Supreme Court
Spry, C.J.
11 April 1979

Landlord and tenant — application for new lease of business premises — whether "occupied" by tenant — meaning of "occupied" — Landlord and Tenant (Miscellaneous Provisions) Ordinance, s.36.
Landlord and tenant — contents of originating summons — RSC Ord. 97, rr.6 and 7.
Estoppel — whether landlord's notice estops him denying that the Ordinance applies.
Practice and procedure — striking out summons as abuse of process — undue delay — RSC Ord. 18, r.19.

The tenant took out an originating summons for a new tenancy of business premises. At a very late stage, the landlord applied to have the summons struck out under RSC Ord. 18, r.19 on the ground that it was seriously defective and not supported by affidavit, as required by RSC Ord. 97, r.7, and that it appeared that the tenant was not in fact in occupation of the premises. For the tenant it was argued that the objection had been taken too late, that the landlord was estopped from raising the issue and that "occupied" in s.36 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (Cap. 83, 1965-69 Ed.) ought to be interpreted in Gibraltar sufficiently widely to cover the case of a tenant occupying through his licensee.

HELD: (i) The originating summons was so defective that it failed to disclose a cause of action.

(ii) There was no evidence to show that the tenant occupied any part of the premises for its own business and there was evidence which indicated the reverse.

(iii) Occupation by a company, for the purposes of s.36, must mean occupation by the company or by an employee employed in the business which brings the premises within the scope of the Ordinance.

(iv) An objection that goes to the root of the application and to the jurisdiction of the court may be taken at any time.

Cases referred to in the order
Pegler v. Craven [1952] 1 All E.R. 685
Teasdale v. Walker [1958] 3 All E.R. 307

Application on originating summons

This was an application that the summons be struck out under RSC Ord. 18, r.19 as not disclosing a cause of action and as being frivolous and vexatious and an abuse of the process of the court.

J. E. Triay for the landlord/applicant
R. Vasquez for the tenant/respondent

17 April 1979: The following order was read—

Anglo Hispano Bodega Co Ltd., to which I shall refer as the tenant, took out an originating summons, applying under s.37 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance for the grant of a new tenancy of a tavern known as the Wig and Gown.

At the first hearing of the application, a preliminary issue was decided. This was whether the landlord of the premises had the intention to use them for a business of his own, that being the ground on which he was opposing the application for a new tenancy. An appeal against that decision is pending.

Notwithstanding the lodging of the appeal, a date has been fixed for the resumed hearing of the originating summons. Mr J. E. Triay, for the landlord, has, however, now applied by summons to have the originating summons struck out as disclosing no cause of action, as being frivolous and vexatious and an abuse of the process of the court. He invokes RSC Ord.18, r.19 and the inherent powers of the court. He has explained that it was only after the first hearing that the landlord became doubtful of the tenant's right to claim a new tenancy and this led his solicitors to observe defects in the originating summons which had not at first been noticed.

Mr. Triay cited a number of cases to convince me that I had the power to make the order for which he was asking. I do not think I need deal with them, as Mr. R. Vasquez, who appeared for the tenant, did not argue that I could not, but only that I should not, make the order. I have no doubt that I have the power.

Mr Triay began his submission by pointing out that RSC Ord. 97, r.6(1) (a) requires an originating summons for a new tenancy of business premises to state the business carried on at the premises, while r.7(1) requires the applicant on issuing the summons to file an affidavit verifying the statements of fact made in the summons. Neither of these requirements has been complied with.

Further, Mr Triay has produced affidavit evidence which suggests very strongly that the tenant is not in occupation of the premises, either directly or through an employee. I do not think it necessary to set out the evidence here. The right to apply for a new tenancy under s.37 of the Ordinance is by s.36 restricted to tenants who are in occupation of the premises.

Therefore, argued Mr. Triay, not only is the originating summons incompetent but also it would appear that the tenant has no locus standi. Notice was given to the solicitors for the tenant and they were invited to apply for amendment, but they have not done so. They were also asked if they would voluntarily give discovery but again they have not done so. All they have done is to make a bald statement that the tenant is in occupation and that there is no sub-tenancy.

