In The Supreme Court of Bermuda

APPELLATE JURISDICTION (CIVIL)

2017: No 35

BETWEEN:-

DAVID WINSTON DILL

Appellant

-and-

CHRISTOPHER E G DILL

Respondent

JUDGMENT

(In Court)

Appeal from Magistrates' Court against possession order – whether agreement between the parties for the occupation of an apartment gave rise to a lease or alternatively a licence

Date of hearing: 21st November 2017
Date of judgment: 4th December 2017

Ms Alexandra Wheatley, Legal Aid Office, for the Appellant
The Respondent appeared in person

1. This is an appeal against a decision of the Worshipful Leopold Mills, Acting Magistrate, made on 7th April 2017, in which he granted an order for possession to the Respondent against the Appellant in relation to an apartment at 1 Fourth Avenue, Cavendish Heights, Pembroke ("the Apartment"). A warrant to evict was issued by the Magistrates' Court on 11th May 2017. On 30th May 2017 the Senior Magistrate stayed the order of possession pending appeal.

2. The appeal was brought under section 14 of the Civil Appeals Act 1971 ("the 1971 Act"). Although section 14(2) provides that all appeals shall be by way of re-hearing, I took advantage of the Court's power under section 14(5) to receive further evidence. Thus I have had the benefit of oral evidence from both parties, together with written submissions from the Respondent and fresh documentary evidence. As a result I have had the advantage of a rather fuller picture than the learned Magistrate, who made the possession order without a full contested hearing.

3. The parties are brothers. Their mother made a will dated 21st June 2000 which contained the following clause:

> "***I DEVISE*** *my two-apartment dwelling-house situate at Fourth Avenue, Cavendish Heights in Pembroke Parish aforesaid unto my son the said Christopher Edmund George Dill [the Respondent] subject to any mortgage or other encumbrance thereon. I direct that the said Christopher Edmund George Dill shall apply an amount up to a maximum of $800.00 (Eight hundred dollars) from the rent obtained from the downstairs apartment of my said dwelling-house toward the rent payable by my son David Winston Dill [the Appellant] wherever he may be residing and so long as the said David Winston Dill shall be responsible for paying rent for his residential accommodation.*"

4. Thus the clause contained a gift to the Respondent coupled with an obligation to make financial provision for the Appellant. The effect of a provision of this type was summarised by Proudman J in University of London v Professor John Prag [2014] EWHC 3564 (Ch) at para 99, where she set out counsel's submissions, with which at para 101 she agreed:

> "*The defendants also say in this context that UOL's position is inconsistent with the*

basic principles of benefit and burden. They rely on *Messenger v. Andrews (1824) 4 Russ 478* *,* *Jay v. Jay [1924] 1 KB 826* *and* *Re Hodge [1940] Ch 260* *for the following propositions:*

> • *Where a donor gives specific property to A, to be used by A for A's benefit, but he imposes a condition on A to make financial provision for B,*
>
> • *And where A accepts the benefit of the disposition,*
>
> • *A cannot take the benefit without accepting the burden, even if that burden exceeds the value of the donated property. In other words, A is not permitted to fail to give effect to the burden of performing the condition in favour of B. B may obtain an order of the court to compel A to give effect to the condition, even though he was not a party to the gift.*"

5. Thus if the Respondent accepted the gift of the property he would be deemed to accept the reciprocal obligation contained in the will that he make financial provision for the Appellant. The obligation was equitable rather than contractual – see Jay v Jay DC *per* Sankey J at 830 – although nothing turns on that. But it was an obligation. The Respondent would be obligated pay the Appellant's reasonable rent, capped at $800, insofar as the Apartment generated sufficient income to do this. The will was silent on two points. First, whether the sum of up to $800 was payable monthly or weekly. Secondly, whether the Respondent would be permitted to retain a portion of the rent to cover the maintenance and upkeep of the property, and, if so, how much. If the parties are unable to agree these points then they have liberty to restore the appeal for me to deal with them.

6. In so finding I have not forgotten section 17 of the Magistrates' Court Act 1948, which provides that a court of summary jurisdiction shall not take cognizance of any action wherein the validity of any devise, bequest or limitation under any will may be disputed. But in the present case the validity of the above mentioned clause of the will is not disputed. It is, however, necessary to interpret that clause in order to analyse the basis on which the Appellant occupies the Apartment.

7. The mother died on 27th April 2012. The Respondent and another brother were the Executors. They arranged a second reading of the will for the family. When this took place there was a discussion between the Appellant, the Respondent and their two siblings. The Appellant and the Respondent agreed that, in lieu of the Respondent making financial provision for the Appellant, the Appellant could live in the Apartment, which is the upper of the two apartments that the Respondent had inherited ("the Agreement"). Thus the Appellant gave consideration for this arrangement. The Appellant had lived in the Apartment with his mother on and off for the past 10 – 12 years prior to her death, and had moved back there in 2013. He was living there when the Agreement was made.

