

and his appeal were dismissed. Then the appellant unsuccessfully sought the leave of the High Court to appeal to this Court.

[2] Subsequently this Court granted leave for the appellant to appeal on the narrow ground whether the Residential Tenancies Act 1986 applied. The appellant and respondent were permitted to file additional affidavits concerning the use of the premises and both parties availed themselves of that opportunity.

Background

[3] Pursuant to an oral agreement the respondent leased part of the premises at 2 Queen Street, Thames, to a company of which the appellant was the sole shareholder and director. After the company was de-registered in July 2004 the appellant remained in occupation until the respondent re-entered in August 2005. He did not pay any rent or outgoings.

[4] The respondent sought summary judgment against the appellant for unpaid rent and outgoings during the period that the appellant was in possession of the premises. His application was opposed by the appellant on several grounds including the ground that the respondent had failed to comply with the Residential Tenancies Act. This allegation was rejected by the respondent who contended that the premises had been used for commercial purposes and that the Act did not apply.

[5] Having heard the application for summary judgment the District Court Judge found that the appellant had occupied the premises pursuant to a monthly tenancy in terms of s 105 of the Property Law Act 1952 for commercial purposes and that the Residential Tenancies Act did not apply. The Judge was satisfied that the second defendant did not have any arguable defence and entered summary judgment accordingly.

[6] On appeal to the High Court Cooper J concluded that the appellant had not advanced any cogent argument to show that the District Court was incorrect and dismissed the appeal accordingly.

[7] In this Court the appellant contended that the premises were used for both commercial and residential purposes with the result that s 2(3) of the Residential Tenancies Act deemed the premises to be residential premises for the purposes of that Act. He alleged that the evidence before this Court verified that he had occupied the premises as a place of residence since 1996 and that the respondent had failed to prove that the premises were let principally for purposes other than residential purposes.

[8] It was not disputed by the respondent that the appellant lived at the premises. Nevertheless the respondent maintained that the evidence now available confirmed that the respondent had established under s 2(3) that the premises were let principally for the operation of the appellant's second-hand dealers and storage business. Under those circumstances, submitted Mr Moodley, the Residential Tenancies Act had no application and the appeal to this Court was bound to fail.

Discussion

[9] As indicated by this Court when leave to appeal was granted, there was limited material before the District Court about the use of the premises at the relevant time and it was not clear from the Judge's decision whether all relevant factors had been taken into account. It was for that reason that the parties were provided with an opportunity to adduce further evidence for consideration by this Court. Given that much of the information before us was not before the District Court, or indeed the High Court, it is necessary for us to consider afresh whether the Residential Tenancies Act applied.

[10] It is common ground that the premises were used by the appellant for both commercial and residential purposes. Under those circumstances s 2(3) of the Residential Tenancies Act applies:

... where any premises ... are used for both commercial and residential purposes, the premises shall be deemed to be residential premises unless it is proved that the premises were let principally for purposes other than residential purposes.

We note that the test is whether the premises were *let* principally for purposes other than residential purposes and that by virtue of the s 2(1) definition, "residential

premises” means “any premises used or intended for occupation by any person as a place of residence”.

[11] The premises in issue, which comprise a land area of 6,235 square metres, are located within an industrial area. A two storey building occupies a relatively small proportion of the premises which include a large yard area. Only part of the ground floor of the building was occupied by the appellant with the remainder being leased to Bendon Limited, which operates a factory shop, and to Thames Peninsula Flooring, which operates a flooring business. The appellant was the sole occupant of the much smaller first floor.

[12] The appellant said that he used the first floor as a flat and that he also used part of the ground floor for residential purposes. He does not dispute that after the company was de-registered he continued to operate the storage and second-hand dealers business from the premises. As indicated by the respondent’s affidavit and the photographs exhibited to that affidavit, that business included the storage of containers, scrap metal, vehicles etc. It can be safely inferred that residential occupation of the premises would be advantageous to the conduct of that business.

[13] Having considered the affidavit evidence, including the photographs and plans, we are satisfied that the respondent has discharged the onus resting on him under s 2(3) of establishing that the premises were let principally for purposes other than residential purposes. In our view they were let principally for commercial purposes and the appellant’s residential use was incidental to that principal purpose. In the overall context of the land and buildings, the part occupied by the appellant for residential purposes was very small. The appellant stayed in the premises as a matter of convenience and was thereby able to keep his eye on the stored goods as a kind of watchman. Moreover, his residential use of the premises was intermittent and the so-called flat was not fully “operational” in residential terms.

[14] It follows that the Residential Tenancies Act does not apply.

[15] The appellant relied on *Kahi v Lucas* HC AK HC81/96 23 September 1996. However, that case can be easily distinguished. In that case Anderson J concluded

that the whole of the top floor of a three storey building constituted residential premises for the purposes of the Residential Tenancies Act notwithstanding that other parts of the building were used for business purposes. That outcome reflected that there was a discrete sub-tenancy of the whole of the top floor of the building for residential purposes. That situation can be contrasted with the *dual* use of the respondent's premises by the appellant which triggered s 2(3) of the Act.

Outcome

[16] The appeal is dismissed.

[17] The respondent is entitled to costs in the sum of \$5,000 together with usual disbursements.

Solicitors:
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