CHELLARAM and another v D'AMATO

Supreme Court
Spry, C.J.
9 November 1977

Service — by registered post — advice placed in private box — when giving of notice complete — Landlord and Tenant (Miscellaneous Provisions) Ordinance, s. 42 (3).

The tenants of business premises took out an originating summons applying for the grant of a new tenancy under s. 42 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (Cap. 83). The landlord took a preliminary objection on the ground that the summons had been taken out more than four months from the giving of the landlord's notice.

Held: (i) The giving of notice is only complete when the notice is or ought to be received.

(ii) Where the hirer of a private box is in business, it is reasonable to expect him to collect his mail daily.

(iii) Service by registered post on a person with a private box is not complete when he receives the advice that a letter awaits collection but only when the letter is available for collection.

Cases referred to in the judgment.

Price v West London Investment Building Society, [1964] 2 All E.R. 318.
Sun Alliance and London Assurance Co. Ltd. v Hayman, [1975] 1 All E.R. 248.
Gresham House Estate Co. v Rossa Grande Gold Mining Co., [1870] W.N. 119.

H.K. Budhrani for the applicants.
S. Benady Q.C. for the respondent.

14 November 1977: The following order was read—

This is a preliminary point on the validity of an originating summons applying for the grant of a new tenancy under s. 42 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance. Subsection (3) of that section provides inter alia that no such application should be entertained

> "unless it is made not less than two nor more than four months after the giving of the landlord's notice under s. 38 . . ."

In the present case, the landlord sent notices to each of the tenants by registered post addressed to them at the premises the subject of these proceedings. The notices were dated 17 March 1977 and were posted on the same day.

The tenants rent a Post Office private box and the Post Office, instead of delivering the notice at the premises to which they were addressed, placed a slip in the box advising the tenants that a registered letter awaited collection. This slip was taken from the box on 21 March 1977 and the registered letter collected.

On 19 July 1977 the originating summons was taken out. Mr. Benady, for the landlord, submitted that as the notice to quit was given on 17 March, the summons was out of time. He stressed that s. 42(3) refers to the giving, not the receiving, of notice. He argued that if the tenants chose to have their mail put in a private box, it was their duty to collect it and he submitted that even if the slip was not put in the box on 17 March, it must have been put there on the following day.

Mr. Budhrani, for the tenants, submitted that it was for the landlord to establish that the notice came into the tenants' hands more than four months before the summons was taken out. He claimed that this had not been proved. There was evidence adduced by the tenants that the slip was in the private box on 21 March but after the lapse of time it was impossible for them to prove that it had not been there earlier. The tenants could do no more than show that their normal practice was to collect mail daily. The landlord had not proved when the slip was put in the box and had not even produced evidence of the Post Office practice in regard to such matters.

Section 42 was taken from and is substantially similar to s. 29 of the English Landlord and Tenant Act, 1954. The relationship between the giving and the receiving of notice has been considered in England in two cases. In *Price v West London Investment Building Society*[1], Danckwerts, L.J., dealing inter alia with the conflict between the form corresponding to Form 2 in the Schedule to the Gibraltar Landlord and Tenant (Forms) Regulations which referred to the receipt of the notice, and s. 29, which

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[1] [1964] 2 All E.R. 318.

referred to the giving of the notice, held that the former was ultra vires and went on—

> "It seems to me, therefore, that the giving of the notice was complete when the registered letter was taken in and signed for...."

In *Sun Alliance and London Assurance Co. Ltd. v Hayman*[1], the court was concerned with a very similar question. There, the landlord had served a notice similar to that served in *Price's* case, but in the meanwhile the statutory form had been changed. The court had to decide whether the notice was good or bad. The decision turned on s. 66(4) of the English Act, which imported the provisions of s. 23 of the Landlord and Tenant Act, 1927, which relates to the service of notices. There is no corresponding provision in the Gibraltar Ordinance, so that the decision is not directly authoritative: it is, however, highly persuasive, because s. 23 allows service by registered post, which is the method of giving notice adopted in the present case.

