FOURTH SUPPLEMENT TO THE GIBRALTAR GAZETTE L.R. 8/79.

No. 1,930 5th MARCH 1981

LAW REPORTS

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

CORSI INVESTMENTS Ltd. and others v. GUILLEM and another

Supreme Court
Spry, C.J.
5 October 1979

Landlord and tenant — business premises — failure of tenants to notify intention — whether jurisdiction to grant relief — Landlord and Tenant (Miscellaneous Provisions) Ordinance, s.48 (2)
Landlord and tenant — acceptance of rent "without prejudice" Repudiation — whether mere failure to execute lease raises inference of repudiation of tenancy agreement
Judgment — judgment in default of appearance — setting aside — need to show defence on merits

After long negotiations and an agreement for a new lease which was never completed, the tenants of business premises were served with notice to terminate the tenancy under s.38 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (Cap. 83, 1965-69 Ed.). They failed to notify their unwillingness to give up possession within the required two months. The landlord took out a writ for possession and obtained judgment in default of appearance. The tenants applied to have the judgment set aside.

HELD: (i) Where a tenant of business premises has been served with notice to terminate the tenancy and has failed to notify his unwillingness to give up possession within the two months required by the notice, the court has no jurisdiction to grant relief.

(ii) Whether acceptance of rent "without prejudice" creates a new tenancy depends on the intention of the parties.

(iii) Mere failure to execute a lease was not enough to show repudiation of the tenancy agreement when the tenants were acting in compliance with it.

(iv) A judgment regularly obtained will not be set aside when the defence must fail.

Cases referred to in the order

Evans v. Bartlam [1937] A.C. 473
Beale v. McGregor (1886) 2 T.L.R. 311
Freeth v. Burr (1874) L.R. 9 C.P. 208
Farden v. Richter (1889) 23 Q.B.D. 124
Clarke v. Grant [1950] 1 K.B. 104

Application

This was an application under RSC Ord. 13, r. 9, for the setting aside of a judgment entered in default of appearance.

D. J. Azopardi for the applicants
A. B. Serfaty for the respondents

1 November 1979: The following order was read—

This is an application under RSC Ord. 13, r.9, for the setting aside of a judgment, entered in default of appearance, for possession of shop premises in Main Street.

There is no dispute regarding the essential facts. The applicants are two sisters who claim to have been in occupation of the shop over 50 years. Notice to terminate the tenancy was first served in May 1976 and the applicants applied under Part III of the Landlord and Tenant (Miscellaneous Provisions) Ordinance for the grant of a new tenancy. In consequence, there was a continuing tenancy under s.37 of the Ordinance. Negotiations continued until agreement was reached in September 1977, when the applicants were asked to execute a lease, the terms of which had been agreed, and to pay certain arrears of rent and costs. There followed a succession of reminders, which elicited no reply. In July, 1978, the respondents attempted to serve a fresh statutory notice and, as there was doubt whether service had been effected, served yet another notice to terminate the tenancy on 31 March 1979. The notice complied with s.38(5), in that it required the applicants to notify the respondents within 2 months whether they would be willing to give up possession but the applicants failed to notify their intention.

The landlord took out a writ in June 1979, claiming possession of the shop, mesne profits and the amount of the costs originally claimed in September 1977. This was served on one of the applicants but no appearance was entered and on 19 July 1979 judgment was entered in default. It is this judgment which I am now asked to set aside.

Mr D. J. Azopardi, who appeared for the applicants, relied on the judgment of Lord Atkin in *Evans v. Bartlam* (1) as authority for saying that the court has an unfettered discretion to set aside a judgment. I accept that as correct, although I would add in passing that Lord Russell of Killowen, who was in agreement, added that no judge exercising the discretion could fail to consider whether any useful purpose would be served by setting aside the judgment. Mr Azopardi also claimed that the court may disregard lapse of time, relying on *Beale v. McGregor* (2), no copy of which is presently available.

Mr Azopardi argued that the applicants are two old ladies, who did not realize the seriousness of the situation. They thought the length of their possession and the agreement that had been reached with the respondents meant that their position was secure. They had been paying rent up to the end of June 1979. He submitted that in the circumstances, the enforcement of the judgment would be harsh and oppressive. The applicants would be content to accept any terms that the court might impose and to execute the lease and pay the costs. Mr Azopardi suggested that the judgment need only be set aside as to that part of it which awarded possession. If this were done, he would then apply for equitable relief against forfeiture.

Mr Serfaty, for the respondents, began by submitting that no question of forfeiture arose. With that, I agree.

His main argument falls into two parts. First, he claimed that the court has no jurisdiction to grant relief against the results of failure to take advantage of the provisions of the Landlord and Tenant (Miscellaneous Provisions) Ordinance. Again, I agree. I think it is quite clear that the applicants lost their right to apply for a new tenancy when they failed to notify the respondents of their unwillingness to give up possession within the two months specified in the notice given under s.38. Section 42(2) precludes the court from entertaining an application in such circumstances.

(1) [1937] A.C. 473

(2) (1886) 2 T.L.R. 311, cited in RSC 13/9/6.

Secondly, Mr Serfaty claimed that the applicants had repudiated the agreement under which they were to execute the new lease.

I cannot accept that there was any repudiation on the part of the applicants. They continued in occupation of the shop, they continued to pay the rent and there is no suggestion that they were in breach of any of the covenants on their part to be observed. In *Freeth* v. *Burr* (1) to which Mr. Serfaty referred me, Lord Coleridge, C.J. said

> "the true question in whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

The contract here was the tenancy agreement. The agreement to execute a lease was not, in my opinion, an independent contract: it was at most supplementary to the substantive contract. There was clearly no repudiation of the tenancy agreement; on the contrary, the applicants acted at all times in compliance with it. In those circumstances, I should require more than mere inactivity before I would infer repudiation even of the ancillary agreement to execute the lease.

I think the agreement was in fact repudiated by the respondents when they served the notice to terminate in September 1978. I am not prepared to say that they were not entitled to repudiate.

The main basis of Mr Serfaty's argument was, I think, that the tenancy had been determined and a judgment for possession given. There is no suggestion that the judgment was not regular. Such a judgment should not be set aside unless there was a defence on the merits. There should be an affidavit of merit (see *Harden v. Richter* (2)) but Mr Serfaty did not rely on the technical omission to file such an affidavit but on the substantive ground that there was in fact no defence. The applicants were seeking the indulgence of the court but there was a long history of forbearance on the part of the respondents, and no explanation offered. If the judgment were set aside, the applicants would presumably come to the court for specific performance

(1) (1874) L.R. 9 C.P. 208
(2) (1889) 23 Q.B.D. 124

and such an application ought to be refused; therefore, no useful purpose would be served by setting the judgment aside.

I feel those arguments irresistible. It is impossible not to feel sympathy for the applicants but they have been given chance after chance. It is inconceivable that specific performance should be ordered in their favour, both because equitable relief is never granted to persons guilty of inordinate delays and because I think the agreement for a new lease reached in September 1977 was repudiated by the respondents when they served their notice in September 1978. I cannot see that there is any subsisting agreement of which specific performance could be ordered.

The acceptance of rent up to June 1979, expressed to be "without prejudice" cannot have operated to create a new tenancy, because it is obvious that that was not the intention of the respondents (see *Clarke v. Grant* (1)).

It follows that this application must fail, and it is dismissed.

(1) [1950] 1 K.B. 104