In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2019: No. 45

BETWEEN:

HENRY O'CONNOR

Appellant

and

GILDA FURBERT

Respondent

JUDGMENT

Appeal against Magistrate's findings of fact and judgment, Civil Appeals Act 1971 section 14, Meaning of appeal by re-hearing, Receiving further evidence upon questions of fact

Date of Hearing: **30 June 2021**
Date of Judgment: **20 July 2021**

Appearances: **Appellant in Person**

Jaymo Durham, Amicus Law Chambers Ltd., for the Respondent

Judgment of Mussenden J

Introduction

1. The Appellant Mr. O'Connor appeals against the decision of the Learned Magistrate Mr. Chin dated 26 November 2019 where the Court, after a trial, made findings of fact and ordered judgment against him in the sum of $6,982.50 in favour of the landlord Respondent for unpaid rent of $2,600 per month for premises located at Upper Apartment, 8 Secretary Lane, St. George's (the "**Premises**").

2. The judgment was in respect of Ordinary Summons 17CV01329, in its original form, filed by the Respondent against the Appellant for a claim of $6,982.50 for rental arrears owed to the Respondent for the period January – November 2016 by the Appellant.

3. At the start of the trial on 21 November 2019, the Learned Magistrate allowed an amendment to the Ordinary Summons by the Respondent so that the amended claim amount was for $9,920.00 and the period of the claim was extended by three more months, December 2016, January 2017 and February 2017. As it turns out, on 26 November 2019, the Learned Magistrate, gave judgment for the original claim amount of $6,982.50 rather than the amended claim amount of $9,920 which was neither clarified at the time of the judgment nor appealed thereafter by the Respondent. Since then the Respondent has proceeded with a Judgment Summons in the amount of $6,982.50 plus court fees. During the hearing of the appeal, Mr. O'Connor stated that he was confused between the Ordinary Summons claim and time period and the amended claim and time period during the actual trial. This Court clarified these matters to Mr. O'Connor based on the Record of Appeal who stated that he understood the circumstances.

4. The Appellant appeals to have the judgment of the Learned Magistrate dismissed on the following grounds:

    a. The Appellant did not reside in the Premises December 2016 to February 2017;
    b. The Appellant was not listed as the tenant based on the lease agreement 2013 – 2016;

c. There was never a verbal agreement with the Respondent;
d. Keys for the apartment were in the hands of the tenant's father; and
e. The BELCO power supply was disconnected on 4 November 2016.

The Trial in the Magistrates' Court

5. At the trial in the Magistrates' Court, the Court heard sworn evidence from both the Respondent and Appellant, both who were in turn cross-examined.

6. The Learned Magistrate in his written judgment made findings of fact as follows:
   a. There was a lease for the Premises for three years from 1 September 2013 to 1 September 2016 between the Respondent and a Carmelita Pitcher, who was the Appellant's wife;
   b. Carmelita Pitcher vacated the Premises in November 2016, three months after the lease had expired;
   c. The rent was $2,600 per month;
   d. There was a month to month tenacy after the expiration of the above lease had terminated on 1 September 2016;
   e. The Defendant's exhibit, a BELCO printout claims "move out" with a date of 4 November 2016. There is no clear reference to the Premises anywhere on the printout. How much reliance can be placed on this document? Does "move out" reflect an actual move out?
   f. The key to the Premises was returned to the Respondent's sister in February 2017;
   g. The Appellant admitted to living in the premises from November 2015 to 2 November 2016;
   h. There was an oral agreement between the Respondent and Carmelita Pitcher to stay beyond the expiration of the lease on 1 September 2016;
   i. There was an oral agreement between the Respondent and the Appellant at the Appellant's request that the Appellant could stay in the Premises until he found alternative accommodation while still paying the monthly rent;
   j. The Appellant is in arrears of rent;

k. The Defendant is a signed witness to the lease dated 1 September 2013 between the Respondent and Carmelita Pitcher; and

l. The Court holds on the balance of probabilities that the Appellant, does owe the debt claimed by the Respondent.

7. On 26 November 2016 when the Learned Magistrate issued judgment to the parties, the Appellant stated that he can provide proof that he did not live in the Premises from November 2016 to February 2017. The Court stated that he ought to have provided proof at trial and that the Court is functus.

