LAND HOLDINGS (1958) LTD. v NORTON

Supreme Court
Flaxman, C.J.
30 April 1964.

Rates — communal services tenements — prohibition order disregarded by tenants — liability for rates — Public Health Ordinance, ss. 85, 290, 300 and 303.
Landlord and tenant — communal services tenements — liability for rates.
Landlord and tenant — prohibition order — tenants remaining in breach — whether statutory tenants — Landlord and Tenant (Miscellaneous Provisions) — Ordinance.
Nuisance — tenants in occupation after prohibition order — whether statutory tenants.

The owners of certain premises failed to comply with an abatement notice. The magistrates' court made a nuisance order which included a prohibition order. The owners served the prohibition order and also notices to quit on the tenants and ceased to accept rent from them, but the tenants remained in occupation.

The premises were communal services tenements and the City Council claimed general and brackish water rates from the owners, who disputed liability. They were sued in the magistrates' court, where they were held liable for the rates. They appealed to the Supreme Court.

Held: (i) The tenants, being in breach of their duty to vacate the premises in compliance with the prohibition order, could not rely on the Landlord and Tenant (Miscellaneous Provisions) Ordinance (Cap. 83, 1965-69 Ed.) to justify their occupation.

(ii) Unlawful occupation by trespassers cannot be deemed to be the occupation of the owners.

(iii) The tenants, being in de facto occupation, were liable for the rates.

Notes. (a) In the catchwords, reference is made to sections of the Public Health Ordinance by reference to the 1970 Edition. The references in the judgment are to the 1950 Edition. The corresponding numbers are, 1950 Edition: Cap. 104, ss. 82, 282, 292 and 295; 1970 Edition: Cap. 131, ss. 85, 290, 300 and 303.

(b) In *Chapman v Becerra (No. 2)*, (1979) Gib. L.R.21 ,Spry, C.J., dissented from the opinion that a statutory tenant who remains in occupation in breach of a prohibition order is a trespasser.

Cases referred to in the judgment.

Salisbury Corporation v Roles, (1948) W.N. 412.
London County Council v Churchwardens etc. of the Parish of Erith, [1893] A.C. 562.
Associated Cinema Properties Ltd. v Borough of Hampstead, [1943] 2 All E.R. 696.
Holywell Union v Halkyn District Mines Drainage Co., [1895] A.C. 117.
Cory v Bristow, (1877) 2 App. Cas. 262.
Crowther Smith v New Forest Union, (1889) 54 J.P. 324.
Blake v Smith, [1921] 2 K.B. 685.

Appeal

Appeal from a decision of the magistrates' court in a suit brought by the Town Clerk to recover arrears of rates.

J.J. Triay and J.E. Triay for the appellants.
S. Benady, Q.C., and B. Vaughan for the respondents.

30 June 1964: The following judgment was read—

This is an appeal against a decision of the stipendiary magistrate holding the appellants as owners liable to pay the rates of premises known as 41 Prince Edward's Road for the second, third and fourth quarters of 1963. These premises were the subject of a nuisance order made on 28 March 1963, on the complaint of the town clerk; the owners, being in default of a notice to abate the nuisance, being ordered to effect extensive repairs, or otherwise to abate the nuisance by demolishing the building. The court, at the same hearing, decided that the building was unfit for human habitation, and prohibited its use until rendered fit for that purpose.

On an appeal by the owners to this court against these orders it was determined on 9 April 1964, by consent, that the order to effect the specified works be set aside, the rest of the nuisance order being affirmed.

In the meantime they had been sued in the magistrates' court for arrears of general and brackish water rates for the three quarters of 1963 subsequent to the nuisance order, liability was unsuccessfully disputed, and an order for

payment of the amount claimed as rates and costs, the subject of this appeal, was made on 18 March 1964.

(After setting out the grounds of appeal, the Chief Justice continued)

The present situation is clearly most unsatisfactory. In spite of the prohibition the tenants, or some of them, remain in the condemned building. The appellants, who served notices to quit immediately after the nuisance order, and who wish to demolish and build, are powerless to secure their eviction, without which they cannot comply with the demolition order; and the respondents, presumably for the practical reason that no alternative accommodation can be made available by the Administration, have taken no steps to bring the tenants, who are there despite the prohibition, to court for their contempt of its order.

