BILLY AH KOY

v.

DAYABHAI JIWA PATEL

(COURT OF APPEAL Gould, V. P., Henry J. A., Spring J. A., 6, 28th November 1979)

Civil Jurisdiction

Fair rents—statutory value—onus of proving.

R. Chandra for Appellant.

B. N. Sweetman for Respondent.

Appellant was the tenant of dwelling house premises in Suva. The respondent's landlord gave a notice to quit to determine the tenancy, then sued in the Magistrate's Court for possession. The appellant there claimed to be a tenant protected by the Fair Rents Ordinance (Cap. 241).

The learned Magistrate held that the premises did not come within the provisions of the Ordinance. He made an order for possession. An appeal to the Supreme Court was dismissed. There were two grounds of appeal. The court said that the "real issue" under the first ground was whether the premises came within the provisions of the Ordinance. One such provision s.24(a) partly is of general application. It states that the Ordinance did not apply to any dwelling premises of which the statutory value is $12,000 or more.

Referring to a passage in the judgment at first instance, Henry J.A. noted that the trial judge has said:

> ".... the issue at the trial ..... (was) of assessing the current value of the flat to determine whether it is subject to protection under the Fair Rents Act."

Henry, J. A. stated—

> "It was an error of law to base his finding on the current value. Section 24 .... required a "statutory valuation" as the test of jurisdiction to revoke the protective provisions of the Ordinance."

Henry, J. A. considered there was no relevant evidence before the Court to establish the statutory value. "The question then arises, upon whom falls the onus of proof" After consideration of authority Henry J.A. said:

> ".... it is the appellant who is relying upon the protection of the Ordinance. In the absence of any evidence to prove that the premises came within the Ordinance, he must fail in his defence."

Held: Appeal dismissed with costs.

A Cases referred to:

Wright v. Arnold (1946) 2 All E.R. 616.
Ford v. Langford (1949) 1 All E.R. 483.
Turner v. Baker (1949) 1 All E.R. 560.
Keane v. Clarke (1951) 2 All E.R. 187.
Bolger v. Daly (1925) 2 Ir. R. 46.

B HENRY, J.A:

Judgment

Appellant was the tenant and respondent the landlord of residential premises situated at No. 19 Extension Street, Suva. Respondent gave one month's notice in purported determination of the tenancy and sued in the Magistrate's Court for possession. Appellant claimed that he was a tenant protected by the Fair Rents Ordinance (Cap. 241) and that an order for possession could not be made unless its provisions were complied with. The learned magistrate held that the premises did not come within the provisions of the Ordinance and made an order for possession. An appeal to the Supreme Court was dismissed.

This appeal is confined to question of law. Two grounds are set out in the notice of appeal. They are:

"1. That the learned Judge erred in law in holding that the question as to whether the Valuers were registered under the Fair Rents Ordinance (Cap. 241) had no possible bearing on the case.

2. That the learned Judge erred in law in holding that obsolescence as an item of valuation has been properly taken into account under the item for depreciation."

The real issue in the first ground is whether or not the premises came within the provisions of the Ordinance. This depends upon value. The Ordinance is divided into four parts being Part I—Preliminary; Part II—Fair Rents; Part III—Recovery of Possession and Part IV—Miscellaneous. Section 24*(a)* is in Part IV and is of general application. It reads:

"24. This Ordinance shall not apply—

(a) to any dwelling-house of which the statutory value is twelve thousand dollars or more."

The interpretation section is Section 2, subsection 1. It provides that unless the context otherwise requires:

" 'Statutory value' in relation to a house means the value of such dwelling-house in its existing condition at the time of valuation assessed on the basis of its new replacement cost less such amount for depreciation and obsolescence as may be determined by the valuer but does not include the value of the site; and for the purposes of this definition a dwelling-house shall be deemed to include outbuildings, paved yards, paved paths and other works and improvements appertaining thereto."

" 'Valuer' means a valuer appointed under the provisions of this Ordinance for the area in which any dwelling-house is situated." A

Part III, which deals with recovery of possession, makes no reference to either statutory value or valuer. It is sufficient to set out Section 19(1) in part. It provides:

"19. (1) No judgment or order for the recovery of possession of any dwelling-house to which this Ordinance applies or for the ejectment of a lessee therefrom shall be made, and no such judgment or order made before the coming into force of this Ordinance shall be enforced, unless . . . ." B

The section then sets out ten conditions—one of which must apply before an order may be made. No provision is made in Part III for the determination of the question whether or not the Ordinance applies to the premises in respect of which recovery is sought. This will be contrasted with Part II which deals with the fixing of fair rents. C

The scheme of Part II is to appoint Fair Rents officers (Section 3(1) and (2)). Subsection (3) then provides:

"3. (3) The Minister may, from time to time appoint such persons as he thinks fit to be valuers for the purposes of this Ordinance for any area or areas to which this Ordinance shall apply." D

Applications may be made by either the lessor or lessee to have the fair rent determined. If such an application is made the Fair Rents officer requests a valuation from a valuer and also the determination of the fair rent. It is unnecessary to set out the whole procedure but the valuer in the course of his duties must determine *(inter alia)* the statutory value of the premises and the value of the site but after taking these and other matters into account his duty is to determine the fair rent. The determination of the fair rent binds the parties. By Section 9 there is a right of appeal to a special tribunal "against any determination of fair rent" so made by the valuer. E

