HAYNES v BOTTINO

Supreme Court
Flaxman, C.J.
22 January 1965

Landlord and tenant — suitable alternative accommodation — wh tenancy of Government property affords security of tenure reasonably equiv to controlled premises — Landlord and Tenant (Miscellaneous Provisi Ordinance s. 22(3).
Landlord and tenant — whether part of the accommodation is sui alternative accommodation.

The landlord served on the tenant notice to quit premises to which Part the Landlord and Tenant (Miscellaneous Provisions) Ordinance (Cap 1965-69 Ed.) applied, offering as alternative accommodation either a f a Government property or the accommodation occupied by the tenan one room.

Held: (i) A monthly tenancy of a flat in a Government housing e does not afford security of tenure reasonably equivalent to that afford premises governed by Part II of the Ordinance.

(ii) An offer of the accommodation presently enjoyed less a room wh in actual use by the tenant, in the absence of special circumstanc unreasonable.

Note. It is suggested that the statement by the Chief Justice that h bound by a decision of the Court of Appeal in England was mad incuriam, and that while such a decision commands the highest respec will usually be persuasive, it is not binding in Gibraltar.

Cases referred to in the judgment.

Sills v Watkins, [1956] 1 Q.B. 250.
Thomson v Brady, (1927) S.L.T. (Sh. Ct.) 20.

Appeal

Appeal from a decision of the Court of First Instance, in which it was held that a flat in a Government housing estate was suitable alternative accommodation to a flat governed by Part II of the Landlord and Tenant (Miscellaneous Provisions) Ordinance. The tenant appealed.

P.J. Isola for the appellant.
L. Peralta for the respondent.

18 February 1965: The following judgment was read—

This is an appeal, under the terms of s. 45 of the Court of First Instance Ordinance, from a decision of the learned judge of that court in a claim for possession of premises in Cannon Lane, Gibraltar. The property is subject to the terms of the Landlord and Tenant (Miscellaneous Provisions) Ordinance, and possession is claimed by the landlord on the grounds that the defendant's tenancy has been determined by a formal notice to quit, and that suitable alternative accommodation is available for him. The receipt of the notice is admitted, and the learned judge has found that suitable accommodation, as defined in s. 22 of the Ordinance, is offered by the landlord. He has accordingly made an order for possession, to be effective on 31 January of this year.

In fact, following an amendment in the course of the hearing in the Court of First Instance, the landlord has offered two alternatives to the tenant: a flat in a Government property known as Alameda House, or the premises now occupied by the tenant, less a sitting room on the first floor. The latter are premises to which Part II of the Ordinance applies: the flat is not, because Government is not bound, where its properties are concerned, by the Ordinance. The learned judge reached the conclusion that suitable accommodation is and will be available in Alameda House, and accordingly did not refer in his judgment to the suitability or otherwise of the alternative.

His decision is disputed by the defendant tenant, and in the notice of appeal I am asked to set it aside and exercise one or the other of the powers set out in s. 47 of the Court of First Instance Ordinance.

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

The appellant tenant, aged 74 years, has lived in the Cannon Lane property, occupying a sitting-room on the first floor; two bedrooms, a dining-room, kitchen and bathroom on the second floor, and a maid's room and wash house on the third floor, for about 25 years. In 1960 he and his brother co-owner sold it to the respondent, who is described as a company director and who now uses the rest of the property; the ground floor and two

rooms on the first floor. Following the sale the appellant remained in possession of the part now claimed by the respondent on a monthly tenancy, this tenancy now being subject to the notice to quit dated 14 July 1964, which expired on 31 August of that year. To obtain possession the respondent had to satisfy the court that his claim is not restricted by the requirements of s. 22 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance, sub-sections (1), (2) and (3) which are as follows:—

> "22. (1) No order or judgment for the recovery of possession of any dwelling-house to which this Part of this Ordinance applies or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—
>
> (a) the court has power so to do under the provisions set out in the Fourth Schedule to this Ordinance; or
>
> (b) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect.
>
> (2) A certificate of the Commissioner of Lands and Works certifying that he will provide suitable alternative accommodation for the tenant by a date specified in the certificate, shall be conclusive evidence that suitable accommodation will be available for him by that date.
>
> (3) Where no such certificate as aforesaid is produced to the court, accommodation shall be deemed to be suitable if it consists either—
>
> (a) of a dwelling-house to which this Part of this Ordinance applies; or
>
> (b) of premises to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably equivalent to the security afforded by this Part of this Ordinance in the case of a dwelling-house to which this Part of this Ordinance applies, and is, in the opinion of the court either—
>
> (i) similar as regards rental and extent to the accommodation afforded by dwelling-houses provided by the Commissioner of Lands and Works for persons whose needs as regards extent are, in the opinion of the court, similar to those of the tenant and his family; or
>
> (ii) otherwise reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent and character."

No certificate of the Commissioner of Lands and Works was produced, and Alameda House not being a property to which Part II of the Ordinance applies, the suitability of the accommodation there fell to be determined under subs. (3) (b).