The appellants must take some share of responsibility for any delay in this matter for they sought and obtained several adjournments of their appeal against the City Council's decision which they lodged on 27 April 1963, and it was not until 9 April 1964 that the consent order was applied for and obtained. Pending the disposal of that appeal the Council were precluded from action. The appellants assert that they have neither received nor claimed rentals from the tenants since the date of the nuisance order, nor recovered previous arrears, and no dispute arises as to this point. The occupants live rent free in their squalor, in premises which are a danger to all persons using the property, and particularly to themselves.

The learned stipendiary magistrate, giving his decision on the claim for rates at a time when the alternative order to repair was effective, expressed the view that both parties were morally to blame for their inaction. The position is now somewhat altered by the setting aside of that part of the nuisance order relating to repair, but it remains unfortunate, particularly in the absence of legislation analogous to the English Housing Act, where in a situation such as this the authority would be able to act effectively, and the practical difficulties could be overcome. The present position is not solely of the parties making. There is a presumption (vide the dicta of Lord Goddard in *Salisbury Corporation v Roles* [1] that local authorities are ready and willing to act reasonably, but, as this appeal shows, they can only act within the bounds given to them by existing law.

The extent to which this situation bears on the merits of the claim for arrears of rates remains to be seen. The appellants agree that they have not paid the sum claimed, and that they must shew why payment cannot lawfully be demanded from them. The claim is under s. 295 of the Public Health Ordinance, which deals with proceedings for the recovery of rates. In this case the appellants, because of powers given by s. 292, are rated instead of the occupiers: a departure from usual rating practice and from the more general law contained in s. 282. Occupation is attributed to owners

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[1] (1948) W.N. 412.

in the case of communal services tenements, as defined in the Landlord and Tenant (Miscellaneous Provisions) Ordinance, and in fact, by order of the Governor, published in a Schedule to Government Gazette No. 589 of 24 April 1959, the premises in question were so defined.

The subsections of s. 292 particularly material to this appeal are (1) and (4). Subsection (1) reads:-

> "(1) Notwithstanding the provisions of subs. (3) of s. 282 of this Ordinance the owners shall be rated instead of the occupiers in the case of dwelling-houses being communal services tenements for the purposes of Part II of the Landlord and Tenant (Miscellaneous Provisions) Ordinance, and in the case of dwelling-houses owned by the Government of Gibraltar and let to members of the general public at a rent inclusive of rates."

Subsection (4) reads as follows:-

> "(4) Every owner who is rated under this section instead of the occupier in respect of any hereditaments shall be deemed to be the occupier of the hereditaments for the purposes of this Part of this Ordinance and shall be treated in relation to any right of appeal against a rate or valuation as standing in the same position as the occupier."

The parties, where the tests to determine rateable occupation are concerned, differ as to the interpretation of subs. (4). For the appellants it is argued that these tests should be applied to the owner, who is "deemed" to be the occupier, whilst the respondents, taking the same view as the stipendiary, submit that the tests should be applied to the occupants, the owner then being deemed to be in the same position. In my opinion any reasonable or practical interpretation of s. 292 confirms the latter contention. Even if the appellants, as is admitted, obtained no benefit from the property during the period covered by the claim for rates, they may still be liable, under the terms of the section, if it is shewn that the occupiers are in beneficial and lawful occupation. An owner is then deemed to be in the position of the occupiers for rating purposes, even if the property is of no present value to him.

Both parties are agreed as to the tests (summarized in Ryde on Rating at p. 17) to be applied where the question of rateable occupation is concerned. First, there must be actual occupation; secondly, it must be exclusive for the particular purposes of the possessor, thirdly, the possession must be of some value or benefit to the possessor; and, fourthly, the possession must not be for too transient a period.

These tests were, in my opinion correctly because of s. 292, applied by the stipendiary to the occupants and not to the owners. The respondents, in applying the first two tests to the tenants, say that there is no doubt as to their actual occupation and nothing to shew that it is not exclusive. Nor, where the fourth test is concerned, is their occupation of a transitory nature. The third test is a more controversial one. The respondents say that, even if these persons are living in undesirable conditions, their occupation is at least of value to them, because they have the use of the property, and because it saves them the expense of living elsewhere.

I have been referred to a number of authorities on this question of beneficial occupation. It is no easy matter to apply some of them to this case, for s. 292 of the Ordinance has created what has been described in the course of this appeal as an "artificial" situation, and one that was not envisaged when the cited cases were determined. I shall however consider the effect of these cases where the occupation of the present occupants of 41 Prince Edward's Road is concerned, and then approach the question from the position created by the words "deemed to be the occupier" in s. 292 (4) of the Public Health Ordinance.

