SPINNING WHEEL LTD. v CULATTO REALTIES LTD.

Supreme Court
Spry, C.J.
2 November 1977.

Landlord and tenant — flat let as dwelling-house — assignment to limited company — user of one room as office — whether protected as business premises — Landlord and Tenant (Miscellaneous Provisions) Ordinance, ss. 5 (1), 22, 36 (1) and (4), 58 (1).

A flat was let on a lease which contained no restriction on user. It was used for residential purposes. The lease was assigned to a limited company, which used the premises mainly to house an employee, but one room was used as the company's office. After the expiration of the term, the company remained in occupation for two years, when a notice to quit was served. The company claimed (inter alia) the protection of Part III of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (Cap. 83, 1965-69 Ed.).

Held: The fact that premises have been subject to Part II of the Landlord and Tenant (Miscellaneous Provisions) Ordinance does not preclude the invocation of Part III where, without breach of the tenancy agreement, the premises have passed into the possession of a limited company and the user of them has been changed so as to bring them within the terms of s. 36 (1).

Cases referred to in the judgment.

Skinner v Geary, [1931] 2 K.B. 546.
Wolfe v Hogan, [1949]2 K.B. 194.

Appeal

This was an appeal against the decision of the judge of the Court of First Instance, who held that Part III of the Ordinance could not apply to the suit premises, which he held had been leased as a dwelling-house and had always remained such, not withstanding the user of one room as an office.

A.V. Stagnetto for the appellant.
A.J. Vasquez for the respondent.

2 December 1977: The following judgment was read—

This is an appeal from a judgment of the Court of First Instance giving possession of a flat at 9/10 Horse Barrack Lane to the landlord, the present respondent, but postponed until 31 December 1977.

The flat was the subject of a lease for five years from 1 January 1970 at the monthly rental of twelve pounds and ten shillings, granted by the landlord to one Brian Cartledge. In due course, the residue of the lease was assigned to the appellant, a limited company. After the expiration of the term of the lease, the appellant remained in occupation, paying the same rent. On 28 February 1977, notice to quit was served, expiring on 31 March 1977.

The lease contained no covenant restrictive of user, but it is not disputed that the letting was originally for residential purposes. Although the lease has expired, its terms still govern the tenancy.

. . . . . .

On the second ground of appeal, Mr. Stagnetto, for the appellant, submitted that, according to the evidence, one room in the flat is used by the appellant as an office for the conduct of its business, that of a restaurant and bar, the rest of the flat being occupied by the chef of the restaurant, rent free,

under the terms of his contract with the appellant. Mr. Stagnetto submitted that if any part of the flat were used for business purposes, the appellant, as tenant, was entitled to invoke the provisions of Part III of the Ordinance. The appellant was not disqualified from so doing by s. 58(1), because, as a limited company, it could not avail itself of the provisions of s. 22.

Mr. Stagnetto relied on s. 36(1) of the Ordinance, which applies the provisions of Part III to any tenancy where the property "is or includes" premises occupied for the purposes of a business.

Mr. Vasquez, for the respondent, argued that the flat was a dwelling-house at the beginning of the tenancy, that no request had ever been made to the landlord to permit a change of user and no consent had ever in fact been given. Moreover, the fact that one room was used as an office did not make the flat cease to be a dwelling-house, having regard to proviso (ii) to s. 5(1) of the Ordinance. Mr. Vasquez argued that once a dwelling-house came under Part II, it remained controlled for ever and he submitted that the unilateral act of the tenant, changing the user of a single room, could not operate to de-control the premises.

The learned judge had found that the tenancy was not one to which Part III applied. He had held that the flat had been leased as a dwelling-house and had always remained such and that it had never been occupied for the purpose of a business. I confess I find this difficult to understand, unless this finding was intended to refer to the flat as a whole, since there was uncontroverted evidence that one room is being used as an office for the purposes of the appellant's business.