The Appellant's Submissions

8. Mr. O'Connor made several submissions generally in support of the grounds of appeal.

9. First, Mr. O'Connor submitted that the Learned Magistrate erred in finding that he was a 'tenant' of the Premises. He referred to the definition of 'tenant' in section 1 of the Landlord Tenant Act 1974 (the "**Act**"). He submitted that being a witness to his wife's signature on the lease did not make him a tenant. Therefore, he could not be the tenant for the period 1 September 2013 to 1 September 2016 and subsequently could not be liable for any rental arrears during that period.

    a. In the Act, 'tenant' is defined as *"tenant" in relation to a contract of tenancy means the person who as between himself and the landlord is entitled to exclusive possession of the premises."*

10. Second, Mr. O'Connor submits that he produced the BELCO printout in evidence which had an entry that said "4 November 2016 – move out". However, he accepted that there were no details on the printout which identified the Premises or gave an explanation as to the meaning of the words "move out". In the appeal hearing, Mr. O'Connor referred to a letter from BELCO dated 29 November 2019 ("**the BELCO Letter**"), three days after judgment was given. He asked the Court to consider the contents which indicated that a

BELCO account for the Premises was active in the name of Carmelita Pitcher for the period 4 November 2011 to 4 November 2016 after which it remained turned off until February 2017 when a new customer account was opened for the Premises.

11. Third, Mr. O'Connor made reference to the written submissions of the Respondent in paragraph 3 which stated "*The critical factor the court below was tasked with determining was whether or not the Appellant had entered into the said agreement and had continued to reside in the premises for the alleged duration. In this regard, the Respondent does not make any assertions that the Appellant ought to be held liable for any period of rental arrears which preceded this verbal agreement and to the extent that the Learned Magistrate may have considered such arrears, we accept that such would amount to an error of law.*" Mr. O'Connor submitted that this was a concession by the Respondent that he, the Appellant, was not liable for some or all of the judgment amount preceding the verbal agreement.

12. Fourth, Mr. O'Connor pointed out various parts of the evidence of the Respondent, on evidence-in-chief and on cross-examination, which he submitted were false. He stated that on 2 November 2016, his family vacated the premises, some moved to England and he went to England returning at a later date to live with his mother at her residence. Mr. O'Connor produced an 'affidavit' from his mother dated 27 November 2016, one day after the judgment, indicating that after Mr. O'Connor had vacated the Premises in November 2016, he had then travelled to England and upon his return to Bermuda, lived with her at her home.

13. Fifth, Mr. O'Connor submitted that in respect of the findings of fact, he was never a tenant of the Premises, moved out on 2 November 2016 and did not return as evidenced by the BELCO printout and that the Magistrate was wrong to order judgment against him in any amount.

The Respondent's Reply

14. The Respondent submitted that the appeal should be dismissed for several reasons.

15. First, the BELCO letter and the affidavit of the Appellant's mother were documents that failed to meet the test of admissibility of fresh evidence. Both documents could have been obtained before trial and used at trial. Mr. Durham cited the case of *Ladd v Marshall* [1954] EWCA Civ 1 where Lord Denning stated:

> *"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."*

16. Second, the Magistrate was correct not to attach any weigh to the BELCO printout which did not have any details on it to identify that it was for the Premises as well as there was no explanation of the words "move out". Further, the BELCO printout and the letter were not conclusive of tenancy in any event as a tenant could still have a tenancy without electricity from BELCO.

17. Third, the Magistrate had the opportunity to assess Mr. O'Connor's evidence, in particular, in respect of when Mr. O'Connor said he returned to Bermuda from England. There were some inconsistencies as he said in his evidence-in-chief that he had returned to Bermuda in January 2017 but on cross-examination admitted that he had returned to Bermuda in November 2016. Mr. Durham submitted that Mr. O'Connor's evidence was impugned by these admissions and that the Learned Magistrate was entitled to assess the credibility of Mr. O'Connor as a result of this evidence.

18. Fourth, in respect of the evidence of termination of the tenancy, there was evidence that the keys to the Premises were returned in February 2017.

19. Fifth, the Learned Magistrate, having heard the evidence, was properly entitled to make the findings of fact as he did and the Appellate Court should not disturb those findings. Mr.

Durham cited the case of *Caines v Public Service Commission* [2008] Bda L.R. 25 where Ground CJ stated at paragraph 12:

> *"…The procedure on such an appeal is governed by Order 55 of the Rules of the Supreme Court 1985. There are also well established principles governing the approach of an appellate court. Such a court will not interfere with the exercise of a discretion unless it can be shown that the person to whom that discretion was entrusted erred in principle, and it will not lightly interfere with findings of fact by a decision maker who has had the benefit of hearing the witnesses and seeing them cross-examined."*