Two of the leading cases on the question of beneficial occupation which have relevance to this appeal are the House of Lords case of *London County Council v Churchwardens etc. of the Parish of Erith* [1]. and *Associated Cinema Properties Ltd. v Borough of Hampstead* [2]. In the former case it was decided that

> "the true test of beneficial occupation was not whether a profit could be made but whether the occupation was of value",

and in the latter it was held that

> "Occupation will fail to be rateable occupation if it is of no value to the person who is sought to be charged"

In these cases the persons to be charged, following the normal law of rating, were the occupiers. The question of any consequential liability where the owners of the property were concerned was not in issue. There is no question in this appeal of any actual occupation by the owners, and the only actual benefit, if there is benefit, is being enjoyed by the statuory tenants. The appellants say that even the occupation of the latter, who could be rateable under s. 282 of the Ordinance, does not meet all the tests, for it is not beneficial or of value because of the condition of the premises, and is not exclusive because they are there wrongfully and liable to eviction, a state of affairs which also makes their occupation transient.

I do not think that these arguments hold good. The degree of value or benefit enjoyed by the occupants may be less than that enjoyed by more happily situated tenants, but it is still of some value and benefit to them. There is no evidence to shew that their occupation is not exclusive for its particular purpose, or such as to create any exemption from the rating law. If they are statutory tenants they have the right to exclusive occupation, and, as the case of *Holywell Union v Halkyn District Mines Drainage Co.* [3] shews

> "The question whether a person is an occupier or not within the rating law is a question of fact, and does not depend upon legal title".

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1 [1893] A.C. 562.
2 [1943] 2 All E.R. 696.
3 [1895] A.C. 117.

Even the absence of a legal title may be immaterial to liability where the question of rating law is concerned, and there does not seem to be such a degree of impermanence in their occupation as to justify its being regarded as transitory. They have already been in occupation for some fifteen months since the date of the nuisance order, the existence of which does not, in my opinion necessarily affect their liability to any payment of rates which arises out of their occupation.

The next point for consideration concerns the merits of the occupation. The occupants' present position is that they are continuing in premises which are the subject of a prohibition order, addressed to the appellants, and notified by the appellants to them. This order prohibits the use of the premises for human habitation. Their occupation is also subject to a notice to quit by the appellants, and in the absence of the nuisance order they would now hold under the original terms of the lease as statutory tenants. It seems, partly from the evidence in the court below, and from facts of which I may take judicial notice, that the reason proceedings have not been taken against the occupants for contempt of the court order is the consideration of the general housing situation in Gibraltar, and the fact that other accommodation is not immediately available for them. It seems that, in the absence here of legislation analogous to the Housing Acts, neither party can obtain an order for the eviction of the occupants, and short of sending the occupants to prison for contempt, the implementation of the order for demolition, effective within four months of the service of the order in March 1963, must await action by the Administration and be subject to the availability of alternative accommodation. The appellants claim that the owner is absolved from liability for rates from the time of the service of notices to quit, and that if the respondents wish to get their rates for the premises the provisions of s. 292 must be regarded as no longer applicable, and they should proceed under the normal rating procedure of s. 282. The power of the appellants to act is in fact nullified by administrative consideration. Neither party has been able to furnish me with authority either in support of, or against the contention, that an owner ceases to be liable for rates after a notice to quit. This is perhaps not surprising, for the liability of an owner to rates is a departure from the general law, and although there is provision in the Rating Act 1925 for the rating of owners it does not, in so far as I am aware, go beyond the process of "compounding", either by compulsion or agreement, where rates in respect of short-term tenancies or premises in the occupation of diplomatic missions are concerned. There is also a departure from English law in s. 292 of the Ordinance in that under s. 11 of the Rating Act 1925 the names of the occupiers are entered in the rate book, and rates may be recovered by the authority from the occupiers, whereas under subs. (3) of s. 292 the Council may omit to enter in the rate book names of such occupiers.

I have also been referred to authority as to the effect of wrongful occupation on rateable liability. The test considers de facto and not de jure occupation, and the absence of title may be immaterial to exemption from liability. In

the already quoted words of Lord Hershell L.C. in *Holywell Union v Halkyn District Mines Drainage Co.*

> "The question whether a person is an occupier or not within the rating law is a question of fact, and does not depend upon legal title".

