58/77

SUPREME COURT OF VICTORIA

DI IORIO & ANOR v ZOLLO

Anderson J

27 April, 10 May 1977 — [1977] VicRp 60; [1977] VR 547

LANDLORD AND TENANT – EJECTMENT TENANCY CREATED BY HOLDING OVER AFTER TERM OF LEASE EXPIRED CONTROLLED BY CLAUSE OF LEASING AGREEMENT – FINDING BY MAGISTRATE THAT SIX MONTHS' NOTICE TO QUIT WAS NECESSARY – WHETHER MAGISTRATE IN ERROR.

The Complainants, proprietors of two different premises, leased each of the premises to the defendant pursuant to a written agreement for a period of three years, at a monthly rental in advance. Clause 13 of the subject agreement said:—

> "It is hereby agreed that no overholding of the leased premises by the tenant hereby created shall be construed as creating a tenancy from year to year, but that notwithstanding the failure of the tenant to vacate upon the expiration of the said term or the landlord to require possession at such expiration the tenant's occupancy after the expiration of the said term may be determined by either the landlord or the tenant at any time upon 14 days notice given at any time."

After a conversation between the parties approximately 3 months before the expiration of the three year period, the defendant requesting "a bit more time" to recoup his investment, the complainant agreed to give him a further twelve months at an increased rent. The defendant continued in occupancy of the two premises. After the 12 months extension passed, the complainant caused a notice to quit to be served on the defendant, requiring the defendant to deliver up the respective premises which he had "as a tenant from month to month" at the expiration of one calendar month. When the defendant failed to do so, ejectment proceedings were instigated.

At the hearing before the Magistrate the defendant's counsel submitted no case to answer because, since the complainant had increased the rent and given the defendant 12 months further occupancy, he had granted in respect of each premises a year's tenancy, and at the expiration of each such year's tenancy the defendant, having over-held, was now a tenant from year to year. Six months' notice was required to terminate the yearly tenancy which the law presumed him to have. The Magistrate agreed with the submission and accordingly dismissed both complaints. Upon appeal—

HELD: Orders nisi absolute. Order of the dismissals set aside. (See also MC12/1978)
1. In each case, Clause 13 was applicable, such clause as already indicated declaring that no overholding beyond the term created was to be construed as creating a tenancy from year to year and giving the complainants the right at any time after the expiration of the three year term to determine the tenancy at any time upon 14 days' notice which might be given at any time.

2. What the defendant obtained was, and was no more or no less than, the right to occupancy for a further twelve months upon the same terms as those on which he was then occupying each of the premises. It is impossible to extract from the evidence more than that the complainants, in consideration of an increase in rent, gave to the defendant a 'bit more time' which they decided to allow him before requiring possession was twelve months; what he was getting was a bit more time of occupancy on the terms he was then enjoying.

ANDERSON J: This is the return of an order nisi to review two decisions of a Magistrates' Court at Melbourne made on 18 March 1977 dismissing two complaints by the complainants, Sabatino and Antonio Di Iorio, to recover possession of premises at 336 and 334 Lygon Street, Carlton, from the defendant, Johnny Zollo. The complainants, who were and are proprietors of the two premises at 336 and 334 Lygon Street, Carlton, leased each of the premises to the defendant in 1972 for a term of three years. The premises at 336 Lygon Street were leased pursuant to an agreement dated 6 June 1972 for a period of three years commencing on 13 March 1972 at a monthly rental of $216.67 payable always in advance. The premises at 334 Lygon Street were leased pursuant to a lease dated 6 September 1972 for a period of three years commencing on 13 June 1972 also at a monthly rental of $216.67 payable always in advance. A relevant clause in each of the two leases was Cl13, which was in the following terms:

> "It is hereby agreed and declared that no overholding of the leased premises by the tenant beyond the term hereby created shall be construed as creating a tenancy from year to year but that notwithstanding the failure of the tenant to vacate upon the expiration of the said term or the landlord to require possession at such expiration or the payment and receipt of rent by the tenant and the landlord respectively the tenant's occupancy of the leased premises after the expiration of the said term may be determined by either the landlord or the tenant at any time upon 14 days notice to the other which notice may be given at any time."

