

BENAIM v ATTARD

Supreme Court
Flaxman, C.J.
5 March 1958

Landlord and tenant — holding over — liability to pay double value — Landlord and Tenant Act, 1730.

Landlord and tenant — contractual tenant acquiring estate as tenant in common — whether liable to eviction at end of tenancy.

Land tenure — tenancy in common — unity of possession.

The contractual tenant of certain premises owned by tenants in common bought the share of one of them. At the end of the contractual tenancy, the other owner demanded possession and, when it was refused, brought proceedings claiming double value and possession.

Held: (i) Double value is only recoverable under the Landlord and Tenant Act, 1730, where the holding over is contumacious. Here, there was a bona fide claim of right and the Act did not apply.

(ii) As tenants in common share unity of possession, one can not obtain an order for possession against the other.

Cases referred to in the judgment.

Wright v Smith, (1805) 5 Esp. 203.

Swinfen v Bacon, (1860) 6 H. & N. 184.

Kurtz & Co. v Spence & Sons, (1887) 58 L.T. 438.

Action

This was an action in which the plaintiff alleged that the defendant was a tenant holding over and claimed double value and possession.

E.M. Russo for the plaintiff.

S. Benady and Miss P. Benady for the defendant.

14 April 1958: The following judgment was read—

The parties in this suit are tenants in common of premises in Main Street. The defendant first went into possession of part of this property in 1945 as the tenant of the plaintiff and one Moses Mattana for a term of years, and in 1952 the defendant purchased the share of the latter. The term of the lease ended in 1955, and the plaintiff, in writing, demanded possession from the defendant. The defendant, however, continues to occupy, and the plaintiff, relying on the Landlord and Tenant Act, 1730, claims double value of the premises from 1 July 1956 to the date of judgment in this action. He also asks for an order for possession. The defendant denies that the plaintiff is entitled to the remedies he seeks.

The title to the Act states that it is to prevent frauds committed by tenants, and the Act provides that, when a tenant for years holds over after the determination of the term, and after demand for possession is lawfully made, he becomes liable to pay double the yearly value of the premises to the lessor. The statute is thus in effect a penal one, and we have the authority of *Wright v Smith*¹ to show that it can only be applied when contumacy in the tenant brings him within its penalty. It has no application when the resistance to possession is under a fair claim of right. The contumacious must be contumacious in the sense that the tenant knows he has no right to continue.

¹ (1805) 5 Esp. 203.

It was remarked in the course of the above case that the books appeared to be very barren on the subject of actions under the Act, and this statement appears to be equally true to this day. In the present action there is the additional and unusual situation of a tenant who during the tenancy became by purchase a tenant in common with his landlord. No case of the application of the Act to a claim between tenants in common can be found amongst the authorities.

The plaintiff seeks to bring the defendant within the Act by asserting that the defendant went in as a tenant, and that the purchase does not affect the plaintiff's position as his landlord. It is submitted that he should be treated as a stranger holding over without right, and not as a tenant in common. The defendant's answer is that the plaintiff, holding in undivided shares with him, cannot sue for double value, and that even accepting the defendant as a stranger, which I think is the correct view, the Act, in the circumstances of the case, does not apply.

In either event we have the authority already cited and that of *Swinfen v Bacon*¹ to shew that the Act is not applicable to a claim where a person holds over under a bona fide belief that he has a right to do so, but only where the person holding over is conscious that he has no right to retain possession. Before the plaintiff in this action can enforce the penalty of double value he must satisfy the court that there has been a deliberate and contumacious refusal on the part of the defendant to give him possession.

His is the onus, and he does not satisfy me as to this, particularly as it is in evidence that there has been correspondence going on between the parties since 1953, continuing up to August 1956, relating to the continuance of the tenancy.

I think it proper to note at this point that learned counsel for the plaintiff opposed the admission of this evidence, on the ground that the whole correspondence was "without prejudice", and the fact of it was not admissible. He referred me to *Kurtz & Co. v Spence & Sons*², as authority for his objection, and in particular to a passage from the judgment of Kekewich J. referring to letters and interviews "without prejudice".

For the defendant it was argued that the evidence he sought to introduce involved no breach of confidence, being nothing more than evidence to shew that letters were written and that negotiation had taken place. I admitted evidence limited to this, evidence of the contents of the correspondence being excluded. These negotiations relating to the continuance of the tenancy were of a somewhat intermittent character extending over a period of two or three years, but I think their existence is sufficient to negative a charge of contumacious holding over on the part of the defendant, either as a stranger or as a tenant in common. I accordingly find that the Act has no application in this cause, and the plaintiff does not succeed in his claim for double value.

¹ (1860) 6 H. & N. 184.

² (1887) 58 L.T. 438.

The remaining issue relates to the claim for possession. The plaintiff says that the legal position of the defendant is that of a tenant holding-over, and that accordingly he is entitled to the order he claims. Whilst I do not doubt that a claim for use and occupation might succeed in such circumstances (in fact the defendant has admitted liability for rental by payments into court) I can find no substance in the claim for possession. The parties, whatever their earlier relationship, are now tenants in common, and I cannot see how the plaintiff, who shares the property with the defendant in unity of possession, can oust him and put himself in. Both parties have an equal right to the land, which they hold in undivided half shares, and the proper and sufficient remedy in partition.

I shall accordingly dismiss this claim and give judgment for the defendant.