From this it follows that in the case of the occupants of 41 Prince Edward's Road, who are in visible physical possession of the land, that it is immaterial, from the point of rating liability, whether they are there under a good title as statutory tenants, or whether they are wrongfully there. In *Cory v Bristow* [1] Lord Cairns L.C. used these words:

> "For the purpose of rating it might, indeed, be sufficient to look at the mere fact of occupation. They are found in occupation of that which is to them a valuable occupation of this fixed property, and are therefore rateable to the relief of the poor, even though it might turn out that their occupation is a wrongful one, or one the propriety of which they cannot justify".

This point is summed up in Ryde on Rating 10th Edition (page 86).

> "If a person, de facto in physical possession of land, were to claim to show that his possession was that of a trespasser, and on this ground to escape rateability, he would then be taking advantage of his own wrong".

Applying the known facts of the occupation of 41 Prince Edward's Road to this principle it seems that, where they are concerned and whatever their de jure position, their liability to be rated would be clear. It remains to be seen, if they are in wrongful occupation, whether such occupation should be deemed to be that of the owners. In *Crowther Smith v New Forest Union* [2] it was decided under general rating law that possession or acts of user by a trespasser will not make the owner rateable if he is not so otherwise.

What then is the position of these occupants?

Learned counsel for the appellants would have me say that their occupation since the nuisance order prohibiting the use of the premises for human habitation is unlawful; and that in any case since the service of the notices to quit the contractual tenancy is determined and statutory tenancies are created by operation of law. He argues, if I have understood correctly, that in either event the premises cease to be "let in parts" by agreement between the landlord and tenants, that because of this the property ceases to fall within the technical definition of a "communal services tenement", and the position must revert to one under the normal rating law, where the ocupants are rateable under s. 282 of the Public Health Ordinance, with no liability attaching to the owners. I think that this is in some degree fallacious. No authority has been shewn for the proposition that the service of a notice to quit affords an automatic release to an owner who was rateable by law when a contractual tenancy was in being. Nor do I see how premises can be said to cease to be "let in parts" solely because a contractual tenancy is

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[1] (1877) 2 App. Cas. 262.

[2] (1889) 54 J.P. 324.

converted into a statutory tenancy. The landlord, under normal circumstances, does not lose his right to collect rents from the tenants who remain, subject to the terms of the Landlord and Tenant (Miscellaneous Provisions) Ordinance, under the original terms until and unless an order for possession can be made against them. These premises have been declared to be a "communal services tenement" by the Governor in Council, they remain so in character, and I do not think that the situation in this respect is altered, either by the notice to quit or by the nuisance order.

I think it is quite clear that under the general law of rating the occupiers, who are in de facto possession, would be rateable, whether they are there lawfully or unlawfully. I also think that if they are there lawfully liability still attaches to the appellants, as it did during the contractual tenancy. But if they are there unlawfully the position may be different, and it is therefore necessary, in considering the appellants' liability, to look at the merits of the present occupation.

Although the facts are distinguishable, the case of *Blake v Smith* [1], decided before the enactment of the Landlord and Tenant Acts, may give some guidance. In this case a house, tenanted by the defendant, was found to be in a bad state of repair, and a closing order made by the local authority was served on the landlord. Notice of the closing order, and the fact that it had become operative, was served on the occupying tenant, who, although the plaintiff endeavoured to get possession, would not go out of occupation, and was eventually ejected by order of the local justices. He subsequently regained possession and the landlord successfully claimed to recover possession and damages. In this respect the case represents a departure from its similarity with the facts in this appeal, but certain dicta of Acton, J., in the course of his judgment have a bearing on a decision as to the legality of the present occupation of 41 Prince Edward's Road. The plaintiff contended that the closing order made it an offence for any person to occupy the house as a dwelling, and that the contractual weekly tenancy of the defendant was at an end as the result of the making of the closing order, and the subsequent eviction; whilst the defendant, inter alia, claimed that the tenancy had not been terminated by the notice to quit, nor by the making of the closing order, or by the service on him of notice of it. Acton, J., in commenting on the effect of several relevant Acts of Parliament said,

> "It is certainly a curious feature of this legislation that it nowhere deals in terms with the effect of a closing order, or of proceedings taken thereunder in compliance with statutory provisions, upon a tenancy such as there was in the present case or any tenancy".

At a later stage in his judgment the learned judge added:

> "it is no doubt somewhat strange that there should be no indication anywhere in this lengthy legislation with respect to closing orders of the effect they are to have upon the relations which before the closing order becomes operative

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1 [1921] 2 K.B. 685.

