

A

V. N. RAO

v.

B

HENRY E. SANDAY

[COURT OF APPEAL, 1977 (Gould V.P., Marsack J.A., Henry J.A.)  
11th, 22nd July]

Civil Jurisdiction

C *Landlord & tenant—notice to quit—subsequent acceptance of rent without prejudice to notice to quit—no operation as waiver of notice—Land Transfer Act 1971 s.169—Property Law Act 1971 s.100(2)—Fair Rents Ordinance (Cap. 241).*

A formal notice to quit was served terminating the tenancy on the 31st December 1976. Two further monthly payments of rent were accepted by the landlord without prejudice to the notice to quit.

D *Held:* Acceptance of rent did not operate to revoke a notice to quit in the absence of evidence of any intention to create a new tenancy, but in any event the case came precisely within the terms of Property Law Act s.100(2) so that no new monthly tenancy was created.

E *Per curiam:* The report of a registered valuer that the value of the flat was in excess of the limit of jurisdiction should have been accepted as conclusive proof, in the absence of any evidence to the contrary, that the flat was not protected by the provisions of the Fair Rent Ordinance.

Cases referred to:

*Davies v. Bristow* [1920] 3 K.B. 428; 123 L.T. 655.  
*Clarke v. Grant* [1950] 1 K.B. 104; 1949 1 All E.R. 768.  
 F *Doe d. Cheney v. Batten* [1775] 1 Cowp. 243; 31 Digest 457.  
*Davenport v. The Queen* 3 App. cases 115.  
*Keith Prowse v. National Telephone Co.* [1894] 2 Ch. 147; 1894 L.J.R. 373.  
*Davies v. Briston* [1920] 3 K.B. 428.

Appeal against the dismissal by the Supreme Court of an application for possession under Land Transfer Act 1971 s.169.

G *P. Knight* for the appellant.  
*Mr Kato* for the respondent.

Judgment of the Court read by Henry J. A.: [22nd July 1977]

H Appellant owns a two-storied building situated at No. 10 Armstrong Street, Suva. Respondent held a monthly tenancy of one of the two residential flats comprising the said building at a rental of \$57 payable monthly in advance. It is common ground that a notice to quit terminated the tenancy on December 31, 1976 and thereafter respondent made two payments of the monthly rent, that is, for the months of January and February, 1977. Receipts were issued for each payment expressly stating that it was accepted without prejudice to notices to quit and legal

proceedings for eviction. Appellant brought proceedings under the provisions of section 169 of the Land Transfer Act 1971 claiming possession on the ground that the tenancy had been lawfully terminated. Respondent replied by claiming that the acceptance of rent rendered the notice to quit invalid (*sic*) and that he was protected by the Fair Rents Ordinance (Cap. 241).

The first defence of respondent was met by an argument by counsel for appellant that section 100, subsection (2) of the Property Law Act 1971 enabled such payments to be made without impairing the efficacy of the notice which terminated the tenancy on December 31, 1976. The learned judge rejected this contention and held that section 100(2) applied only to rent for the remaining period of the tenancy after notice had been given and that acceptance of rent for any period after December 31, 1976 created a new monthly tenancy. The application was accordingly dismissed. This appeal is against such dismissal.

Section 100, subsection (2) provides:

"100 (2) After the giving of a notice to quit acceptance of rent expressed to be without prejudice to the notice shall not operate as a waiver of the right to enforce the notice or create or revive a tenancy."

Any payment of rent which accrues due during the currency of a tenancy is merely the performance and acceptance of performance of an existing obligation. Such an act has no legal significance in relation to the continuance of the tenancy unless it is voidable under a right of forfeiture for breach of its terms. In that event such a payment may amount to a waiver of the right of forfeiture. No such question arises in respect of rent whilst the term continues and no right of forfeiture has arisen—the payment and acceptance of rent is a normal event happening according to the provisions of the tenancy during its agreed term. Attention was drawn to this distinction by Lord Goddard C.J. in *Clarke v. Grant* [1950] 1 K.B. 104, 105 where his Lordship when dealing with a payment of rent for a month after the expiry of the notice to quit said:

"The County Court Judge has fallen into the error of confusing an acceptance of rent after a notice to quit with an acceptance of rent after notice that a forfeiture has been incurred."

His Lordship continued later:

"It has always been held that if the landlord accepts rent after notice of forfeiture he thereby acknowledges that the lease is continuing.

