**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Magisterial Appeal No. 1 of 2014**

**BETWEEN:**

**EUGENE LEACOCK** **Appellant**

**AND**

**LORNA GRIFFITH** **Respondent**

**Before: The Hon. Sir Marston C.D. Gibson, K.A., The Hon. Sandra P. Mason, and The Hon. Kaye C. Goodridge, Justices of Appeal**

**2015: 26 March**
**2016: 14 September**

**Mr. Benjamin Drakes in association with Mr. Roosevelt White for the Appellant**

**Mr. Emerson Graham for the Respondent**

## DECISION

**MASON JA:**

**Introduction**

[1] This matter was commenced by the filing in this Court on 28 March 2014 of an application together with an affidavit pursuant to **rule 62.2** later amended to **rule 62.6 (3)** of the **Supreme Court (Civil Procedure) Rules 2008 (CPR)**

for leave to appeal out of time the order made on 28 August 2013 by Her Worship Magistrate Barbara Cooke-Alleyne. A supplemental affidavit in support was filed in excess of 8 months later on 6 May 2014, on which date the application was heard and leave granted to file the appeal.

[2] When this matter first came on for hearing on the said 6 May 2014, the Court gave instructions for the Notice of Appeal to be filed by 17 May 2014 and adjourned the matter for hearing on 24 September 2014. That date was vacated because the record of appeal was not available. A new date of 13 October 2014 was assigned for the appellant to comply with the requirements of **rule 62.9** of **CPR.** The matter was accordingly adjourned.

[3] On the adjourned date of 16 February 2015 the Court made an order that the appellant file and serve submissions by 13 March 2015 and the respondent file and serve submissions by 20 March 2015.The date of hearing was scheduled for 26 March 2015. In the meantime an Amended Notice of Appeal was filed on 5 March 2015.

**Background**

[4] The appellant, Eugene Leacock, resides at Broomfield in the parish of St. Lucy and is one of the beneficiaries under the second will dated 31 December 2008 of her grandmother, Gladys Archer, deceased. By this will

the appellant was bequeathed the chattel house which occupies a plot of land at the same address.

[5] The respondent, Lorna Griffith, is the aunt of the appellant and the daughter of the deceased. By the terms of the said will, the respondent was appointed executrix of the deceased's estate. The plot of land on which the chattel house stands was bequeathed to the respondent.

[6] The respondent was granted probate of the will on 28 June 2012. By letter dated 26 July 2012 from the respondent's attorney-at-law, Mr. Emerson Graham, the appellant was requested to vacate the land on which her chattel house stands by 31 October 2012.

[7] By letter dated 16 August 2012, Mr. Orville Durant, attorney-at-law, acting on behalf of the appellant, sought to refute the respondent's authority and to assert the appellant's claim to ownership of the land. This contention was based on the contents of the deceased's first will.

[8] By letter dated 5 September 2012, Mr. Graham wrote to Mr. Durant advising of probate of the second will and of the sole executorship of the respondent. He then reiterated the directions contained in his letter of 26 July 2012.

[9] In a letter dated 31 October 2012, Mr. Durant indicated a willingness by the appellant to discuss the situation given, according to him, that his client, the appellant, had occupied the dwelling house for over 30 years and had

"personally substantially developed" the house and "it was not now a chattel house". By letter of even date, Mr. Graham informed Mr. Durant of the respondent's rejection of this proposal.

[10] The appellant, having not vacated the property by the stipulated date, the respondent sent her a notice to quit dated 31 October 2012 for delivery up of possession on 30 April 2013. That request was ignored and the matter proceeded to the Magistrate's Court.

**Magistrate's Court Proceedings**

[11] The ejectment application was heard in Magistrate's Court on 28 August 2013. The appellant was unrepresented by counsel. She indicated to the court that she "needed time" and was, according to the court, allowed the maximum time to vacate the premises. The order made by consent was for the appellant to quit and give up possession by 28 October 2013.