Law on the Procedure of Civil Appeals

20. The Civil Appeals Act 1971 section 14 provides as follows:

> *"Determination of appeals*
> *14 (1) Subject to any other provision of law, upon the hearing of an appeal the Court may allow the appeal in whole or in part or may remit the case to the court of summary jurisdiction to be retried in whole or in part and may make such other order as the Court may consider just.*
> *(2) All appeals to the Court shall be by way of re-hearing on the record, and shall be by notice of appeal, and no writ of error or other formal proceedings other than such notice of appeal shall be necessary.*
> *(3) The Court shall have power to draw all inferences of fact which might have been drawn in the court of summary jurisdiction and to give any judgment and make any order which ought to have been made.*
> *(4) No appeal shall succeed on the ground merely of misdirection or improper reception or rejection of evidence unless in the opinion of the Court substantial wrong or miscarriage of justice has been hereby occasioned in the court of summary jurisdiction.*

(5) The Court shall, on the hearing of an appeal, have all the powers as to amendment and otherwise possessed by the Court in the exercise of its original jurisdiction, together with full discretionary power to receive further evidence upon questions of fact, either orally or by affidavit or deposition."

21. Under the Civil Appeals Act 1971 the Court has broad powers in the conduct of an appeal. The appeal is a re-hearing on the record, the Court can draw all inferences of fact which might have been drawn in the court of summary jurisdiction and the Court has full discretionary power to receive further evidence upon questions of fact, either orally or by affidavit or deposition.

22. In respect of the meaning of "appeal by re-hearing", in *Qamar v Bermuda Medical Council* [2021] SC (Bda) 9 App Subair Williams J stated as follows:

"67. Mr. Stevens pointed to the decision in Papps v Medical Board of South Australia [2006] SASC 234 [32-34]:

"*32. Cox J in Wigg v Architects Board (1984 36 SASR 111 at 112-113 undertook an examination of the different types of appeal that may be created with respect to the decisions of judicial and administrative bodies. Martin J adopted this analysis in Thompkins v South Australian Health Commission [2001] SASC 147 at [28]-[31]:*

His Honour identified three types of appeal. First, an appeal "strictly so called" in which the question is whether the judgment complained of was right when given and there is no issue of introducing fresh evidence in the appeal court. All that is decided is whether the court below came to the right decision on the material that was before it.

The second type of appeal identified by Cox J is the appeal by way of rehearing. His Honour described this appeal as follows (p 111):

"This is a rehearing on the documents, but with a special power to receive further evidence on the appeal. The latter power is necessary, because the question on a rehearing of this kind is whether the order of the court below ought to be affirmed or overturned in the light of the material before the appeal court at the time it hears the appeal."

The third type identified is an appeal de novo in which the appeal court hears the matter afresh. Regardless of which party appeals, the appeal is conducted as an original cause and all the evidence is given afresh unless the parties agree to the material used before the original body being used on the appeal. The judge who hears such an appeal will determine the question upon the material presented before the judge and will not be limited in any way by the decision that has been made by the body appealed from.

As Cox J observed (p 113):

"Which type of appeal is given by a particular Act will depend upon its construction. The use of the word "rehearing" will not be decisive, because that is a word to which different meanings have been given…. It will be a matter of discerning Parliament's intention from an examination of the legislation as a whole." (footnotes omitted)

33. Which of these three kinds of appeal is designated by a statutory provision will depend upon the legislative intention as disclosed by an examination of the legislation as a whole [foot note omitted]. *Both Cox J and Martin J observed that a statutory appeal procedure does not always fit easily into one of the three categories. It is open to the legislature to create any kind of appeal, including an appeal that combines features of one or more of the traditional categories.*

34. Ultimately, the nature of the appeal must depend on the terms of the statute conferring the right. [foot note omitted] *Section 66 of the Medical Practitioners Act*

confers wide powers upon a single judge of this Court. It provides that the hearing is to be a rehearing on the documents, but with the power to receive further evidence on the appeal."

23. In respect of civil appeals from the Magistrates Court, in *Qamar v Bermuda Medical Council* Subair Williams J stated as follows:

"73. … In the case of civil appeals from the Magistrates' Court, the Civil Appeal Rules 1971 do not expressly state the manner in which civil appeals shall be heard. However, section 14 of the Civil Appeal Rules 1971 gives way to the application of the Rules of the Court of Appeal in respect of any matter which is not expressly provided for under the 1971 Rules. The manner in which civil appeals are heard is not provided for under the Rules of the Court of Appeal but section 15 of the Court of Appeal Act 1964 provides: "Subject to any Rules, all civil appeals shall be by way of re-hearing…")"

Analysis of the Appeal

24. In light of the above, I consider this appeal to be of the second type as set out by Cox J in *Wigg v Architects Board* and where it was stated that the question on a rehearing of this kind is whether the order of the court below ought to be affirmed or overturned in the light of the material before the appeal court at the time it hears the appeal.

