FOURTH SUPPLEMENT TO THE
GIBRALTAR GAZETTE L.R. 2/79

No. 1,834 of 4th OCTOBER, 1979.

LAW REPORTS

Note: These Reports are cited thus —
(1979) Gib. L.R.

CHELLARAM and another v. VASSALLO

Supreme Court
Spry C.J.
21 June 1979

Landlord and tenant — business premises — variation of terms on grant of new tenancy — Landlord and Tenant (Miscellaneous Provisions) Ordinance, s. 48

Section 48 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (Cap. 83, 1965-69 Ed.) should never be used to substitute a new and materially different contract for that which the parties agreed.

Cases referred to in the judgment

Gold v. Brighton Corporation [1956] 1 W.L.R. 1291
Cardshops v. Davies [1971] 1 W.L.R. 591

Application

This was an application under s. 37(1) of the Landlord and Tenant (Miscellaneous Provisions) Ordinance for the grant of a new tenancy of business premises.

H. K. Budhrani for the applicant
S. Benady, Q.C., for the respondent

27 June 1979: The following judgment was read —

This is an application for a new tenancy of business premises brought under Part III of the Landlord and Tenant (Miscellaneous Provisions) Ordinance. There are two issues. First, Mr.

Budhrani on behalf of the tenants asked me to exercise the power given me by s.48 of the Ordinance to change the terms of the tenancy; secondly, there is the issue what rent should be payable.

The holding consists of a shop at the North end of Main Street which bears the numbers 14, 16 and 18. It has a frontage of 22 feet and a superficial area of 1300 square feet, of which 900 square feet are used for selling space and 400 square feet for two stores. It appears that at some time in the past the building was enlarged to absorb a patio in which there was a manhole to a foul water drain which serves the upper floor as well as the toilet in the shop. This manhole, according to Mr. Chellaram, who gave evidence for the tenants, has an ill-fitting cover and emits foul smells and occasionally overflows. This makes it impossible to carpet the shop or to stack goods on the floor. There are two other manholes in the shop, but little was said about these. The shop also suffers from damp, apparently from defective guttering above and rain water drains which descend inside the shop. There is said to be a patch of damp in the centre of the ceiling of the main selling area which at times makes it dangerous to use the electric lighting. The walls of the rear store are extremely damp and the other store is also damp, which means that goods stored there are liable to rust and mould.

Mr. Benady, Q.C., who appeared for the landlord, suggested that this evidence was exaggerated. It may well be so, but there is no evidence to contradict it. I must remark that if the condition of the premises is as Mr. Chellaram described it, I cannot understand why the public health authorties have taken no action. Also, of course, it is significant that the tenants are asking for a new tenancy in spite of the condition of the shop.

The latest lease of the premises contained a covenant by the tenants to keep the inside of the premises in good and substantial repair and condition (fair and reasonable wear and tear and damage by fire tempest, the firing of guns or the Queen's enemies excepted) and a proviso that

> "the lessor will not be responsible to the lessees for damage caused by water to the demised premises or the contents thereof in any manner whatsoever."

Section 48 of the Ordinance provides that the terms of a tenancy granted by order of the court shall, in the absence of agreement between the parties, be determined by the court and continues

> "and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances."

Mr. Budhrani relied on the words "all relevant circumstances" and asked me to exercise my discretion by excluding the proviso quoted above, by inserting a covenant on the part of the landlord to carry out repairs of a structural nature and to keep the premises water tight and by qualifying the repairing covenant on the part of the tenants by excluding damage resulting from damp in walls and ceilings. He argued that it would be reasonable to make the relationship between the parties correspond with the common law relationship of landlord and tenant.

The only authorities that were cited to me were *Gold v. Brighton Corporation* (1) and *Cardshops v. Davies* (2). I do not think either is of any great assistance and incidentally both were cases where it was the landlord who was seeking the change. Mr. Benady cited the former for a dictum by Lord Denning that

> "It is to be remembered that the object of this Act is to protect the tenant in respect of his or her business and not to put a new saleable asset into her hands."

Even without authority, I have no hesitation in rejecting Mr. Budhrani's submission. I think the admittedly wide discretion of the court may be used to correct some error or omission or make some minor adjustment to the existing contractual terms or to make some possibly more significant change where surrounding circumstances have changed. I do not think it should ever be used to substitute a new and materially different contract for that which the parties agreed. The essence of Part III is that it provides for the *extension* of tenancies. Some modification may be necessary or desirable but it is not for the court to frame a new contract and impose it on the parties. It is quite clear from two leases made between the parties, one in 1968 and one

(1) [1956] 1 W.L.R. 1291.
(2) [1971] 1 W.L.R. 591.

in 1973, which are in evidence, that the landlord has always been insistent that he should not be liable in respect of damp and that the tenants took the premises on that basis.

That is enough to dispose of this issue but there is another ground on which I should in any case have rejected the proposed variation of terms. The proposed covenants would have the effect of compelling the landlord to effect major capital works. I have not been given any estimate of the cost of those works and it is quite likely that the cost would be out of proportion to the useful life of the present building. It would, in my opinion, be quite wrong to use s.48 to impose an unquantified and possibly very heavy burden on the landlord.

[*The Chief Justice then considered the evidence as to the appropriate rent and made his assessment.*]

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