It is common ground that, in both cases, the alternative accommodation offered is available to the appellant. He is already in occupation at Cannon Lane, and evidence has been called to confirm that there is no objection on the part of the Commissioner of Lands and Works to his tenancy of the flat at Alameda House, which the respondent now occupies. Evidence was

also given by the Housing Manager to shew that the accommodation offered is adequate for two persons. In fact it is meant for more. The reason why no certificate under s. 22(2) was forthcoming is unexplained.

The issues before the learned judge, where the Alameda offer was concerned, were to determine whether it was reasonable to make the order for possession, whether the security of tenure offered was reasonably equivalent to the security afforded by Part II of the Ordinance to a dwelling-house to which that part of the Ordinance applied, and whether the flat was suitable alternative accommodation within the terms of subs. (3) (b) (i) or (ii). It is apparent from the judgment that the learned judge, in exercising his discretion as to the reasonableness or otherwise of making an order for possession, gave careful and detailed consideration to these issues, and took into consideration the respective interests of the parties, and the public interest too.

The appellant asks me to disturb the decision on the grounds that the alternative accommodation offered is not suitable alternative accommodation within the meaning of the Landlord and Tenant (Miscellaneous Provisions) Ordinance, and that, in all the circumstances of the case, it was not reasonable to make an order for possession. It is also submitted that, if the learned judge considered that it was reasonable to give the landlord possession, he could have given him possession of the sitting-room in the dwelling-house at Cannon Lane, and not ordered the ejectment of the appellant from the whole of the premises he now occupies there.

In argument as to the suitability of the accommodation it is claimed for the appellant that the decision errs both in fact and in law. Where the issues of fact are concerned, both as regards suitability and reasonableness, I am satisfied that there was ample evidence on which the learned judge, in the exercise of a proper and wide discretion, could reach his findings. It is (inter alia) suggested that he failed to comply with the mandatory provision, contained in para. (g) of the Fourth Schedule to the Ordinance, which enacts that where the dwelling-house is reasonably required by the landlord for occupation as a residence judgment shall not be given where greater hardship would be caused by granting the order or judgment than by refusing to grant it. Whilst this consideration is one which might affect the issue of reasonableness, it seems from the heading to this Schedule, "Possession or ejectment without proof of alternative accommodation", that its relevance to this case is limited.

For success in this appeal the appellant relies mainly on a point of law, which learned counsel describes as the "mainstay" of his application. It is submitted that, when considering the suitability of the proposed alternative accommodation in Alameda House, the learned judge failed to apply the decision of the Court of Appeal in *Sills v Watkins* [1] where it was held that

---

[1] [1956] 1 Q.B. 250.

> "as the house offered by the landlord was a council-house, the occupation of which was subject to a week's notice, the proposed tenancy would not be on terms which would afford to the tenant reasonable equivalent security of tenure, so that an order for possession ought not to be made."

In that case the court was considering the question in the light of s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the terms of which are similar to those of s. 22 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance. It is to me strange to find that *Sills v Watkins*, referred to in the books as the authority for the proposition that a short-term tenancy of a council-house, since it is unprotected, is not suitable alternative accommodation, was apparently not referred to in the court below, and there is no indication in the judgment that it was in the mind of the learned judge when he reached his decision as to suitability. The respondent seems to have relied upon *Thomson v Brady* [1] (vide Blundell's Rent Restriction Cases No. 1068.). The reference gives no indication of the reasons for the finding of the court in Scotland in which the case was heard, but (vide Megarry 9th Ed. The Rent Acts p. 272) it decided that reasonably equivalent security of tenure does not necessarily demand a controlled tenancy.

> "A lease of sixteen years has been held sufficient and so has a lease for a year to be let by a local authority."

Thomson v Brady is referred to as authority for the last part of the quotation.

Thomson v Brady was apparently considered in *Sills v Watkins*, and its decision was not applied. It had been relied upon by the judge in the lower court and learned counsel for the landlord had submitted to the appellate court that common sense requires that council-house terms must be regarded as satisfactory security of tenure. No reference to *Thomson v Brady* is made in the judgment of the Court of Appeal, but it may be that the differing nature of the tenancies (in *Sills* case a weekly tenancy) was in point. The facts in *Sills v Watkins* were very similar to those now in question. The tenant had for some years occupied a rent-controlled flat. The premises were acquired by a new landlord, who sued to obtain possession. He occupied a council-house in an adjoining district and made an offer to the tenant to vacate the council-house in his favour. This house was let at a rent appropriate to the tenant's means and was conveniently situated to his work, and a housing officer of the district in which the house was situate gave evidence to the effect that his council viewed such exchanges with favour, and that the tenant would be considered a suitable tenant, although he was unable to state with certainty that the tenant would be given possession of the landlord's former house. It was said that no certificate under s. 3(2) of the Act (which corresponds to s. 22(2) of the Ordinance) could be produced, because the houses were situated in different housing areas.

---

[1] (1927) S.L.T. (Sh. Ct.) 20.

These facts, apart from the circumstances that here the property is Government property, and not municipal, is on a monthly instead of a weekly tenancy, and is not in a different housing area, fit closely with the present case. There was some uncertainty in *Sills v Watkins* as to whether the tenant would be accommodated in the actual house then occupied by the landlord, but the trial judge, in making the order for possession must have been satisfied that similar premises would be available. Housing estates in England are not remarkable for variation in design.