[12] When the appellant failed to comply with the consent order, a warrant of ejectment dated 20 November 2013 was issued by the Court. However, when Marshals visited the premises to execute the warrant, it was discovered that the house was not a chattel house but rather consisted mainly of wall. A summons was then issued for the parties to return to court.

[13] On 12 February 2014 when the parties returned to court and the full particulars regarding the house were disclosed, the appellant was advised to seek legal

representation. On 12 March 2014, counsel entered an appearance on behalf of the appellant who then pursued an appeal to this Court.

**Grounds of Appeal**

[14] By Amended Notice of Appeal filed on 5 March 2015, the appellant filed the following 3 grounds of appeal:

> "(a) There should be a reversal of the decision made at the hearing before the learned Magistrate because there is additional evidence available to the Appellant, which was not before the lower court and which would have had an important influence upon the result of the hearing before the lower court in light of **sections 146** and **147** of the **Magistrate's Court Act Cap.116A** of the **Laws of Barbados.**
>
> (b) Even if the Court does not allow this additional evidence, the learned Magistrate erred in law in holding that the purported tenancy of the house spot was validly terminated by the Respondent/Complainant's notice to quit which notice did not comply with **sections 4(1), 11, 13, 14** of the **Security of Tenure of Small Holdings Act Cap. 237** of the **Laws of Barbados ("The Act").**
>
> (c) There was no evidence or no sufficient evidence upon which the learned Magistrate could properly find that the Appellant was served on the 31st day of October, 2012 and was therefore given the statutory minimum period of six (6) months notice pursuant to **sections 11** and **15** of the **Act".**

**Submissions by Counsel**

[15] Mr. Benjamin Drakes, counsel for the appellant, introduced his argument for permission to rely on additional evidence by referring the Court to the provisions of **rule 62.23** of **CPR** and to the principles laid down in the well known English Court of Appeal case of **Ladd v Marshall [1954] 3 All E.R 745 (Ladd v Marshall)** which state that:

> "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, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible".

[16] In considering the first of the **Ladd v Marshall** principles, namely, whether the evidence could not with reasonable diligence have been obtained at the hearing, counsel accepted that an applicant must give an explanation for not providing the evidence at the previous hearing.

[17] While acknowledging that the required evidence was available and existed at the initial hearing in the Magistrate's Court, counsel argued that the appellant did not understand the significance of this evidence nor did she appreciate its importance to the result of the proceedings. According to counsel, it was only when she returned to the court and certain enquiries were made relative to her occupation and residence on the contested property that she discovered the importance of that evidence.

[18] Counsel contended that the appellant's ignorance of the law which was compounded by the fact that she was unrepresented at the hearing should vitiate any argument that the appellant failed to act with reasonable diligence. He submitted that "the wider interests of justice" ought to be considered and it would in the circumstances be necessary to review the background to the matter.

[19] Counsel cited the English Court of Appeal cases of **Haile v Immigration Appeal Tribunal [2001] EWCA Civ 663** and **Gillingham et al v Gillingham [2001] EWCA Civ 906** in support of his argument for consideration of the criterion of "reasonable diligence", for special circumstances affecting the appellant at the initial hearing and for consideration of "the wider interests of justice".

[20] Counsel further submitted that in the circumstances of the case, the interests of justice embodied in **Part 1.1** of **CPR** require that the affidavit evidence of the appellant be received particularly in consideration of the overriding objective.

[21] Counsel argued that the affidavit evidence sought to be adduced fulfils the second principle in **Ladd v Marshall** in that had the Magistrate been made aware of the circumstances under which the appellant had been living on the property, which circumstances gave rise to proprietary estoppel, or of the

issues raised in connection with the devises under the first will of the deceased, there would have been no jurisdiction to hear and determine the disparate interests of the parties by operation of **section 147** of the **Magistrate's Courts Act, Cap. 116A**.