Mr. Vasquez, argued, in the first place, that since the landlord's notice of opposition had been based on the single ground that he intended to use the premises for a business of his own, there were only two issues in the proceedings, that of intent, which has been decided, subject to appeal, and that of the quantum of the rent to be payable under the new tenancy. Moreover, Mr Vasquez submitted that at this late stage, the landlord was stopped from raising a new issue. Mr. Vasquez cited no authority for the latter proposition and I know of none. Estoppel by inactivity might possible have been arguable if it had led to the tenant acting to its disadvantage, but it has not done so.

Mr. Vasquez conceded that the landlord's notice could not in itself estop him from subsequently denying that the tenancy is one to which the Ordinance applies. There is a statement in Woodfall's Landlord and Tenant, 27th Ed., Vol. 2, para. 2475 to that effect. It does not appear to be supported by any authority, but I accept it as correct.

This is unquestionably a very late stage at which to challenge the originating summons but I do not think it is too late to take an objection which goes to the very root of the application and indeed to the jurisdiction of the court to grant a new tenancy. I think such an objection may be taken at any time, although of course where there has been undue delay, it may be allowed only on terms. In the circumstances, if the tenant had sought leave to amend, even at this late stage, I would have allowed it, but no application for leave to amend has been made.

Next, Mr. Vasquez argued that it was wrong to invoke Ord. 18, r. 19 in circumstances such as these. He submitted that the question whether the tenant was in occupation raised issues of fact and law which were inappropriate for affidavit evidence. The weakness of his position here, as I see it, is that he has not thought fit to file any affidavit by way of rebuttable. Had there been such an affidavit and had I felt that there was a serious issue to be tried, I should certainly have refused to decide it under Ord. 18. As it is, the landlord's assertion that the tenant is not in occupation and the evidence he has produced to support it stand entirely unchallenged.

Finally, Mr Vasquez argued that the word "occupied" ought to be given a wider meaning in Gibraltar than in England. He based this proposition on the definition of "to occupy" in s. 2 of the Interpretation and General Clauses Ordinance. This proposition I entirely reject. The definitions in s.2 only apply "unless the context otherwise requires" and, in my opinion, when interpreting the Landlord and Tenant (Miscellaneous Provisions) Ordinance the context does otherwise require. Part III must be read as a whole and having regard to s.36 (1) and (3) and s.55, I think "occupied" must be given a restricted meaning and in the case of a company, means occupied by the company itself or by an employee of the company, employed for the purposes of the business which brings the premises under Part III. Occupation by a sub-tenant or by a licensee who has been given exclusive possession is not occupation by the sub-lessor or licensor. It appears from the evidence that the premises are occupied by a Mr. Bray, who carries on the business of a publican and who is not accountable to the tenant for the retail profits. The tenant appears to have put Mr. Bray into possession and supplies him with his stock but there is no evidence at all that the tenant itself carries on any business on the premises. Mr. Vasquez suggested that both the tenant and Mr. Bray might be in occupation

of the premises but there is nothing on the record to support this and a great deal to rebut it.

I find support for these views in *Pegler v. Craven* (1) in which, dealing with s.10 (1) of the Leasehold Property (Temporary Provisions) Act, 1951, Jenkins, L.J., said—

> "the meaning of the word 'occupation' is one which must be determined by reference to the context in which the expression is used, and, in my view,the context makes it reasonably plain that the occupation by a third party under a licence otherwise than for the purpose of carrying on a business belonging to the tenant himself does not suffice to make the tenant the occupier of a shop under a tenancy within the meaning of the Act."

Those words were quoted with approval in *Teasdale v. Walker* (2) and held applicable to s.23 of the Landlord and Tenant Act, 1954, from which our s. 36 was derived.

I should perhaps add that counsel were agreed that the originating summons was in the form commonly used in Gibraltar. The fact that there has been laxity in the past, probably because the tenant's occupation is rarely challenged, cannot, in my opinion, assist a person who comes to the court with an application which is defective not in a merely technical but in a fundamental respect.

To conclude, the originating summons is so defective that, as it stands, it does not disclose a cause of action. There is no application before me for leave to amend. There is affidavit evidence before me, which stands unchallenged, which indicates that a Mr. Bray is in occupation of the premises for the purposes of his own business. The tenant has not thought fit to file an affidavit showing that it occupies any part of the premises for the purposes of its own business and I must assume that it does not. Therefore, it would seem that the tenant is not entitled to invoke Part III of the Ordinance and I must regard the originating summons as an abuse of the process of the court. It is accordingly struck out.

(1) [1952] 1 All E.R. 685, at p. 689.
(2) [1958] 3 All E.R. 307, at p. 313.