Neither party called a valuer as defined by the Ordinance. Valuers were called. There was a conflict of evidence but the evidence for respondent, which fixed a value in excess of $12,000, was accepted by the court and on their evidence a value in excess of $12,000 was found. It was accordingly held that the premises were excepted from the Ordinance. The learned judge said: F

"No reason or explanation was furnished as to why it was necessary as a matter of law for the learned magistrate to ascertain whether the respondent's valuers were registered under the Fair Rents Act before he could consider their evidence. In point of fact neither of the three valuers called at the trial was registered under the Act. In any event the matter could have no possible bearing on the case because the court was not adjudicating on the matter of fair rents for the basement flat. Assessment of fair rents is of course the task for a valuer who is duly registered under the Act and the machinery for this does not come into operation unless the relevant provisions of the Act are specifically invoked. The ground of appeal is plainly misconceived because as already indicated, the issue at the trial is not one of fixing a fair rent but of assessing the current value of the flat to determine whether it is subject to protection under the Fair Rents Act." G H

It was an error of law to base his findings on the current value. Section 24, which applies to Section 19 in the determination of whether or not the Ordinance applied to the premises, required a "statutory valuation" as the test of jurisdiction to invoke the protective provisions of the Ordinance.

In my opinion the expression "statutory value" must mean that defined in in Section 2. No one has suggested that it can have any other meaning. There is no common concept of statutory value. There is nothing in the context to require a different meaning. If that be so, then there is no relevant evidence before the court to establish the statutory value. The question then arises; upon whom is the onus of proof cast? In the absence of relevant proof that party must succeed.

The appeal therefore comes before this court with no evidence upon which the court may determine whether or not appellant has the protection of Section 19(1) of the Ordinance. If the burden of proving this falls on appellant then his appeal must fail. The point has arisen in comparable legislation in England. There, however, the tenant was in a much stronger position because there was a statutory presumption in his favour. The Increase of Rent and Mortgage Interest (Restrictions) Act 1938, S.7(1) reads:

> " 'If any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which these Acts apply unless the contrary is shown.' "

The word "dwelling-house" was earlier defined and the class of "dwelling-house" to which the Act applied was also defined. Apart from the defined class of dwelling-house the Act did not apply. The presumption put a tenant in a much stronger position than that which obtains in Fiji.

In *Wright v. Arnold* (1946) 2 All E.R. 616, 620 Morton, L.J. said:

> "Counsel for the defendant at first argued that that was a complete answer to the submission of counsel for the plaintiffs, and that, as the landlords had failed to discharge the onus which was cast on them, he must succeed. However, I do not think the sub-section can apply save where it is first established that the premises regarding which the question arises are 'a dwelling-house whithin the definition contained in the Act. The intention of the sub-section is, in my view, that when the court is satisfied that the building about which the question arises is 'a dwelling-house,' then it shall be deemed to be a dwelling-house to which the Act applies unless the contrary is shown."

Tucker and Asquith, L. JJ. agreed with this reasoning which was followed in *Ford v. Langford* (1949) 1 All E.R. 483 by a Court consisting of Bucknill and Asquith, L. JJ. and Hodson J. and by Lord Merriman in *Turner v. Baker* (1949) 1 All E.R. 560.

Reference may also be made to *Keane v. Clarke* (1951) 2 All E.R. 187, 189 in which Sir Raymond Evershed, M.R. said:

> "*Bolger v. Daly* (1925) 2 Ir. R. 46, equally, does not bind us, but the point raised was of a similar character, and in the course of the leading judgment in the Supreme Court Kennedy, C.J., said:
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> " 'The application of the Act depends on whether the standard rent or the valuation is within the maximum limit prescribed by the statute in defining the pre-

mises to which it applies. No evidence as to valuation is before this court, nor was any such evidence given before Johnston, J.: and the case is, therefore, further narrowed down to a question as to whether there is evidence that the standard rent was such as to bring the premises within the Act.' "

The Master of the Rolls said of *Bolger v. Daly:*

"I may say that the action was one in which the landlord sued the tenant for rent of a dwelling-house, and the tenant's defence was that the rent charged was in part irrecoverable.

I accept that reasoning and think it should be applied to the present case."

Applying this reasoning to the appeal it is appellant who is relying upon the protection of the Ordinance. In the absence of any evidence to prove that the premises come within the Ordinance he must fail in his defence.

The legislation does not appear to set up machinery for requiring the valuer to make a valuation if requested by a party, and, if made, to be challenged by some method of appeal. These may be matters requiring the attention of the Legislature.

I would dismiss the appeal with costs to respondent to be fixed by the Registrar.

SPRING J.A:

I agree that his appeal fails. The appellant argued before this Court that as no valuer, as defined in the Fair Rents Ordinance (Cap. 241) had given evidence in the Court below that the premises, owned by the respondent and occupied by the appellant, exceeded $12,000, that the order for possession was not validly made.

In this Court the appellant acknowledged he was relying on the protection of the Fair Rents Ordinance (supra) but no evidence had been adduced in the Courts below that the statutory value of the "dwelling house" occupied by appellant was within the limits prescribed by the Ordinance. Accordingly, I agree with the Judgment of my learned brother Henry J.A. and with his reasoning and conclusion as to the fate of this appeal and the order proposed by him as to costs.

GOULD V.P:

I have had the advantage of reading the judgment of Henry J.A. in this appeal. I agree with it and have nothing to add.

All members of the court being of the same opinion the appeal is dismissed with costs.

Appeal dismissed.