[22] In support of his contention regarding proprietary estoppel and the appellant's equitable interest and title in the property, counsel cited the case of **Blackett v Blackett [2001] 61 WIR 40. (Blackett).** In that case, the father had permitted his son and his wife (daughter-in-law) to place a chattel house on his land and they had expended considerable sums of money and efforts in converting this house into a permanent structure. After the death of the father and later the son, the mother sought to eject the daughter-in-law from the property. The Court held that the son and daughter-in-law had acquired equity in the property as joint tenants and on the son's death his interest passed to his wife, the daughter-in-law, by survivorship under the "jus accrescendi" rule.

[23] In his written submissions, counsel stated that in the absence of the evidence relating to the devise or bequeath of the property under either the first or second will, the Magistrate had granted the order having made presumptions that (i) the respondent had let the appellant into occupation, (ii) a relationship of landlord and tenant existed between the parties and (iii) the house was a

chattel house as defined by law, namely movable property and not a wall structure as was later discovered.

[24] Mr. Drakes submitted that the proffered documentary evidence, namely receipts and photographs showing the extent of wall improvement and the first will of the deceased, satisfies the third criterion under the **Ladd v Marshall** principles, namely that the evidence be credible even if not necessarily incontrovertible.

[25] Counsel's contention in relation to the second ground of appeal was that since the respondent's notice to quit did not substantially conform to the prescribed form as provided for in the **Third Schedule** to the **Security of Tenure of Small Holdings Act, Cap. 237 (the Act)**, it was rendered a nullity. He suggested that the deviations in the notice to quit materially affected the substance of the form which the statute required. He argued that these deviations were calculated to mislead the Magistrate and to allow the respondent to benefit from the order without disclosing material particulars. Counsel relied on **Graham v Price BB 1990 DCI (Graham v Price)** a decision of the now defunct Divisional Court for support of this contention.

[26] On the third ground of appeal which concerns the requirement of the giving of a statutory minimum period of notice of 6 months, counsel submitted that in order to properly obtain an order for ejectment, the respondent must provide

proof of service pursuant to **section 35** of the **Landlord and Tenant Act, Cap. 230.** He stated that the record does not reveal any evidence establishing proof of service as required by law.

[27] Counsel argued that while the appellant was not disputing that service had been effected upon her, she disputed the date when that service had in fact been effected. He noted that the notice to quit was dated 31 October 2012 for delivery up of possession on 30 April 2013. He submitted that given that the deemed date of service of mail by post is three days after date on the postal receipt, notice must be taken as having been effected sometime after 31 October 2012 with the result that the appellant would not have received it until sometime in November 2012 and therefore the required statutory six months notice would not have been satisfied.

[28] In his turn, Mr. Emerson Graham, counsel for the respondent, rejected the notion of fresh evidence. He considered that the appellant had had ample opportunity to express herself fully before the Magistrate. According to counsel, because the appellant had been fully seized of the contents of the second will of the deceased and had knowledge that probate of the will had been granted to the respondent, when the appellant came to court, her sole request had been for more time in order to remove her house from the land. Counsel alluded to the fact that immediately after leaving the court, the

appellant had gone to the National Housing Corporation seeking a house spot. He rebutted the suggestion of the appellant's ignorance of the law by pointing out that even before the proceedings had commenced, the appellant had retained the services of an attorney-at-law who had written to him as well as to the respondent.

[29] Mr. Graham refuted the need for the notice to quit to conform to the provisions of the **Security of Tenure of Small Holdings Act** on the grounds that the circumstances of the case were not that of a contract of tenancy as defined by that **Act**. He explained that the respondent had not rented the land to the appellant, but that the appellant was a tenant at will. Counsel submitted that in any event, there was not even the need for the six months notice because the appellant was a tenant at will. The respondent had merely described herself as landlord as a matter of convenience for the purpose of the proceedings before the Magistrate's Court with no intention to mislead or deceive the court.

