REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 159 OF 1977

BATTAN ENGINEERING WORKS.....APPELLANT

VERSUS

WHITE LINE RETREAD DEPOT.....RESPONDENT

JUDGMENT

This is an appeal from a decision of the business premises rent tribunal ordering a tenant (the appellant) to give vacant possession of premises in Nairobi to the landlord (the respondent).

The landlord's notice dated 20th September 1976 seeks termination of the tenancy on the ground that the landlord intends to occupy the premises for a period of over one year for the purpose of a business carried on by it (section 7(1)(g) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. There is another ground which the tribunal rejected and with which we are not concerned. The tenant filed a reference to the tribunal.

The suit premises are part of larger premises divided into three portions.

The tenants of two of these portions have vacated them at the landlord's request. The landlord now requires the appellant's portion to expand its tyre retread business.

Mr D N Khanna appearing for the tenant argued two grounds of appeal on the evidence before the tribunal. The remaining grounds related to the interpretation of section 7(2) of the Act. He submitted that there was no evidence that the landlord intended or would be able to occupy the premises for a period of over one year, or that the suit premises were occupied as a shop as defined in section 2(1) of the Act. They were clearly not used as either a hotel or a catering establishment.

The manager of the landlord company testified that, the premises in which it had carried on its tyre retread business having been destroyed by fire, it required for the purpose of its business the whole of the premises of which the suit premises formed part. The space already vacated by the other two tenants was not sufficient. The tribunal accepted that the landlord required the premises for its own use. The inference, I think, is inescapable that the landlord intended to occupy the tenant's premises for the purposes of its business and, in view of the nature of that business, intended to do so for a period of over one year as stated in the landlord's notice.

The landlord is itself a tenant on a month-to-month basis and, therefore, subject to fifteen days' notice. There was no evidence that it would be allowed to occupy the premises for another year. In *Gregson v Cyril Lord Ltd* [1962] 3 All ER 907 the Court of Appeal in England held that a landlord had to satisfy the Court that he had a reasonable prospect of being able to bring about this occupation by his own act of volition and that the test was an objective one. The same test, I think, should be applied here. The

landlord had occupied the premises for six years. A reasonable man in the circumstances would believe that he had a reasonable prospect of being able to continue his occupation for at least another year.

If the premises were not occupied by the tenant as a shop, the tribunal had no jurisdiction. The tenant raised no objection to the jurisdiction of the tribunal at the hearing. It referred the matter to the tribunal under section 6 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, the appropriate form including the words "I therefore request the tribunal to investigate the matter and determine the issues involved". In thus submitting to the jurisdiction the tenant, I think, was by its conduct (if not expressly) admitting that the tenancy was a controlled one and therefore that the premises were occupied as a shop.

I turn now to the interpretation of section 7(2) of the Act. In crossexamination the landlord's witness said:

We have no interest in this property except that we pay rent to the landlord as their tenants. I have no receipts here. We have had a verbal tenancy with the landlord since 1970. I have nothing here to show that a verbal tenancy was created in 1979 in favour of my company. We have been sub-letting the suit premises to various tenants since 1970. We never occupied the suit premises until February 1977.

Mr Khanna contended that the landlord had no interest in the premises within the meaning of that word in section 7(2) of the Act, which reads as follows:

The landlord shall not be entitled to oppose a reference to a tribunal on the ground specified in subsection (1)(g) of this section if the interest of the landlord, or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created within the five-year period preceding the date of the tenancy notice seeking to terminate the tenancy, and at all times since such purchase or creation the premises concerned have been occupied wholly or mainly for the purposes of a shop, hotel or catering establishment.

The reference was made under section 7(1)(g) of the Act. Mr Khanna submitted that "interest" means a proprietary interest. There could not be a merger without a proprietary interest and an interest which is not proprietary could not be purchased, he contended. There would have to be a continuing interest for at least one year after the date of the tenancy notice making at least six years in all and a monthly interest such as the landlord had could not mature to six years. Except where a premium was paid, a lease could not be purchased and, without registration, an interest could not be created. He also submitted that there was no evidence that the premises had been occupied wholly or mainly as a shop since such purchase or creation.

Mr Esmail appearing for the landlord said that he was not contending that his client's interest was purchased; it was created and it was created in 1970 when the landlord became a tenant on a month-to-month tenancy.

The interest of the landlord need not be proprietary.

The mischief the subsection is designed to prevent is the acquisition of controlled premises by a person as landlord in order to obtain early occupation for the purposes of a business to be carried on by him. The clear intention of Parliament was to protect a tenant from eviction by a landlord who has not been the landlord for at least five years preceding the notice seeking termination of the tenancy. "Landlord" is defined in section 2(1) as meaning:

the person for the time being entitled, as between himself and the tenant, to the rents and profits of the premises payable under the terms of the tenancy.

The word therefore includes a person who is himself a tenant without restriction as to the terms of his tenancy. The definition is fundamental to the interpretation of the Act. The words:

If the interest of the landlord, or an interest which has merged in that interest and but for the merger

would be the interest of the landlord, was purchased or created

are taken from section 30(2) of the Landlord and Tenant Act 1954 (England). “Landlord” in section 44(1) of that Act is defined by reference to his ownership of an interest in the property comprised in the tenancy, a definition which is so framed as to exclude any tenancy which has less than fourteen months to run. The interpretation by Courts in England of the words “interest” and “created” is therefore of no assistance. Having regard to the mischief the subsection is designed to prevent and the more liberal definition of the term “landlord” in our Act, these words in my opinion must be given their ordinary and natural meaning. “Interest” would then include the right to receive rents and profits and “created” would not be restricted in meaning to created by registration. To hold otherwise would be to disregard the definition of “landlord” and exclude many sub-tenants from the protection the provision is intended to afford them. If the legislature had intended to restrict the meaning of the word “landlord” in this provision it would have done so expressly and not by implication.

Since the term “interest” also includes a proprietary interest I am not persuaded that the phrase relating to merger of interest deprives the word of its ordinary and natural meaning. The tenancy of the landlord is a lease from month-to-month terminable on fifteen days’ notice. It was made or created in 1970 and not having been terminated is still in existence. It was not created within the five-year period preceding the date of the tenancy notice. The two conditions in section 7(2) being conjunctive it is unnecessary to consider whether the premises had been occupied wholly mainly for the purposes of a shop at all times since the creation of the landlord’s interest.

I would dismiss this appeal with costs to the landlord and would grant a certificate for a getting-up fee. The tribunal ordered the tenant to give vacant possession within six months of its order of 16th November 1977. I think that it would be unreasonable to give the tenant more than a further two months from the date of this judgment.

Appeal dismissed with costs.

Dated and Delivered at Nairobi this 3rd day of January 1977.

A.H.SIMPSON

JUDGE