> subsist between the landlord and the tenant of the house to which the order applies. It seems to me that the present case is one in which it is highly expedient for a court of first instance to decide no more than is necessary for the decision of the particular case".

In the event the learned judge decided against the defendant, partly because he

> "was in breach of his statutory duty .....in remaining in possession even up to May 11 1920". (The date of the execution of the warrant of ejectment).

If this case is accepted as a fair comparison with the accepted facts in this appeal, it furnishes guidance in support of the appellants' contention that the occupants retention of occupancy is an unlawful act, and that the effect of a nuisance order is to bring a tenancy to an end.

If the occupiers are no more than trespassers, *Crowther Smith v New Forest Union,* already referred to, may also have relevance. In that case one of the grounds for decision, in the judgment of Cave, J., was that liability for rates does not fall upon an owner whose land is used, without his knowledge or consent, by persons who take a benefit from it. It cannot be said in this case that the occupants are there without the owners' knowledge, but they are certainly there without their consent.

Where this appeal is concerned it is in evidence that the managing director of the appellants' firm passed a copy of the prohibition order to all tenants, and I do not think it is asserted that they are in ignorance of it. The terms of the order, addressed to the appellants, were:

> "And the Court is of the opinion that the said nuisance is such as to render the said building unfit for human habitation and therefore prohibits the use of the said building for that purpose until the Magistrates' Court, being satisfied that it has been rendered fit for habitation, withdraws the prohibition".

The order is clear and unambiguous, although in fact it is the intention when possession can be obtained not to repair but to demolish the property.

In my opinion the effect of this lawful order is to create an obligation, not solely on the part of the owners, but on all persons making use of the property with knowledge of it. Any person who, without reasonable excuse fails to comply, is liable to substantial punishment under s. 82(1) of the Public Health Ordinance. The occupants have undoubtedly ignored this order, and they may have an excuse which would exempt them from the penalty provided. But a reasonable excuse does not necessarily make their conduct legal. They are persisting in an act which a competent court has expressly forbidden, and they have a duty to go out of the premises, and remain out, until they are made fit for habitation in the terms of the order. If one applies the principle of *Blake v Smith* the occupiers are there in breach of duty, and cannot now rely on the limited right of statutory tenancy acquired under the Landlord and Tenant (Miscellaneous Provisions) Ordinance to justify their occupation. They are, in my opinion, trespassers,

and as such, being in de facto occupation, as liable under general rating principles for payment of rates as if they were lawfully there. The premises are not vacant, but unlawfully occupied.

It is argued for the respondents that the only way in which the appellants can escape their obligation to pay rates is to obtain vacant possession. Learned counsel points out that it is the court's duty to set sentiment aside when considering this matter, and to apply the law as it stands, even if the position of the appellants is burdensome and devoid of advantage to them. The Ordinance may have created an artificial situation, one outside the normal principles of rating law, but it must be applied as it stands. This is undeniable. Where clear and unambiguous language is used by the legislature, a court must give the words full effect, however unjust or arbitrary they may appear. No one disputes the fact that the present position of the owners of this property is, to say the least, most unsatisfactory from their point of view, although the situation is to some extent of their own making. I have no evidence as to the length of the period of their ownership, but if the company has held the property for a long time they must be to blame for its deteriorated condition, or if for a short time, they must accept the hazards of purchasers of "slum" property. Certainly their ownership is not a beneficial one: very much the reverse, although this is a liability they would have to accept under s. 292(4) as the landlords of tenants in lawful and beneficial occupation. The concern under the Ordinance is with the beneficial occupation of the occupants, not that of the owners. I consider, however, that the legislature must have contemplated a lawful occupation, and cannot have intended to deem an unlawful occupation by occupants to be the occupation of the owners. The rateable liability of a trespasser cannot in justice be attributed to the landowner. The question becomes one, not of possible injustice, but of the condonation by the court of illegality, which I do not believe could be the intention of any legislative body. The illegality of the occupation has brought the relationship of landlord and tenant to an end, and in my opinion s. 292(4) ceases to be of application, the position where liability is concerned reverting to s. 282, applicable in the circumstances of this case to the occupants and not to the appellants. The occupants are under a duty to obey the terms of a lawful order relating to a public nuisance, have failed to comply, and their failure cannot in justice or equity be attributed to the owners, who are themselves powerless in the matter.

For these reasons I shall allow this appeal, set aside the decision of the magistrates' court and dismiss the claim of arrears of general and brackish water rates made by the City Council of Gibraltar against the appellants, Land Holdings (1958) Limited.