**Discussion**

**Issue of Fresh Evidence**

[30] The **CPR** by **rule 62.23** prescribes the rules governing proceedings where it is being sought to introduce evidence "additional to evidence in the court below" and accords to the Court of Appeal a discretion whether or not to grant that request. The rule states:

> "(1) This rule applies to any application to the court to receive evidence in proceedings on an appeal additional to evidence in the court below, as in an appeal in which a new trial is sought on the ground of fresh evidence.
>
> (2) This rule applies unless the court otherwise directs.
>
> (3) The application shall be made by motion on the hearing of the appeal without filing or serving notice of the motion.
>
> (4) The grounds of the application shall be stated in an affidavit.
>
> (5) Any evidence necessary to establish the grounds of the application, and the evidence which the applicant wishes the court to receive shall be given by affidavit.
>
> (6) The applicant shall file any affidavit not later than 28 days before the hearing of the appeal.
>
> (7) The evidence of any other party to the appeal shall, unless the court or a judge otherwise orders, be given by affidavit filed not later than 14 days before the hearing of the appeal.
>
> (8) A party to the appeal shall, not later than the time limited for him to file an affidavit under this rule
>
> (a) lodge as many copies of the affidavit as the Registrar may direct; and

(b) serve three copies of the affidavit on each party to the appeal".

[31] A proper reading of **rule 62.23 (1)** reveals that that sub-rule codifies the principles laid down by Denning LJ in **Ladd v Marshall.** This interpretation of that rule is supported by this Court's decision in **Knox v Deane Civil Appeal No 6 of 2010 (Knox v Deane)** where **Burgess JA** very cogently summarised the legal principles applicable to the receipt by this Court of what he terms "new" evidence under **CPR** and emphasised that the Court has a "broad" discretion whether or not to determine in favour of the receipt of fresh evidence while adhering to the general principle of finality of judgments. At para 31 **Burgess JA** opined:

> "This (broad) discretion is to be exercised only when necessary to achieve the overriding principles of justice underlying **CPR.** Pre-**CPR** authority, and for that matter, even post **CPR** authority, therefore, has only persuasive value in deciding whether the overriding principles of justice require that a departure from **Ladd v Marshall** should be directed. The facts and circumstances of each case alone determine whether the overriding principles require the exercise of the **Rule 62.23 (2)** discretion". (Emphasis added)

[32] In fact this was the position taken by Hale LJ in the English Court of Appeal case of **Hertfordshire Investments Ltd. v Bubb and Another [2000] 1 WLR** where she acknowledged that the position governing applications to adduce fresh evidence on appeal is governed by **CPR.** She noted that the court will not consider evidence which was not before the court below unless

it has given permission to do so and that that discretion must also be exercised in accordance with the overriding objective. She made reference to the English Court of Appeal case of **Grant Russell Banks et al v John Cox et al [2000] EWCA Civ 5565** where Morritt LJ observed at para 41:

> "In my view the principles reflected in the rules in Ladd v Marshall [1954] 1 WLR 1489 remain relevant to any application for permission to rely on further evidence, not as rules but as matters which must necessarily be considered in exercise of the discretion whether or not to permit an appellant to rely on evidence not before the court below".

[33] In the case of **Browne v Moore-Griffith et al Civil Appeal No. 16 of 2009** where an application for fresh evidence filed under **rule 62.23** of **CPR** was denied, this Court recognised that it was not uncommon for fresh evidence to come to light after a judgment had been perfected and in those circumstances the unsuccessful litigant may be able to invoke the evidence in order to challenge the judgment on appeal. The Court went on to state that it is however understood, that such circumstances must be of exceptional character, for the rule of practice in relation to fresh evidence is that the outcome of litigation should be final and the Court of Appeal will not allow fresh evidence to be adduced in support of an appeal if that evidence was reasonably accessible at the time of the original hearing.

[34] This attitude accords with the age old rule laid down in 1843 by Sir James Wigram VC in the case of **Henderson v Henderson 3 Hare 100** that parties

to litigation should bring forward their whole case or they will not be permitted to open the same subject in relation to the matter which might have been brought forward as part of the subject in context, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.