The concluding passage in Lord Denning's judgment in the Court of Appeal states the law in most positive words:—

> "The council house which the landlord offers fulfils all the requirements of subs. (3) except in regard to security of tenure. It fails on that point. On the letting of a council house by a local authority to an individual there is no security of tenure. The terms of letting do not provide for any security at all. It is an ordinary weekly tenancy, and the council can evict the tenant at a week's notice if they please. In practice the local authority do not take such a stringent course except in the case of a tenant who does not pay his rent or does not behave properly. Nevertheless, the terms of the tenancy do not give security. They enable the local authority to evict the tenant at a week's notice. This means that the requirements of the sub-section are not satisfied. We cannot read the words "on terms" as if they meant "in circumstances." We have no right to put words into the Act or alter what is there. It appears to me that except when a housing authority in the same area gives a certificate within the terms of subs. (2) then a council house is not suitable alternative accommodation, because it does not by its terms afford reasonable security of tenure."

These words, although they should be read in the context of the case then considered, appear to me to apply as equally to premises on a Government housing estate as to those on a council estate, and to a monthly tenancy as much as to a weekly tenancy. No reservation is made in the judgment because there was no definite acceptance by the council of the tenant as a tenant in the council-house. If the decision is applicable to the facts of the present case, as I believe it to be, I am of course bound by it even if its application might be considered to cast some unreasonable doubt on the goodwill of the local housing authority, and contemplates the possibility of a situation which, in Gibraltar, seems remote. I can find no later case to modify the judgment, and it is with some reluctance that I feel myself bound to adopt its authority as decisive on the issue of law in this appeal. There are minor differences in the facts but the decision seems wholly applicable. It appears to me conclusively to deal with the point of law raised for the appellant on the question of suitability, and as such is binding upon this court.

I must therefore find in favour of the appellant on this issue and determine that the alternative accommodation in Alameda House offered to him by the landlord cannot in law be deemed as suitable because it does not afford to him security of tenure reasonably equivalent to the security afforded by his present tenancy.

The last ground for this application relates to the premises at Cannon Lane, where the landlord offers, as an alternative to the flat at Alameda House, the present premises occupied by the tenant, less the sitting room on the first floor. The issue of the reasonableness and suitability of this offer was not determined by the learned judge, who decided that, as he had reached the conclusion that the accommodation at Alameda House was suitable and available there was no need for him to dwell on the Cannon Lane offer. It is open to me to return this case to him for a definite decision on this point, but I shall not do so, as I have read the record and had the benefit of argument by learned counsel and it may save the parties some expense if I determine it forthwith.

On the issue of reasonableness there is the evidence of the tenant and his wife, and of a nephew, to show that they regularly use the sitting-room. In the tenant's words, "it is part of our life." They have occupied it for many years. It is suggested by a witness that the second-floor dining room could reasonably serve the dual purpose of a sitting-dining room, and in fact it seems that at one time, had the landlord been more definite as to his reasons for requiring the room, and in consideration of some reduction of rental, agreement might have been reached between the parties. Unfortunately this solution of the dispute did not eventuate, and the attitude of the tenant, in the words of his wife, is "we want to retain what we have, and are not prepared to give anything."

> It seems from decided cases that "a part of the accommodation actually occupied by a tenant may be suitable alternative accommodation if the part claimed by the landlord is not occupied by the tenant in the usual sense of the word."
> (Megarry p. 276.)

This would be applicable in a case where a landlord is kept out of a room which the tenant does not want to occupy, and out of which he makes a profit. But there is no question in this case of sub-letting by the appellant or any use of the sitting-room as other than part of the dwelling-house. The burden of proof of reasonableness is on the landlord, and there is no conclusive evidence in this case to shew that it would be reasonable to deprive the appellant of a principal room or that the remainder would necessarily be suitable to his and his wife's needs and means. In fact the evidence goes to the contrary. To permit a landlord to carve a dwelling-house out of a dwelling-house occupied by his tenant would, in the absence of special circumstances be in principle both wrong and unreasonable, and might constitute a most undesirable precedent. The offer of the alternative accommodation in Cannon Lane is not reasonable and is not suitable alternative accommodation within the meaning of the Ordinance and the landlord is not entitled to an order for possession.

The learned judge of his own motion, raised a further point in his judgment, regarding which some rather inconclusive argument has been addressed to me in the course of this appeal. He has expressed a doubt as to whether the tenant, in the circumstances of his occupation, is in fact a protected

tenant under Part II of the Ordinance. The case in the court below was contested and decided on the premise that Part II of the Ordinance applied, and I consider that in the absence of more precise evidence regarding the earlier tenure, without which the question could not be determined, it is unnecessary to deal with this point.

I must allow this appeal, and accordingly set aside the decision reached in the Court of First Instance, and dismiss the landlord's (respondent's) claim for possession.

In view of the fact that the order for possession has been set aside on a point of law not taken in the court below, I shall make no order for costs for the successful appellant.