FOURTH SUPPLEMENT TO THE
GIBRALTAR GAZETTE L.R. 10/78.

No. 1,809 of 10th MAY, 1979.

LAW REPORTS

Note: These Reports are cited thus —
(1978) Gib. L.R.

ANGLO-HISPANO BODEGA Co. Ltd. v. MARRACHE

Supreme Court
Spry, C. J.

12 December 1978

Landlord and tenant—business premises—application for new tenancy—opposition by landlord on the ground that he intends to carry on business therein—meaning of "intend"—Landlord and Tenant (Miscellaneous Provisions) Ordinance, s.43(1)(g)

The applicant company, the tenant of a tavern, applied for the grant of a new tenancy. The landlord opposed the application, on the ground that he intended to occupy the premises for the purposes of a business to be carried on by him therein. At the hearing the question whether the landlord had such an intention was taken as a preliminary issue.

HELD: The evidence did not show that the landlord had worked out his proposed undertaking in any detail or seriously analyzed its feasibility: therefore he had not the firm intention necessary to resist the application.

Cases referred to in the order

Cunliffe v. *Goodman* [1950] 2 K.B. 237
Betty's Cafe's Ltd. v. *Phillips Furnishing Stores Ltd.* [1959] A.C. 20
Gregson v. *Cyril Lord Ltd.* [1962] 3 All E.R. 907
Tunstall v. *Steigman* [1962] 2 Q.B. 593

Originating summons

This was an originating summons for the grant of a new tenancy brought under s.37 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (Cap. 83).

R. M. Vasquez for the applicant.
H. K. Budhrani for the respondent.

19 December, 1978: The following order was read—

This is an originating summons for the grant of a new tenancy of business premises. It is brought under s.37 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (Cap. 83). It is opposed by the landlord (the respondent) under s.43(1) (g) on the ground that he intends to occupy the holding for the purposes of a business to be carried on by him therein.

At the beginning of the hearing, I agreed, by consent, to take as a preliminary issue the question whether the landlord could establish a sufficient intention to satisfy the requirements of s.43(1)(g).

The law on this subject has been exhaustively examined in England, and since the Gibraltar Ordinance is derived from the English statutes, the English decisions must be highly persuasive here and I see no reason to depart from them. Their application, however, is not easy.

I would mention here that Mr. R. Vasquez, who appeared for the tenant (the applicant), drew my attention to s.43(3), which was inserted in 1968 and does not follow any English precedent. This subsection provides that a landlord who has successfully opposed an application, relying on s.43(1)(g), may only grant a tenancy of the premises during the ensuing three years subject to certain conditions. Mr. Vasquez submitted that the insertion of this subsection had the effect of putting a higher burden of proof on the landlord. With respect, I do not think so. I think the subsection only takes effect after the application has been determined, when it operates to give the tenant a limited right in the event of the landlord changing his mind.

The preliminary issue turns on the meaning of the word "intend" in s.43(1)(g). Mr. Vasquez began by citing *Cunliffe* v. *Goodman* (1). That was a case under the Landlord and Tenant Act, 1927, where a tenant, to avoid paying damages for breach of a covenant to repair, had to prove an intention on the part of the landlord to demolish the premises at the end of the term. The circumstances were therefore entirely different from those in the present case, and it will suffice to quote certain dicta on the meaning of intention. Cohen L. J., said—

(1) [1950] 2 K.B. 237.

> "It is, I think, clear that the intention which must be proved against the landlord is a definite intention. This intention may be revocable, but it must not be provisional"

Again, Asquith, L. J., said—

> "An 'intention' to my mind connotes a state of affairs which the party 'intending' ... does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition."

Later, he said—

> "Not merely is the term 'intention' unsatisfied if the person professing it has too many hurdles to overcome, or too little control of events: it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worth while."