[35] In accordance with the first condition under the **Ladd v Marshall** principles, the admissibility of the fresh evidence turns upon the ability of the appellant to demonstrate that the evidence now sought to be adduced could not have been obtained with reasonable diligence.

[36] The pith of this case is that the respondent came to the court to retrieve her property from the appellant and made that request to the court. The appellant never denied that she was in possession of that property nor indicated that she had or might have any claim to it. In her reasons for decision, the Magistrate noted that the appellant "did not inform the Court that she had built a wall structure or had any reluctance to leave the land". It was against this backdrop that a consent order was made.

[37] As demonstrated by the contents of her affidavit in support of the present application for fresh evidence, the proposed evidence was irrefutably within the knowledge of the appellant during her initial appearance before the court. However, her counsel, while acknowledging its existence at that initial

hearing, seeks to minimize this reality by focussing instead on the appellant's lack of representation at trial and her supposed incomprehension of the significance of this evidence to her case. He argued therefore for consideration of the wider interests of justice and application of the overriding objective since the appellant cannot be said to have failed to act with reasonable diligence.

[38] A proper application of the overriding objective requires the Court to concentrate upon the justice of the position between the parties. Put another way, the Court must take into account the fact that the scales of justice must be evenly balanced and as stated by **Burgess JA** in **Knox v Deane,** where necessary, determine whether the overriding principles of justice require a departure from the **Ladd v Marshall** principles.

[39] It will be recalled that in **Ladd v Marshall** the issue surrounded the telling of a lie by a witness who later sought to resile from that lie. Both Denning and Parker LJJ observed that if it were that a witness had been bribed or coerced into telling a lie or if it were proved that a witness made a mistake on a most important matter and wished to correct it, then the fresh evidence could be entertained. In the circumstances of the present case, the appellant was fully seized of the contents of the second will of the deceased which had been already proved and which gave the respondent authority over the

administration of the deceased's estate. She presented to the Magistrate's Court a willingness to accede to that authority. There was neither coercion nor mistake, nor no lie told. As observed by the Magistrate, she showed no reluctance to move.

[40] In relation to the position of the unrepresented litigant regard might be had to the case of **R (Hysai) v Secretary of State for the Home Department; and other applicants [2014] EWCA Civ 1633.** Although the case dealt principally with the non compliance by parties with certain procedural rules, Moore-Bick LJ had also to consider whether the court should adopt a different approach in relation to litigants in person. He made the following statement which is apposite and can be adapted accordingly to our case:

> "[44] The fact that a party is unrepresented is of no significance at the first stage of the enquiry when the court is assessing the seriousness and significance of the failure to comply with the rules. The more important question is whether it amounts to a good reason for the failure that has occurred. Whether there is a good reason for the failure will depend on the particular circumstances of the case, but I do not think that the court can or should accept that the mere fact of being unrepresented provides a good reason for not adhering to the rules … Litigation is inevitably a complex process and it is understandable that those who have no previous experience of it should have difficulty in finding and understanding the rules by which it is governed. The problems facing ordinary litigants are substantial and have been exacerbated by reductions in legal aid. Nonetheless, if proceedings are not to become a free-for-all, the Court must insist on litigants of all kinds following the rules. In my view, therefore being a litigant in person with no

> previous experience of legal proceedings is not a good reason for failing to comply with the rules".

[41] While the maxim *ignorantia juris non excusat* is historically related to criminal justice, it is in our view equally applicable in this case to dispel the supposition that the appellant's lack of knowledge with regard to certain legal requirements ought to redound to her benefit. And so while it may be that in some instances an entirely new set of facts is so indisputably relevant that they can and should be entertained without injustice even though they had been overlooked through the earlier stages of litigation, this is however not the case in the present matter.

[42] In the premises we are not satisfied that the first condition laid down in **Ladd v Marshall** has been established nor do we see the need to exercise our discretion to relax the strictness of that condition.