With regard to the payment of rent after a notice to quit has been given in respect of a periodic tenancy such as a yearly tenancy, the result is to be the tenancy to an end just as effectually as if there had been a term which had expired. Therefore, when a landlord has brought a tenancy to an end by means of a notice to quit, a payment of rent after that date will only operate in favour of the tenant if it can be shown that the parties intended that there should be a new tenancy. A new tenancy must be created. That has been the law ever since it was laid down by the Court of King's Bench, presided over by Lord Mansfield, in *Doe d. Cheney v. Batten* (1). I need not read the judgments in extenso, but Lord Mansfield said (2): "the question therefore is, *quo animo* the rent was received", and what the real intention of both parties was."

(1) (1775) 1 Cowp. 243 (2) Ibid: 245

- A** Waiver is an appropriate term only when there is an abandonment of a right: *Halsbury's Laws of England* (3rd Ed.) Vol. 14 para. 1175 p. 637. Payment of rent due whilst the tenancy is still running, and is not voidable for breach, cannot be construed as the abandonment of any right. Nor can such a payment create a new tenancy nor revive a former tenancy. Such an act is no more than a normal incident during the tenancy and can have no such contractual effect. The language of section 100(2) is therefore quite inapt when applied to the carrying out of a moral obligation to pay rent during the term when there has been no breach which will render the contract voidable at the option of the landlord.

- C** There are numerous cases in the reports where the effect of payment of rent for a period after the termination of the tenancy has been a matter of contest. *Clarke v. Grant* (*supra*): *Davenport v. The Queen*: 3 Appeal cases 115, 131, and *Keith Prowse & Co. v. National Telephone Co.* [1894] 2 Ch. 147 are typical instances. Other cases are cited in *Halsbury's Laws of England* (3rd Ed.) Vol. 30 at pp. 528, 529. It was pointed out by Lush J. in *Davies v. Bristown* [1920] 3 K.B. 428 pp. 437-8 that waiver of a notice to quit was a convenient but inaccurate expression and that what happens is that the notice has expired and rent has been accepted thereafter. Thus, although waiver is inapt it has gained currency. Section 100(2) covers precisely the questions, which have arisen in the cases where payment has been made for a period after termination. It now provides a certain means whereby difficult questions of fact can be avoided by complying with its provisions. This is exactly what happened in this case. Accordingly, we are of opinion that no new tenancy was created and that the notice to quit had effectively terminated the tenancy at the time of hearing. Counsel for respondent did not argue in support of the judgment on this point.

**The learned judge said in respect of the second point:**

- F** "It is not necessary to consider the defendant's claim to be protected by the Fair Rents Ordinance but if I had to do so I would hold that this raises an issue which cannot in this case be properly dealt with in chambers. Mr Knight argued that I should accept the Registered Valuer's affidavit evidence as he is more qualified than the defendant to assess the value of the premises. The defendant may have been able to produce a qualified witness to establish a different value if he had had an opportunity to do so. In that event I would be faced with conflicting affidavits and be in no position to accept one or reject the other."

- G** A comprehensive valuation was sworn to by a registered valuer. It showed that respondent's flat was valued at \$10,199. For protection under the Ordinance the value must not exceed \$6,000. Respondent elected to go to hearing without calling expert evidence to contradict this valuation. Counsel for respondent neither challenged this evidence nor asked for an adjournment to give time to file an affidavit in opposition. There should have been a finding on the evidence that respondent was not protected by the provisions of the Fair Rents Ordinance (Cap. 241) by reason that there was uncontradicted proof by a registered valuer that the value was far in excess of the limit of jurisdiction.

The result is that the appeal must succeed and the dismissal of the application in the Court below must be set aside. The normal result would be that this Court would make an order for possession or direct that such an order be made. However, both counsel agreed that two further notices to quit have been served—one as a result of the acceptance of rent which does not have the protection of Section 100(2). This has happened since the hearing in the Court below and may have altered the legal relationship of the parties. The case therefore should be remitted for the Supreme Court to deal further with the application in such manner as may, after hearing counsel, appear to be just in all the circumstances.

The appeal is allowed with costs to appellant. The judgment in the Court below is set aside and the case is remitted to the Supreme Court for further hearing accordingly.

*Appeal allowed. Case remitted to Supreme Court for further hearing.*