It is interesting to note that counsel for the tenant submitted, as did Mr. Benady in the present case, that there was a real difference between the giving of a notice and its receipt. Stephenson, L.J., said—

> "In my judgment....a notice under the provisions of the Act is both given and received when it is served in accordance with s. 23(1) of the 1927 Act, and to anyone who knows the law, the time when it is given and the time when it is received are one and the same, namely, the time of service when the giving of the notice is in law complete.... The giving and receiving of the notice are two aspects of the same action and are simultaneous...."

Again, Lord Salmon said—

> "According to the ordinary and natural use of English words, giving a notice means causing a notice to be received".

Adopting these arguments as my own, I have no hesitation in holding that 17 March 1977, the date of landlord's notice and the date when it was posted, is not the material date. What is much more difficult is to decide what is the relevant date.

As I have said, the Gibraltar Ordinance contains no provision as to the method of giving notice, nor, so far as I am aware, is there any general provision in our law. Mr. Benady suggested that the matter should be governed by RSC Ord. 65, r. 5, but, with respect, I do not think that can be so. The Rules of the Supreme Court, 1965, have effect in relation to proceedings in the Supreme Court (see Ord. 1, r. 2(1)) but not to extra-judicial matters between landlord and tenant. However, it was not disputed that notice to quit may be given by post and *Gresham House Estate Company v Rossa Grande Gold Mining Company*[2] is authority for saying that—

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[1] [1975] 1 All E.R. 248. [2] [1870] W.N. 119.

> "if a letter properly directed, containing a notice to quit, is proved to have been put into the post-office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post-office, and was received by the person to whom it was addressed."

Here, it is not disputed that the letter was properly directed or that it was received by the tenants. The only question is whether it ought to be treated in law as notionally having been received earlier than the time when on the evidence it was actually received: the problem arising because the letter was not delivered, in the ordinary sense, but rather collected by the addressee.

No authority has been cited to me, and I am not aware of any, of the legal consequences of the use of Post Office private boxes. I think that the use of these boxes, in various parts of the world, is now so general that it should be regarded as an ordinary use of the postal services. They are recognised in law in the Post Office (Private Letter Box) Regulations. Unlike postal deliveries, where the time of delivery is presumed to have been in accordance with the ordinary routine of the Post Office, the receipt of a letter by way of a private box depends not only on the actions of the Post Office sorters but also on those of the hirer of the box. It is obvious that the addressee of a notice should not be allowed to benefit from his own laxity in collecting his mail and so it is necessary to decide how frequently mail should reasonably be expected to be collected and relate the completion of service to the date when the letter should have been collected, not when it actually was. I think in the case of persons in business, it would be reasonable to expect a daily collection, and that is what the tenants say is their practice.

Unfortunately, no evidence has been adduced to show how quickly the slips relating to registered letters are placed in the appropriate private boxes. Mr. Benady submitted that it would be reasonable to assume that even if the slip in question was not put in the tenant's box on 17 March, it must have been put there the following day. In the absence of evidence, I accept that, but I am not prepared to assume that it was put there before 9 a.m. That means that it may not have been available for collection according to the tenants' practice of making daily collections at 9 a.m., until the morning of 19 March. But that day was a Saturday and I think I may take judicial notice of the fact that the Post Office in Main Street, Gibraltar, does not open on Saturdays or Sundays. If the slip had been collected from the box on the Saturday, the letter could not have been collected at the counter before the opening of the Post Office on Monday 21 March.

For these reasons, I do not think there can be any presumption of receipt before 21 March and consequently that the giving of notice cannot be regarded as having been complete before that date, which happens to be the date when the notice was in fact received by the tenants. I have no sympathy with the tenants, who left the taking out of their summons until the last possible moment but I think that in law the summons was taken out in time and therefore that the preliminary objection must be, and it is, dismissed.