[43] The next question to be determined is whether the evidence sought to be adduced would have influenced the Magistrate's decision, although it would not have been decisive.

[44] The unequivocal answer must be in the affirmative.

[45] The parameters of the civil jurisdiction of the Magistrate's Court are set out in part 1X of the **Magistrate's Court Act Cap. 116A.** That jurisdiction is limited. **Section 147 (2)** states in part:

> "(2) A Magistrate's Court shall not, except as in this Act provided, have jurisdiction to hear and determine any action
>
> (a) for the recovery of land; or
> (b) in which the title to any hereditament or to any franchise is in question; or
> (c) ...
> (d) ...; or
> (e) in which the validity of any device, bequest or limitation under any will or settlement may be disputed.

[46] The record of proceedings reveals that it was only when the warrant of ejectment could not be executed because of the structural composition of the house and the parties had returned to court, that the Magistrate became aware that certain considerations affecting the property might come into play. In addition, according to the affidavit evidence, the appellant is claiming to have an entitlement by dint of proprietary estoppel and therefore to have an equitable interest and title in the property.

[47] It is our considered opinion that had the Magistrate been apprised of these circumstances at the initial hearing, she would have been judicious in the handling of the matter being alert to the proscription wrought by the **Magistrates' Court Act** with respect to the jurisdiction of that court.

[48] It seems evident then that this aspect of the **Ladd v Marshall** principles has been satisfied.

[49] We note here that it needs however be said that the case of **Blackett** can only be relevant to the appellant's case in circumstances if and or where a case is brought and determined on its merits. The appellant's evidence has been proffered by means of affidavit and has been contradicted in similar fashion by the respondent. Such evidence has perforce to be put to the test by examination and cross-examination.

[50] It must be noted that after having entered the consent order of the parties, the Magistrate became *functus officio.* Her observations made consequent upon the return of the parties to court because of the marshals' inability to execute the warrant of ejectment were obiter. The Magistrate did not at this stage have the legal authority to reopen the case in order to revisit the consent order.

[51] All that is required under the third limb of the **Ladd v Marshall** principles is that the evidence be apparently credible. Prima facie this threshold has been met. The evidence then need not be incontrovertible. Despite this requirement however, it needs be said that the issue of credibility cannot be determined merely by reading the contents of an affidavit especially when it is at variance with the contents of another and opposing affidavit.

[52] It is our opinion that while the appellant has been able to satisfy conditions 2 and 3 of the **Ladd v Marshall** principles, she has come upon an insuperable hurdle with respect to condition1. It has been admitted that the evidence

sought to be adduced was readily available at the hearing, it residing well within the bosom of the appellant. It has been admitted that the order of the Magistrate was by consent of the parties and without coercion, not erroneously made or fraudulently secured.

[53] We are mindful that while the rules of **Ladd v Marshall** remain relevant to the determination of an application for permission to admit additional evidence, those rules are merely matters which have to be considered subject to the discretion conferred upon this court by **rule 62.23 (2)** of **CPR.**

[54] In the premises we are satisfied that there is nothing in this case which justifies this Court invoking the broad discretion entrusted to it in **rule 62.23 (2)** of **CPR.** In the circumstances the appellant's application to adduce fresh evidence is denied.

**Notice to Quit**

[55] The two remaining grounds of appeal will be dealt with under this head.

[56] The appellant's argument is that the noncompliance of the respondent's notice to quit with certain sections of the **Security of Tenure of Small Holdings Act (the Act)** nullified that notice and as a result the Magistrate erred in terminating the tenancy.

[57] We are of the view that because of the peculiar facts of this case, that **Act** is inapplicable.