8. The Respondent cross-examined the Appellant. He suggested that there was no agreement on the timeline, to which the Appellant replied: "*That means it's indefinite*". In reply to a question from me the Respondent confirmed that no timeline was stipulated, but said: "*It was meant I stay there until I die*". The Respondent gave evidence that when he arrived for the second reading there was a discussion underway as to whether the Appellant could stay at the Apartment. The Respondent had said that he wasn't in a position to fix the place up so the Appellant could stay there. He told the Court that what he meant was that the Appellant could stay there for now.

9. The question arises as to whether the Agreement gave rise to a lease or alternatively a licence. A lease, otherwise known as a tenancy, is a legal estate in land which would in this case be protected by the Rent Increases (Domestic Premises) Control Act 1978 ("the 1978 Act") and could only be terminated in accordance with that Act. A licence, while entitling the licensee to use the land, does not create an estate in the land and is therefore not protected by the 1978 Act. See the leading case of Street v Mountford [1985] 1 AC 809 HL *per* Lord Templeman, giving the judgment of the House, at 814 E – G. It can be terminated by the landlord on giving reasonable notice. See Minister of Health v Bellotti [1944] 1 KB 298 EWCA *per* Lord Greene MR, giving the leading judgment, at 305 – 306.

10. There are at least two criteria for a lease. (i) The lease must give the leaseholder a right of exclusive possession of the land; and (ii) the lease must be for a term, whether fixed or periodic: "*for a term or from year to year or for a life or lives*". See Street v Mountford *per* Lord Templeman at 827 C – E, approving the summary of Windeyer J in Raidach v Smith (1959) 101 CLR 209, High Court of Australia, at 202. In England and Wales, a tenancy to a natural person for life is converted by section 149(6) of the Law of Property Act 1925 to a fixed term of 90 years. But there is no equivalent statutory provision in Bermuda, and section 1(1) of the Land Valuation and Tax Act 1967 expressly acknowledges the possibility of a life tenancy.

11. There may be a third criterion for a lease, namely the payment of a premium or periodical payments. Lord Templeman stated that there was in Street v Mountford at 818 F. But he approved the summary of the applicable law by Windeyer J, who made no mention of any such requirement. In Ashburn Anstalt v WJ Arnold & Co [1989] Ch 1 EWCA, Fox LJ, having analysed Lord Templeman's speech, concluded at 10B, "*that the reservation of a rent is not necessary for the creation of a tenancy*". In Prudential Assurance Co Ltd v LRB [1992] 2 AC 386 the House of Lords held that Ashburn Anstalt was wrongly decided, but they did not criticise the Court of Appeal's reasoning on this point. See the leading judgment of Lord Templeman in Prudential Assurance at 395 G. Although I need not decide the point, I am inclined to agree with Fox LJ.

12. On the Appellant's case, he has a tenancy of the Apartment for the term of his life whereas on the Respondent's case he has a licence for an indefinite period, ie not for an agreed term. I am satisfied that the Appellant has a right of exclusive possession of the Apartment. He has, insofar as this is relevant, provided consideration, analogous to the payment of rent, by foregoing a contribution from the Respondent towards payment of his rent for accommodation elsewhere. However I find that the duration of the Agreement was not discussed and that there was no common intention as to what that duration should be. As there was no agreed term I find that the Appellant does not have a lease but a licence.

13. The mother's will was admitted to probate on 24th February 2015 and the administration of the estate was granted to the Executors. By a vesting deed dated 11th March 2015 they conveyed the two apartment dwelling house named in the will to the Respondent. By accepting the conveyance, the Respondent became subject to an equitable obligation to make financial provision for the Appellant. The Agreement had the effect of suspending the obligation for the duration of the lease. But the obligation will resume if the lease is terminated.

14. The Respondent gave evidence that he would like to fix up the Apartment and rent it out. He instructed attorneys who served a notice to quit dated 13th February 2017. This stated (typographical errors as in the original letter):

> "*Our client intend to carryout major internal renovations in the apartment the said apartment. He has previously discussed his intentions to do the said work, especially to replace a ceiling which has fallen in causing a hazard, hoping that you would have made alternative living arrangements.*
>
> *Therefore, you are hereby on notice to vacate these premises on or before 13th March, 2017, so that our client can carryout the necessary internal renovations of a major nature and secondly, you have failed to pay rent and utilities expenses for the same apartment for several years.*"

15. The Appellant stayed put. The Respondent's attorney issued an application for a possession order in the Magistrates' Court under the 1978 Act. The grounds given in the application notice were the same as the grounds given in the notice to quit. They resulted in the possession order which is the subject of the present appeal.