In about June 1975, by which time the lease of the premises at 336 Lygon Street had expired and the lessee was now overholding pursuant to Cl13, the complainants and the defendant met and a conversation took place, the substance of which was stated in evidence by the first-named complainant as being "that conversation was Mr Zollo asked us if he could have had a bit more time because he had to spend the money on the place and he didn't recover all the money and, you know, he was losing or something like that, and we decide to increase the rent and give him twelve months".

There was other evidence that the rent paid in respect of the premises at 336 Lygon Street changed at about 13 June 1975 to $368.34 per month and that the rent in respect of the premises at 334 Lygon Street changed to $368.34 at 13 July 1975. Thereafter the defendant continued in occupation of the two premises. In about July 1976, by which time the 12 months which the complainants had given the defendant had passed, the complainants gave instructions to their agents and to their solicitors to the effect that they wanted possession of the premises, and notices to quit were served. Evidence was scanty as to what happened between July and November 1976, but such evidence as there was was consistent only with the complainants wanting possession of the two premises. Eventually, fresh notices to quit dated 1 November 1976 were served upon the defendant, and it is on these notices that the complainants proceeded. Each of these notices stated that the complainants required the defendant to deliver up each of the respective premises, which he held "as a tenant from month to month", at the expiration of one calendar month from the date of the service of the notice to quit. The defendant continued on in occupation of the premises and, eventually, on 10 January 1977 complaints and summonses were issued whereby the complainants sought possession of the premises.

In the proceedings before the Stipendiary Magistrate on 18 March 1977 at the Magistrates' Court at Melbourne, evidence to the effect I have already mentioned was given as well as certain other evidence which it is unnecessary to recount for the purposes of this case. At the close of the complainants' case, counsel for the defendant submitted that there was no case to answer because the evidence showed that the complainants, in or about June 1975, had decided to increase the rent and give the defendant 12 months' further occupancy of the two premises. Counsel submitted that what had thereby happened was that the complainants had granted in respect of each of the premises a year's tenancy and at the expiration of each such year's tenancy the defendant, having overheld, was now a tenant from year to year and six months' notice was required to terminate the tenancy which the law presumed him to have. The Magistrate retired to consider the submission and when he returned he said: "I have looked at the documents carefully and the submissions that have been made and I have come to the view that this is the twelve months' lease requiring six months' notice." He accordingly dismissed both complaints.

The complainants have obtained the order nisi to review the Magistrate's decision on a number of grounds, the essence of which is that the Magistrate was in error in dismissing the complaints on the basis that the tenancy enjoyed by the defendant was a 12 months' tenancy and that six months' notice was required to determine the tenancy.

On the return of the order nisi counsel for the complainants submitted that the tenancy which the defendant had during the period of twelve months in question was not a yearly tenancy, but was merely extension of the tenancy which the defendant then had of each of the premises for a further twelve months upon the same terms except as to rent as he then held then and he relied upon *Digby v Atkinson* [1815] EngR 108; 4 Camp 275; 171 ER 88 and *Cole v Kelly* (1920) 2 KB 106.

In *Cole v Kelly* Atkin LJ at p132 referred to the law as being stated to the law as being as stated by Swinfen Eady LJ in *Wedd v Porter* (1916) 2 KB 91, at p98, namely that

'where tenants hold over after the expiration of a term, and the facts do not exclude an implicit agreement to hold upon the terms of the old lease, then the law determines that they implicitly hold subject to all the covenants in the lease which are applicable to the new situation.'

He submitted that the tenancies which the defendant enjoyed in respect of the premises upon the expiration of the initial terms of three years were tenancies the terms of which were those of the original lease so far as they were applicable. One such term was contained in Clause 13 already referred to, and the giving of a further twelve months' occupancy was accordingly upon the same terms including Clause 13 as those on which the defendant was holding when the further twelve months was given, thus enabling the complainants, after the expiration of the twelve months, to give notices to quit in the terms allowed by Clause 13.