[58] Witness the facts as set out earlier in this decision but which bear some repetition here. The land in question belongs to the respondent having been bequeathed to her by the will of her deceased mother. The house that stands on that land belongs to the appellant having been bequeathed to her by the said will. On completion of the probate proceedings, the respondent sought to gain possession of her land. The only means by which she could do so, after letters from her attorney-at-law failed to achieve the desired result, was by serving the appellant a notice to quit. That notice to quit simply said:

> I, LORNA ANETHA GRIFFITH, of Broomfield in the parish of St. Lucy give you NOTICE TO QUIT and deliver up possession on the 30th day of April 2013 of the house spot on which you are residing situate at Broomfield in the parish of Saint Lucy in this Island which you hold as a Tenant at Will.
>
> I require the house spot for my use.
>
> Dated the 31st day of October 2012
> Lorna Anetha Griffith
> Landlady

[59] While the respondent indicated to the appellant that she, the appellant, was residing on the land as a tenant at will, the facts do not give rise to that classification.

[60] A tenancy is said to be created when a contract for exclusive possession of premises for some determinate period exists. Thus if the three hallmarks of such contract are absent, namely exclusive possession, a term and a rent, then there will not be a tenancy unless there are exceptional circumstances to

negative such: see **Prudential Assurance Co. Limited v London Residuary Body et al [1992] 2 A.C 386** per Lord Templeman in the House of Lords.

[61] The facts in our case disclose that the appellant falls more appropriately into the category of a tenant at sufferance.

[62] According to the learned authors of Megarry & Wade, on The Law of Real Property 7th edition at para 17-079 and 17-080, a tenancy at will arises wherever a tenant **with the consent of the owner** occupies land as tenant on the terms that either party may determine the tenancy at any time and where either party does any act incompatible with the continuance of the tenancy.

[63] Halsbury's Laws of England 4th edition, vol 27(1) at paras 176 -177 indicates that a tenancy at sufferance arises by implication of law and may not be created by contract between the parties. A tenant at sufferance has possession but no privity of estate. The tenant would have entered on the land by a lawful title – in the instant case by permission and consent of the testatrix – and after the title had ended – that is, on the death of the testatrix – continued in possession without authority and without obtaining the consent of the person then entitled – in this case, the respondent. The circumstances of a tenant at sufferance are distinct from a tenant at will who is in possession with the landlord's consent. A tenancy at sufferance requires no notice to determine it and consequently the landlord may enter at any time without notice and may

sue for use and occupation of the premises: **Leigh and Another v Dickeson (1884) 15QB60**.

[64] In coming to the conclusion that the **Act** has no bearing on this case, regard must be had to **section 2** of t**he Act** - the interpretation section - by which the relevant terms are defined.

[65] For the purposes of the **Act,** a tenant means the holder of land under a contract of tenancy and includes the executors, administrators, assigns or other persons deriving title from a tenant.

[66] A contract of tenancy means a letting or sub-letting of land or agreement for letting or sub-letting land, for a term certain or for any periodic tenancy, and includes a licence to occupy land. This definition when juxtaposed against the facts at bar, indicates that there has been no evidence proffered of letting or sub-letting. Letting presumes the payment of money. In addition there has been in this case neither a term certain nor periodic.

[67] Counsel sought to argue that the appellant was a licensee having derived that title through her relationship with her grandmother with whom she lived in the house on that land. This supposition is inarguable.

[68] Taking into account that a licence is an authority to do a particular act upon another's land without possessing any title therein, even if the affidavit evidence that the appellant resided with her grandmother is to be accepted, on

the grandmother's death that licence would have ceased to exist unless under the terms of her will, there had been a condition that the appellant should continue to live there for a determinate period. Therefore, on the grant of letters testamentary, the respondent as executrix becomes responsible for the administration of the deceased's estate and is duty bound to carry out the wishes of the testatrix. In any event, the grandmother's house has been bequeathed to the appellant but not the land.

[69] In our opinion there is no contract of tenancy.

