Supreme Court
Spry, C. J.
4, 5 June 1979

*Landlord and tenant — statutory tenancy — whether determined by failure to vacate in compliance with a prohibition order — Public Health Ordinance, s.84 — Landlord and Tenant (Miscellaneous Provisions) Ordinance, s. 22*
*Fundamental rights — protection from deprivation of property —whether restriction on right to possession ultra vires — The Constitution of Gibraltar, s.6 — Landlord and Tenant (Miscellaneous Provisions) Ordinance, s. 22*

A nuisance order was made prohibiting the use of certain premises for human habitation until made fit. The landlord served notice to quit on, and ceased to collect rent from, two tenants who claimed the protection of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (Cap. 83, 1965-69 Ed.). He then applied to the Court of First Instance for an order for possession, which was refused. On appeal to the Supreme Court-

HELD: (i) The making of a prohibition order does not affect the relationship of landlord and tenant and the tenant continued to enjoy the protection of the Landlord and Tenant (Miscellaneous Provisions) Ordinance.

(ii) The protection afforded a tenant by the Ordinance does not amount to property or to an interest in or right over property, and s.22 is not in contravention of s.6 of the Constitution.

Per curiam. (a) A landlord has at common law no right to dispossess a tenant on the ground that he has used the premises for an illegal purpose.

(b) An ordinance enacted before the Constitution may be held to be void if it cannot be modified so as to conform with the Constitution.

(c) There is a presumption in favour of the validity of any law made by the Legislature and the onus of proof is on the person who alleges that a law is ultra vires.

Cases referred to in the judgment

*Land Holdings (1958) Ltd. v. Norton* (unreported)
*Gas Light and Coke Co. v. Turner* (1840) 6 Bing. (N.C.) 324
*In re Davis & Cavey* (1888) 40 Ch.D. 601
*Blake v. Smith* [1921] 2 K.B. 685
*Marela Ltd. v. Machorowski* [1953] 1 All E.R. 960
*de Freitas v. Benny* [1976] A.C. 239
*D.P.P. v. Nasralla* [1967] A.C. 238
*Ulster Transport Authority v. James Brown & Sons Ltd.* [1953] N.I. 79
*Chiranjit Lal Chowdhury v. Union of India* (1950) S.C.R. 869
*Government of Malaysia v. Selangor Pilot Association* [1977] 2 W.L.R. 901
*Pillai v. Mudanayake* [1953] A.C. 514
*Belfast Corporation v. O.D. Cars Ltd.* [1960] A.C. 490

**Appeal**

This was an appeal from a judgment of the Court of First Instance dismissing two consolidated actions for possession of premises to which Part II of the Landlord and Tenant (Miscellaneous Provisions) Ordinance applied.

J. E. Triay and H. K. Budhrani for the appellant
B. Perez for the respondent
The Attorney General (D. Hull) and C. Finch amici curiae

15 June 1979: The following judgment was read -

This is an appeal from a judgment of the Court of First Instance dismissing, with costs, two consolidated actions for possession of premises to which Part II of the Landlord and Tenant (Miscellaneous Provisions) Ordinance applies. The plaintiff was the landlord and the two defendants were tenants under tenancies which were originally contractual but had become statutory, of parts of the building known as No. 5 Shakery's Passage. The defendant Joseph Lezzano has, since the hearing of the action, vacated his flat and has ceased to be concerned in the appeal except as regards costs. I shall refer to the defendant Victoria Becerra as the tenant.

The facts may be stated briefly. An abatement notice was served on the landlord under s.84 of the Public Health Ordinance requiring him to abate a nuisance existing at No. 5; he failed to comply with it and a complaint was lodged, which re-

sulted in the making of a nuisance order prohibiting the use of the premises for human habitation until the magistrates' court should be satisfied that the premises had been rendered fit for human habitation. The landlord then served a notice to quit on the tenant and ceased to collect rent from her.

In the Court of First Instance, the landlord appears to have relied almost entirely on the judgment of Flaxman, C.J., in *Land Holdings Ltd. v. Norton* (1958) (1), in which he said that tenants remaining in occupation in defiance of a prohibition order were trespassers and could not "rely on the limited right of statutory tenancy acquired under the Landlord and Tenant (Miscellaneous Provisions) Ordinance to justify their occupation." The case for the tenant was that no order for possession could properly be made unless it came within the provisions of that Ordinance.