It is, I think, necessary to look at the Ordinance as a whole. Its main provisions are contained in Parts II and III, the former of which is based on the English Increase of Rent and Mortgage Interest (Restrictions) Act, 1920; the Rent and Mortgage Interest Restrictions Act, 1923; the Landlord and Tenant Act, 1927; the Rent and Mortgage Interest Restrictions (Amendment) Act 1933; the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938; the Furnished Houses (Rent Control) Act, 1946; and the Landlord and Tenant (Rent Control) Act, 1949; while the latter is based on the Landlord and Tenant Act, 1954. Part II deals with dwellings, that is to say, with houses and flats; Part III deals with tenancies of business premises, that is to say, with legal estates. This is responsible for a somewhat different approach. Each Part is capable of applying to properties that are used partly for residential and partly for business purposes: thus proviso (ii) to s. 5(1) provides that the application of Part II to a house is not excluded by reason only that part of it is used for business purposes, while s. 36(1) applies Part III to tenancies of or including premises occupied for the purposes of a business or for those and other purposes. Part II affords a tenant two kinds of protection, one regarding increases in rent and one against dispossession, but a distinction must be drawn between them in that the control over the rent is attached to the property, whereas the protection against dispossession is personal and enjoyed only by a person who is an

actual resident in the dwelling — see *Skinner v Geary*[1]. Part III is basically concerned with security of tenure but it does incidentally provide some control over rents, and it operates by way of regulating the relations between landlords and tenants, not by granting rights attaching to property.

The difference between Part II and Part III appears very clearly when ss. 5(1) and 36(1) are compared. The vital words in s. 5(1) are "let as a separate dwelling" and when the question arises whether the section applies, the court looks to the bargain between the parties and only takes account of a change of user where the acceptance of the change by the landlord enables the court to infer a new contract — see *Wolfe v Hogan*[2].

On the other hand, in s. 36(1) the essential reference is to occupation: the premises must be occupied by the tenant and occupied for the purpose of the business. In deciding whether s. 36(1) applies, it is not the original letting that has to be considered but the actual current user.

Obviously the user of property may change. This is recognised to a limited extent in s. 36(4), which denies the rights conferred by Part III to a tenant who is carrying on business in all or any part of the premises in breach of the terms of his tenancy agreement, unless there has been consent or acquiescence. Clearly, then, Part III may be invoked where there has been consent and it seems to me to follow that it may be invoked where, as in the present case, a change of user does not constitute a breach of the tenancy agreement.

It is expressly provided by s. 58(1) that the reliefs afforded by Part III are not available to a person who is entitled to the security from dispossession afforded by s. 22. It is nowhere stated that the provisions of Part III cannot apply to premises which have once been subject to Part II and there is no equivalent to s. 12(6) of the 1920 English Act, which provided that where that Act had become applicable to any dwelling-house, it should continue to apply whether or not the dwelling-house continued to be one to which the Act applied.

On the face of it, the tenancy now in issue falls within the terms of s. 36(1), because

> "the property comprised in the tenancy.....includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him....."

Translated into terms appropriate to the present case, the flat includes a room occupied by the appellant as an office for the purposes of its business of a restaurant and bar. The appellant is not in breach of any term of the lease, so that s. 36(4) has no application. The applicant, being a limited company, cannot avail itself of s. 22, so that s. 58(1) has no application.

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1 [1931] 2 K.B. 546.

2 [1949] 2 K.B. 194.

A holding cannot be governed simultaneously by both Part II and Part III. A direct conflict is, I think, avoided by the use in both s. 5(1) and s. 36(1), of the words "Subject to the provisions of this Ordinance,". (This is, incidentally, another departure from the English statutes, because to accord with them, the draftsman should have used the words "Subject to the provisions of this Part,"). The Ordinance is essentially one for the protection of tenants and I think, therefore, that in the particular circumstances of this case, where either Part II or Part III could apply, the tenant, that is to say the appellant, must have the option to invoke whichever Part suits him best. He has chosen to invoke Part III. The appeal must succeed.

[*The judgment then deals with the alternative argument based on hardship.*]