25. In my view, the judgment of the Court below ought to be affirmed and the appeal should be dismissed for several reasons.

26. First, I am unable to agree with Appellant's contention that various findings of facts were false because he takes a different view. The Learned Magistrate heard the evidence of the witnesses and was entitled to assess the evidence and then reach the various finding of facts that he did. In following the principles in *Caines v Public Service Commission* I see no reason to interfere with those findings of fact.

27. Second, the Learned Magistrate was entitled to reach the finding of facts that he did in respect of who was a tenant and for which period of time. In following the principles in *Caines v Public Service Commission* I see no reason to interfere with these findings of fact:

    a. He found that Carmelita Pitcher was the tenant for the period of the lease from 1 September 2013 to 1 September 2016.
    b. He then found that Carmelita Pitcher was the tenant by way of an oral agreement with the Respondent to stay beyond the expiration of the lease on 1 September 2016. He also found that she vacated the premises in November 2016.
    c. He then found that the Appellant was the tenant by way of an oral agreement with the Respondent until he could find alternative accommodations.
    d. He found that the key to the premises was returned to the Plaintiff's sister in February 2017. This would have been supporting evidence to find that the Appellant had exclusive possession of the Premises from the time his wife vacated the premises until February 2017.

28. In my view, it follows that the Learned Magistrate had found that the Appellant's wife was the tenant for November 2016 and the Appellant was a tenant for the months of December 2016, January 2017 and February 2017, which based on the evidence, he was entitled to do. I feel obliged to comment that the Learned Magistrate should have set out the exact dates or months that he found the Appellant to be the tenant. It follows that the Learned Magistrate did not find that Mr. O'Connor was the tenant of the Premises at any time prior to December 2016 and therefore no liability for payment of rent arises before then. This finding addresses the Appellant's complaint that the Respondent was making a concession that the Appellant was not liable for some or all of the judgment amount.

29. Third, I am prepared to exercise my discretion under the Civil Appeals Act 1971 section 14(5) to receive the BELCO letter as further evidence. I note the contents that the account in the name of Ms. Pitcher was active from 4 November 2011 to 4 November 2016 and then a new customer account was opened in February 2017. However, in my view, the

evidence of when the electricity was turned off in November 2016 does not amount to evidence of when the tenancy was terminated.

30. Fourth, in respect of the BELCO printout, the Learned Magistrate was not prepared to attach any weight to it because it did not include specific details of the account and he could place little or no reliance on the words "move out" as being proof of whether the Appellant had actually moved out. In my view, the Magistrate was entitled to assess the printout evidence and the Appellant's evidence about it in the way that he did. In any event, I am of the view, that the BELCO evidence is not conclusive proof that the tenancy had terminated, as a tenant could still hold the tenancy with or without electricity.

31. Fifth, I am also prepared to exercise my discretion to receive the further affidavit evidence of the Appellant's mother that he lived with her upon his return from England. However, in my view, the fact that the Appellant lived with his mother does not negate the fact that he was still the tenant of the Premises. It seems to me that the circumstances of living somewhere else and being a tenant in other premises are not mutually exclusive - one person can be doing both.

32. Sixth, in my assessment of the record and the further evidence that I received, I am satisfied on the balance of probabilities that the Appellant was a tenant for the months of December 2016, January 2017 and February 2017.

Conclusions

33. In light of the above reasons, the appeal is dismissed on all grounds.

34. As stated in the Introduction above, the Learned Magistrate ordered judgment in the sum of $6,982.50 instead of a newly calculated amount based on the findings of the December 2016 to February 2017 tenancy. The rent was $2,600 per month which would total $7,800 for December 2016, January 2017 and February 2017 when Mr. O'Connor was found to be the tenant of the Premises. The Schedule of Payments on page 30 of the Record of

Appeal shows that Mr. O'Connor paid $300[1] from 17 February 2017 to 23 May 2017 in respect of rental arrears. If that $300 was credited against the actual rental arrears amount of $7,800, he would still owe $7,500 plus any other appropriate costs to be added. In light of the fact that the judgment amount of $6,982.50 is less than $7,500, I make no amendment to the judgment amount of the Learned Magistrate as it would be unfair in the circumstances to the Appellant to increase the judgment amount which was not appealed by the Respondent.

35. Unless either party files a Form 31TC to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Respondent on a standard basis, to be taxed by the Registrar if not agreed.

Dated 20 July 2021

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT

[1] I have disregarded the 9 February 2016 payment of $50 when Carmelita Pitcher was the tenant.