The learned judge held that he was not bound by the dicta of Flaxman, C.J., in the *Land Holdings* case as they were obiter. This is clearly not so, but I think it was a mere slip and that what the judge intended to say was that the case could be distinguished. He thought he should follow the English authorities. He did not say on which authorities he relied but quoted from Megarry's Rent Acts.

In this court, the proceedings took a different form. Mr. J. E. Triay, for the landlord, based his argument on two main propositions. The first was that the tenant, by remaining in occupation notwithstanding the prohibition order, was in breach of her obligations as tenant. The second was that the provisions of Part II of the Ordinance offend against s.6 of the Constitution of Gibraltar.

Mr. Triay claimed that the first of these propositions was not essentially different from the argument raised in the Court of First Instance but he was not pressing the argument that the tenant was a trespasser; rather he was relying on the fact that at common law, a tenant was not permitted to use the premises for illegal purposes. For this, Mr. Triay relied on a statement in Hill and Redman's Law of Landlord and Tenant, 12th Ed., p. 234, para. 155, that

(1) Included in (1812-1977) Gib. L.R. shortly going to press.

> "Unless restrained by statute or by restrictive covenant binding upon him, a tenant has the right to use the demised premises for whatever purposes he likes, provided they are not illegal....."

As authority for this, the learned author cites *Gas Light and Coke Co. v. Turner* (1). Unfortunately, reference to that case does not support the statement, still less Mr. Triay's interpretation of it: it is only authority for saying that a contract entered into for an illegal purpose is void. Mr. Triay also referred to *In re Davis & Cavey* (2), but in my view it is of no assistance. I have not been able to discover any authority that says that at common law, in the absence of an express covenant, a landlord can dispossess a tenant on the ground that the latter has used the demised premises for an illegal purpose.

Under the Landlord and Tenant (Miscellaneous Provisions) Ordinance (3), a landlord may obtain an order for possession if the tenant has been convicted of using the premises for an immoral or illegal purpose, but it is not suggested in the present case that the tenant has been convicted of any offence.

I must now, I think, consider the *Land Holdings* decision because, although Mr. Triay originally said that he was not going into the question whether the tenant was a trespasser, when dealing with the judgment appealed from, he submitted that the dicta of Flaxman, C.J. were correct. I am concerned with them only so far as the learned judge held that tenants were trespassers. He placed considerable reliance on the case of *Blake v. Smith* (4), although stressing that the facts were different. The facts were very different, because in *Blake's* case the tenant had been evicted by the local authority, had been out of possession for five months and had then made an unauthorized forcible entry into the premises. Quite apart from the existence of the closing order, he was clearly a trespasser. I am not satisfied, however, that the making of a closing order, or as it is called in Gibraltar a prohibition order, has in itself any effect on the relationship of landlord and tenant. I think, with great respect, that Flaxman, C.J. was wrong when he described the tenant in the *Land Holdings* case as a trespasser. I express no opinion on his decision as to the liability for rates, the substantial issue in the case, because it is unnecessary to do so.

(1) (1840) 6 Bing. (N.C.) 324.
(2) (1888) 40 Ch. D. 601.
(3) Section 22 and 4th Sched., para. (b).
(4) [1921] 2 K.B. 685.

I am reinforced in my opinion by the judgments in *Marela Ltd. v. Machorowski* (1), a case that does not appear to have been cited to Flaxman C.J. Mr. Triay submitted that the case was not on all fours with the present case and that it was not binding here. It is certainly not binding, but it is highly persuasive. There, as here, a closing order had been made, the tenant remained in occupation and the landlord sought an order for possession. Ignoring the argument whether s.156 of the Housing Act, 1936, applied, which has no relevance here, the gist of the matter was expressed by Romer, L.J., when he said—

> "and, inasmuch as there is no other enactment which removes these premises from the general scope of the Rent Restrictions Acts, it necessarily follows that the tenant is entitled to the protection of those Acts, the landlords cannot succeed in their attempt to recover possession."