16. The Respondent's attorney was clearly under the misapprehension that the Agreement had given rise to a tenancy. The grounds were drafted so as to fall within the permitted grounds for termination of tenancies under section 8 of the 1978 Act. Nonetheless, the notice to quit was a valid notice for the purpose of terminating the licence. In my judgment, and in the particular circumstances of this case, one month was not a reasonable period of notice. But, as I have said, the notice to quit was still valid.

17. If I am wrong and the Agreement gave rise to a tenancy for life then a possession action would be defeated by section 3(1) of the Conveyancing Act 1983. This provides in material part that no action may be brought upon any contract for the disposition of an interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be "*charged*", which in this context I take to mean "*sued*". A lease is a contract for the disposition of an interest in land. Section 3(2) provides that the section shall not apply to leases or tenancies not exceeding three years. But that proviso would not cover a tenancy for life.

18. I make three other observations about the notice to quit and the application for a possession order.

    (1) A: The Respondent gave evidence that the roof had developed a leak which then seeped inside the ceiling of one of the bedrooms, causing it to fall in; there was a little bit of rot in the floor of that bedroom; and the kitchen cabinets were 20 years old and he wished to replace them. The Appellant said that he had fixed the ceiling one month ago, and that there was no leak in the roof or rotting of the floor.

    B: The Respondent produced a Property Appraisal Report for the Apartment dated 26th January 2017. That was also the valuation date. The Report stated:

    "*At the time of inspection, the interior of the Upper apartment was in reasonable condition. ... We did not gain access into one of the bedrooms. The flooring in the Dining Room and the Living Room had been upgraded. The kitchen appeared to have been upgraded to a basic standard. The interior of the Lower Apt was in reasonable condition. We did not note any recent upgrades. Ceramic tiling was throughout. The bathroom was dated and the kitchen was in reasonable condition.*"

    The Respondent stated that the bedroom to which the valuer did not gain access was the one where the ceiling had fallen in.

C: I accept the Respondent's evidence on this issue, but am not satisfied that the renovations which he wishes to undertake could fairly be described as of a major character within the meaning of section 8(4) of the 1978 Act. Ie although they might prove to be extensive I am not satisfied that they could not reasonably be carried out with the Appellant in occupation or that it would cause undue hardship to the Respondent, by reason of the additional expense, if the Appellant remained in occupation while the renovations were carried out.

(2) As the terms of the Agreement did not involve payment of rent this was not a ground on which the Appellant was entitled to terminate the Agreement. This ground should not have been included in the notice to quit or the application for a possession order. The Respondent gave evidence that its inclusion was because of a miscommunication with his lawyer.

(3) The Agreement did not specify who was responsible for payment of utility bills. However I am satisfied that it was an implied term of the Agreement that they were the responsibility of the Appellant. In other words, I am satisfied that this is what the Agreement, understood as a whole against the relevant background, should reasonably be understood to mean. See Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988 *per* Lord Hoffmann, giving the judgment of the Privy Council, at para 21. The Appellant was the occupier of the premises; the Respondent's obligation under the will, had the Appellant not moved in to the Apartment, would have been to contribute to his rent not his utility bills; and the Appellant accepted that he had made some payments towards the utility bills and had tried, unsuccessfully, to have the utility company's account put into his name.

19. In conclusion, I find that the Agreement gave rise to a licence and that the notice to quit was effective to terminate this. The Appellant now occupies

the Apartment as a trespasser. However the Magistrates' Court is a creature of statute. Whereas the 1978 Act and the Landlord and Tenant Act 1974 gives it jurisdiction to make a possession order in relation to a tenancy, there is no statutory provision enabling it to do so in relation to a licence. What the Respondent should have done (and will now no doubt do if the Appellant does not agree to move out) is brought summary proceedings for the possession of land in the Supreme Court under RSC Order 113.

20. Whereas the Respondent would be entitled to a possession order in the Supreme Court, he was not entitled to one from the Magistrates' Court. Under section 14(5) of the 1971 Act, my powers on appeal are limited to those of the Magistrates' Court when it heard the Respondent's application. So I cannot make a possession order for the Apartment. The appeal is therefore allowed and I quash the possession order. The warrant to evict is discharged.

21. Given the rather unusual facts of this case I am not minded to make any order as to costs. The Appellant is the successful party but only because the Respondent used the wrong procedure to get a possession order, not because the Respondent is not entitled to one. If either party wishes to persuade me to make a different order as to costs he may file and serve written submissions on the point within 14 days of the date of this judgment: if only one party does so then the other party will have seven days in which to file and serve a written response. I will deal with the issue on the papers.

22. I hope that the parties can resolve their differences over the occupation of the Apartment without the need for further litigation.

DATED this 4th day of December, 2017

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Hellman J