[70] A house-spot is defined in the **Act** as any parcel of land comprised in a contract of tenancy made (whether or not the contract of tenancy expressly so provides) in contemplation of the land being used solely as a site for a chattel building and the curtilage appurtenant thereto for the use of the tenant, as a dwelling or as a place of business. While the plot of land on which the appellant's house is sited is prima facie a house-spot, it having been determined that a contract of tenancy does not exist in the present circumstances, this dictates that this plot of land cannot be defined as a house-spot for the purposes of the **Act**.

[71] According to the **Act,** a landlord means any person for the time being entitled to receive the rents and profits of any land. While the respondent is legally entitled to receive rents for her land if she had so requested, she specifically

refers to the appellant in the notice to quit as a tenant at will, a person from whom no rent is collected. There is no evidence that the respondent either demanded or collected rent from the appellant. So although the respondent in the notice to quit refers to herself as the "landlady", it is evident that the usual relationship of landlord and tenant did not exist. In addition we do not discern that there was any intention on the part of the respondent to mislead or deceive the court. We are of the view that erroneous nomenclature cannot operate to defeat the respondent's claim.

[72] Since we have determined that the **Act** is inapplicable, then by extension the need for conformity with the form in the Third Schedule to the **Act** is obviated. However, for the sake of completeness we state why that argument for compliance with the prescribed form cannot be sustained.

[73] Reliance was placed by counsel for the appellant on the case of **Graham v Price** which is distinguishable. In that case there was a definitive relationship of landlord and tenant. The plaintiff had let to the defendant a house-spot for which the defendant had paid rent under a quarterly tenancy up until a notice to quit was served on him. That notice purported to be in accordance with the requirement for the determination of a contract of tenancy under the **Act** but did not strictly conform to the prescribed form as provided for in the Third Schedule to the **Act,** (i) in that it did not identify the landlord as the person

giving the notice, (ii) it did not describe the land as a house-spot and the tenant as being under a contract of tenancy under the **Act** and (iii) it did not state the reason for terminating the tenancy.

[74] The Divisional Court determined that there being a contract of tenancy under the **Act**, the notice ought to have specifically conformed to the form prescribed by the **Act** and so the deviations therefrom materially affected the substance of the form which the statute required, thereby nullifying the notice.

[75] In light of the findings above, it stands to reason that the requirement for the statutory minimum period of six months notice to quit pursuant to the **Act** would not now obtain. For being a tenant at will, only a fair notice is required. In our opinion "fair notice" connotes a reasonable period and not a fixed or determinate date.

[76] The proof of service in **section 35** of the **Landlord and Tenant Act** which counsel for the appellant contends is necessary before an order for ejectment can be issued, relates to the written notice by which a reluctant or recalcitrant tenant is informed of the landlord's intention to proceed to recover possession. By **subsection 3** it is provided that upon proof of service of this notice, and of neglect or refusal of the tenant to deliver up possession, the Magistrate shall proceed to issue a warrant of ejectment.

[77] The **Act** does not state by what means proof of service is to be effected but the trial record exhibits as Exhibit 'B' a copy of that notice dated 30 April 2013, a date exactly one year after the appellant was required to give up possession. In our opinion this stance taken by the appellant equates to a non sequitur. The appellant admitted service of the notice to quit and of this **section 35** notice by her appearance before the court. The proceedings do not disclose any objection to these notices by the appellant.

[78] On the final tack, counsel for the appellant sought to determine the effective date of service of the notice to quit by stating that it does not logically fit into the time period which takes account of the three days deemed date of service by post. He however neglected by documentary proof, namely the postal receipt to which he referred, to show when the appellant did in fact receive the notice to quit. In the circumstances, even if that six months notice were necessary, supposed logic aside, there is no record to prove that the appellant did not receive it in time.

[79] In sum, this Court finds no reason to set aside the order of the Magistrate made on 28 August 2013. This determination does not, however, preclude the appellant from seeking elsewhere consideration of her suggested rights to equitable title in the land.

**Disposal**

[80] This appeal is dismissed and costs to the respondent to be assessed if not agreed.

**Chief Justice**

**Justice of Appeal** **Justice of Appeal**