The court in that case clearly treated the tenant as a tenant, not as a trespasser.

Mr. Perez, for the tenant, placed much reliance on the *Marela* case, and argued that there is no conflict between the Public Health Ordinance and the Landlord and Tenant (Miscellaneous Provisions) Ordinance. There is nothing in the former to exclude the provisions of the latter. I agree. I hold that the tenant is entitled to the protection of the Landlord and Tenant (Miscellaneous Provisions) Ordinance notwithstanding the prohibition order. The first part of the appeal fails.

The second part of the appeal raises an issue which was not considered in the lower court. On this, Mr. Triay argued that Part II of the Landlord and Tenant (Miscellaneous Provisions) Ordinance operates to enable the tenant to take possession of property, compulsorily, that is without the consent of the landlord, without adequate compensation and without a direct right of access to the Supreme Court. Therefore, according to Mr. Triay's argument, it offends against s.6 of the Constitution of Gibraltar. He submitted that a statutory tenancy is just as much "property" as a contractual one and that it is property which passes from the landlord to the tenant.

Before considering s. 6, I should, I think, deal with a submission made by the learned Attorney General, who appeared

(1) [1953] 1 All E.R. 960.

as amicus curiae and to whom I am obliged for his assistance. Mr. Hull began by submitting that an ordinance in existence when the Constitution was enacted cannot be said to be contrary to it and that, where such an ordinance is not in accordance with the Constitution, the duty of the court, having regard to s.2 of Annex 2 to the Gibraltar Constitution Order 1969, is to modify the ordinance so far as it may be necessary. With respect, I am not in complete agreement. The Constitution contains no validation of existing laws, unlike that of Trinidad and Tobago (see *de Freitas v. Benny* (1)) or Jamaica (see *D.P.P. v. Nasralla* (2)). Instead, the existing laws are to be treated as if they had been made in pursuance of the Constitution. I think, therefore, that if an existing law were in direct conflict with the Constitution, the court might have to hold that it was void. That would, of course, only be in the last resort, if it proved impossible to bring it into conformity with the Constitution.

I pass then to s.6 of the Constitution, which begins—

> "No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired,"

and there follow certain exceptions.

Mr. Perez argued that there had been no taking or acquisition. He submitted that the provisions of Part II merely impose negative restrictions on certain landlords, and prevent them from recovering possession of premises of which they voluntarily parted with the possession when they created contractual tenancies. He submitted that such restrictions are regulatory and not so arbitrary as to be confiscatory. He submitted, moreover, that the rights so restricted do not amount to "property" for the purposes of s.6. Mr. Hull associated himself with those arguments.

Some slight support for Mr. Perez' argument is to be found in the judgment of Sheil, J., in the Divisional Court in the case of *Ulster Transport Authority v. James Brown & Sons Ltd.* (3), which was cited by Mr. Hull. It had been suggested that if "property" were interpreted to include the intangible, the legislative power would be crippled and mention had been made of the Rent Acts. Sheil, J., remarked, obiter, that

> "The Rent Acts did not destroy a landlord's rights. They did not provide that a tenant should occupy a house

(1) [1976] A.C. 239, at p. 244.
(2) [1967] A.C. 238, at p. 248.
(3) [1953] N.I. 79, at p. 92.

> rent free. They suspended his right to get possession, insisting that he keep his bargain so long as the tenant kept his."

The Court of Appeal made no comment.

I should perhaps deal briefly with some of the cases that have been cited to me although I do not think they are really of any assistance. Passages that were quoted to me seem apt in isolation but lose their significance when seen in context. *Chiranjit Lal Chowdhury v. Union of India* (1) was concerned with the validity of a law which gave the Central Government power to appoint the directors of a manufacturing company. The law was challenged by one of the shareholders. The court found that he retained the ownership of his shares, the right to dispose of them and the right to share in any dividend and therefore had not been dispossessed of property. The facts are therefore very different from those of the present case. One sentence is perhaps worth quoting:

> "The test would certainly be as to whether the owner has been dispossessed substantially from the rights held by him or the loss is only with regard to some minor ingredients of the proprietary right."