Betty's Cafe's Ltd. v. Phillips Furnishing Stores Ltd. (1) was not cited before me, but I mention it for two reasons. First, Viscount Simonds, in the House of Lords, endorsed, in the strongest possible words, the opinion expressed by Asquith, L. J., in the first of the two passages quoted above. Secondly, the House held, by a strong majority, that the time when the intention has to be proved is the time of the hearing, while Lord Denning stressed that the landlord

> "must *honestly and truthfully* state his ground in his notice and he must establish it as *existing* at the time of the hearing."

I pass then to *Gregson* v. *Cyril Lord Ltd.* (2), in which it was expressly held that the interpretation of intention in *Cunliffe's*

(1) [1959] A.C. 20.
(2) [1962] 3 All E.R. 907.

case applied to cases under s.30(1)(g) of the Landlord and Tenant Act, 1954, from which our s.43(1)(g) was derived.

The premises with which the court is concerned are part of No. 10 Cannon Lane and are used as a tavern, the "Wig and Gown."

Mr. Marrache (the landlord) gave evidence. He testified that he acquired the premises for a freehold title by purchase in 1952. He has never entered into any contract to sell or dispose of them. He now wishes to run them himself, as a tavern. He said that he was negotiating with a Mr. Peter Ivor McKellen, whom he would like to employ as manager. He proposed to change the name of the tavern to the "Wig and Pen" and had registered that name under the Business Names (Registration) Ordinance (Cap. 16). He did not foresee any difficulty in obtaining a liquor licence, although he was advised that he could not apply for one until he had possession of the premises. He claimed that he was a man of substance owning property in Gibraltar and Spain, with sufficient means to refit and operate the tavern.

Mr. Marrache was cross-examined at some length regarding his financial standing. He said that there were mortgages on his properties for about £32,000, including an overdraft facility of £5,000 on which he had not drawn. He claimed that the capital value of the properties far exceeded the amount of the mortgages.

One of the mortgages is secured on 10 Cannon Lane. Mr. Marrache said that there had been a misunderstanding: he thought what was due had been paid. He had recently enquired what was owing so that he could discharge it. He agreed that there had been a case in 1971 but denied knowledge of any order for sale. Subsequently, the court record in action 1971 G. No. 59 and the chamber minute book were produced in evidence and it appeared that an order for sale was made but suspended. Mr. Marrache agreed that interest on this mortgage is outstanding. He agreed also that interest is not being paid in respect of a mortgage on his house but said that this was by agreement, the arrangement being that when the property was developed, the developer would pay off capital and interest. He agreed that he is paying a judgment debt by

instalments. He declined to answer questions regarding his bank accounts, an attitude which is quite understandable but perhaps a little unfortunate when the onus is on him to show the feasibility of taking over the tavern. My conclusion on this part of the evidence is that while Mr Marrache may well be, as he claims, a man of considerable substance, his immediate cash position is not strong.

As regards the actual financing of the tavern, Mr Marrache reckoned that about £2,000 would be sufficient for improvements, redecoration and fitting out the tavern and £1,000 as working capital. These he proposed to raise by way of his £5,000 bank overdraft facility. Mr C. E. Isola, the managing director of the tenant company, gave evidence and estimated that £7-8,000 would be needed to re-equip the tavern to its present standard, assuming that all tenants' fixtures had been removed. He thought that £1,000 as working capital might suffice if, but only if, the new management enjoyed good credit with its suppliers. Mr Birch, the manager of a licensed restaurant, called by the tenant company, also estimated £7-8,000 to fit out the tavern to a good average standard but he thought a working capital of £1,000 would provide an inadequate cash flow, even with monthly credit; he thought £1,500 might be enough. These two witnesses have experience in the liquor trade and I see no reason to doubt their honesty. Mr Marrache might be able to make a start with somewhat less than the figure they estimate, but I think he would need more than his £5,000 facility. He said that he had instructed his estate agent to make a survey and when he received it, he would prepare a scheme for redecoration and improvement. This, presumably fairly recent, action seems somewhat belated, considering that Mr Marrache's first notice of intention was given on 29 September 1977, and the contractual tenancy expired on 31 March 1978.