Counsel for the defendant submitted that it was a question of fact as to the terms on which the defendant overheld at the expiration of the twelve months. He submitted that there was evidence, namely, that of the first-named complainant of his conversation with the defendant and the evidence of the payment of the increased rent, which the magistrate was entitled to rely upon for six months' notice to terminate it. His submission was that the defendant had obtained new leases in respect of the two premises, leases which were quite separate and distinct from the earlier three-year leases which were no longer relevant. Such a submission amounted to treating the leases as though they contained no terms other than the defendant's right to occupancy for the twelve months and the complainants' right to rent for the same period, with, perhaps, such covenants as were implied by law. Such a submission, however, involves ignoring the terms on which the defendant was occupying the premises at the time in or about June 1975 when the further twelve months were granted. As a matter of law the defendant was at that time in occupation of No. 336 pursuant to the terms (so far as those terms were applicable) of a lease which had expired, and of No. 334 either pursuant to a then current lease or the terms (so far applicable) of a lease which had expired. (*Digby v Atkinson*, *Cole v Kelly*, *Wedd v Porter* (*supra*)).

In each case, Clause 13 was applicable, such clause as already indicated declaring that no overholding beyond the term created was to be construed as creating a tenancy from year to year and giving the complainants the right at any time after the expiration of the three year term to determine the tenancy at any time upon 14 days' notice which might be given at any time.
In my opinion what the defendant obtained was, and was no more or no less than, the right to occupancy for a further twelve months upon the same terms as those on which he was then occupying each of the premises. I think it is impossible to extract from the evidence more than that the complainants, in consideration of an increase in rent, gave to the defendant a 'bit more time' which they decided to allow him before requiring possession was twelve months; what he was getting was a bit more time of occupancy on the terms he was then enjoying.

It is, I think, immaterial by what name one calls the entitlement which the defendant had to the further twelve months' occupancy. If, indeed, it were to be regarded as a lease for twelve months, it was a lease for a term which expired at the end of that period by effluxion of time and no notice to quit would have been necessary to determine the tenancy at that time. As a matter of law it was then at an end. There was no evidence to suggest that there was thereafter such an overholding as would create a tenancy from year to year; so far as the evidence went, it was to the contrary; for it strongly indicated that the complainants were unwilling for the defendant to continue in occupation.

The real question is, by whatever name one may wish to call the defendant's entitlement, what were the terms of that entitlement? I think that, as a matter of law, the defendant was in occupation during the contentious twelve months upon such terms of the original three year lease, then expired, as were applicable and one of these applicable terms was Clause 13. Whatever may have been the case had any argument that six months' notice was necessary; and, as a matter of law, in my opinion it was not open to the Magistrate to find that six months' notice was necessary.

In the course of argument before me many cases were cited and a number of other matters were argued, but it is unnecessary for me to discuss them at length because of the conclusion I have reached. One matter may, perhaps, be mentioned. It was argued by counsel for the defendant as I understood him, that the Magistrate's reasons dismissing the complaints could be upheld on a further ground, namely, that the notices to quit were invalid because they described the

defendant as being a tenant from month to month and gave one calendar month's notice, whereas, if the notices were given under Clause 13, the defendant was wrongly described as a tenant from month to month and Clause 13 provided for only 14 days notice; and it was further argued that in the complaints the tenancy was wrongly described as a 'monthly' tenancy.

I think there is no substance in the submissions. An overholding tenant whose obligation as to rent is to pay it monthly always in advance is not unreasonably described as a tenant from month to month or a monthly tenant, even though his tenancy may be determined by 14 days' notice; and the generosity of the complainants in giving one calendar month's notice instead of only 14 days does not invalidate the notice.

In view of the opinion I have expressed, the orders nisi will be made absolute in each case and the order of the Magistrate at Melbourne dismissing the two complaints set aside.