The *Ulster Transport Authority* case, to which I referred earlier, was a case where a prohibition imposed by law had the effect of robbing a company of its goodwill, which then of necessity fell into the lap of a statutory corporation. It is useful as authority for saying that the word "property" embraces intangible as well as tangible property and for saying that where such a prohibition is merely a colourable device to secure property without compensation, it may properly be held to be ultra vires. *Government of Malaysia v. Selangor Pilot Association* (2) was a very similar case but was decided differently because the majority of the Judicial Committee thought that although the Association might have been deprived of the goodwill of its business, that goodwill had not been acquired by the port authority which had been give the exclusive right to carry on the business. The "colourable device" argument had been raised in the lower court but was not pursued before the Committee.

*Pillai v. Mudanayake* (3), which was concerned with citizenship, has no direct relevance but was cited for a statement that

(1) (1950) S.C.R. 869.
(2) [1977] 2 W.L.R. 901.
(3) [1953] A.C. 514.

> "Legislation, though framed so as not to offend directly against a constitutional limitation of the power of the legislature, may indirectly achieve the same result and..... in such circumstances the legislation would be ultra vires."

Finally, *Belfast Corporation v. O. D. Cars Ltd.* (1) was a case where it was claimed that the right to build on one's land is property and that planning legislation which restricted the use of property amounted to a taking away of part of the property. This argument was rejected and Viscount Simonds observed that anyone using the English language in its ordinary signification

> "would surely deny that any one of those rights which in the aggregate constituted ownership of property could itself and by itself aptly be called 'property'."

As I have said, I do not think any of these cases takes the matter much further. I think what has to be done is to analyze the effect of Part II, or more particularly s.22, since it was on that section that the argument was based.

Section 22, put simply, precludes the making of an order for possession of a dwelling-house to which Part II applies unless the court thinks it reasonable to make such an order and the tenant is in default in one of certain specified respects, or the landlord requires the dwelling-house for his own residence or that of a close relative, or suitable alternative accommodation is available for the tenant. What is important, I think, is that a tenant who is not in default has no absolute right to remain in the premises. If he had, I should not hesitate to hold the provision contrary to the Constitution, because such a provision would take the reversion expectant on the contractual tenancy, which is undoubtedly property, away from the landlord and give it to the tenant. What s.22 does is nearer to giving the tenant a general right to accommodation, rather than a right to remain where he is, because if suitable alternative accommodation is available he can only remain if the court refuses to make an order for possession on the ground that it would be unreasonable. In fact, s.22 does not even go so far, because if the landlord requires the house for his own residence, the court has to

(1) [1960] A.C. 490.

weigh the balance of hardship and the tenant may be evicted even though no suitable alternative accommodation is available.

When the matter is looked at in this light, I think it is clear that the rights given to a tenant by s.22 are certainly not themselves "property" nor can they properly be called an interest in or a right over property, property here being the premises comprised in the tenancy. The rights of the landlord are certainly curtailed but not, in my opinion, to the point where the section could be described as confiscatory.

I return to the words of s.6 of the Constitution. First, "no property of any description shall be compulsorily taken possession of." On a literal interpretation, I do not think those words can be said to apply. The landlord does not have possession of the dwelling-house, so that possession cannot be taken from him. What happens is that his right to recover possession is postponed for an indefinite period which may be long or short. Admittedly, he is injuriously affected but I think it would be straining the language to say that his deprivation amounts to a taking possession of his property.

Secondly, "no interest in or right over property of any description shall be compulsorily acquired." The only person who is acquiring any benefit is the tenant and as I have said, I do not consider the rights given him by s.22 amount to an interest in or a right over property.

I think that the provisions of the Constitution that protect the fundamental rights and freedoms of the individual must be strictly construed, since they are fetters on the legislative power, but with the qualification that the court must consider the effect of the legislation and not just its form. I think also that there is a presumption in favour of the validity of any law made by the Legislature and that the onus of proof is on the person who alleges that a law is ultra vires. In my opinion, Part II of the Landlord and Tenant (Miscellaneous Provisions) Ordinance does not, directly or indirectly, offend against s.6 of the Constitution.

The appeal is dismissed.