Mr Marrache admitted that he had no personal knowledge of the running of a bar "except club bars". He had seen an advertisement in the local press by Mr McKellen, whom he thought suitable as a manager and with whom he was negotiating. Mr McKellen gave evidence. He is the owner of three bars in Spain and has property in Tangier. He would like to buy or lease a bar in Gibraltar but found this impossible. He inserted his advertisement in June 1978. Discussions had taken place regarding his possible employment as manager for Mr Marrache but they had not reached the stage of discussing remuneration. He assumed that he would receive a share

of profits, but that had not yet been mentioned. It is obvious that these negotiations are at a very early stage, and even so, it seems surprising that no figure should have been suggested as a possible salary. This also tends to confirm that Mr Marrache has not yet seriously applied his mind to the feasibility of his project.

Mr Marrache said that he had made arrangements for his bar supplies, but he was not prepared to give any particulars. He said that he had a definite promise but conceded that there was no written agreement. Without particulars or corroboration this evidence can carry little weight.

Another part of Mr Marrache's evidence that is not, I think, without significance concerns his other projects. He has a scheme for the re-development of a property he owns in Main Street at a cost of £1m. He has also put to the Government of Gibraltar schemes for two big hotels. He has applied for licences to trade in various commodities, including tobacco and motor vehicles. Finance for these schemes is being negotiated but nothing has been concluded. There is, of course, nothing wrong in negotiating several different schemes at the same time, indeed it shows an admirable spirit of enterprise. But I am left with the impression that all these schemes are still indefinite: they are unlikely all to come to fruition and one may have to be sacrificed to another. The "Wig and Pen" seems to be one of the smaller enterprises and might be one of the first to be abandoned if necessary for the sake of one of the major schemes.

There is one other matter. In answer to a question in cross-examination, Mr Marrache said that he intended to apply for the necessary licences in the name of a company. He said that he already had a company, wholly owned by him, which could be used for the running of the bar. As Mr Vasquez pointed out, *Tunstall* v. *Steigman* (1) is authority for saying that Mr Marrache cannot bring himself within the provisions of s.43(1)(g) by proving an intention to occupy through the medium of a company. This may well have been a thoughtless answer, but the onus is on Mr Marrache to prove his intention and that was the answer he gave and he did not attempt to recall it. At the very lowest, it confirms what other parts of the evidence suggest, that Mr Marrache's plans are still inchoate.

(1) [1962] 2 Q.B. 593.

I have not dealt with a question that was much canvassed, that is, whether Mr Marrache would or would not be likely to get a liquor licence. There is no means of knowing and I cannot speculate. Counsel appear to be agreed that it is impossible to obtain advance approval for a liquor licence before acquiring the premises to which it is to relate.

This is not an easy decision. I accept that Mr Marrache would like to take over the "Wig and Gown" and that he might be able to finance its running, but I do not think the project has been worked out in any detail or its feasibility seriously analyzed. This is the more strange when Mr Marrache was proposing to enter a business of which he had no experience. Plans for works to be carried out, for management and for financing are all indefinite. Mr Marrache talked of "improvements" but gave no indication of what he had in mind. He gave no break-down of the amounts it would be necessary to spend. And, as I have said, it is more than a year since he first gave notice of intention. No-one would expect a landlord in Mr Marrache's position to incur substantial expenditure until he was certain of obtaining possession, but there is a great deal that could have been done, at little or no expense, to find out what would be needed and to obtain provisional estimates of the cost. These are matters that, on the authorities, distinguish an intention from a mere wish or hope. In the words of Asquith, L.J. in *Cunliffe's* case, the project has not

> "moved out of the zone of contemplation — out of the sphere of the tentative, the provisional and the exploratory — into the valley of decision."

Accordingly, I hold that the respondent has failed to prove the necessary intention to satisfy the provisions of s.43(1)(g) of the Landlord and Tenant (Miscellaneous Provisions) Ordinance.