light of the above I hold that the defendant who bears the burden in this case has failed to satisfy me that he has a right to possession of the plaintiff's land and accordingly there will be an order for possession with costs to the plaintiff to be taxed if not agreed.

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(Order for possession.)