**[1980–87 Gib LR 20]**

## SHARRATT v. RENT ASSESSMENT TRIBUNAL

SUPREME COURT (Davis, C.J.): March 16th, 1981

*Administrative Law—judicial review—failure to exercise jurisdiction—postponement by Rent Assessment Tribunal of hearing of application for determination of rent for unreasonable length of time, because of extraneous matters, amounts to failure of tribunal to exercise jurisdiction*

*Landlord and Tenant—rent—assessment of statutory rent—Rent Assessment Tribunal not to adjourn assessment hearing to allow landlord's action for possession to proceed first—issue of mandamus correct procedure to ensure timely hearing in absence of statutory right of appeal*

The applicant applied for an order of mandamus to require the Rent Assessment Tribunal to determine the correct amount of rent payable in respect of her flat.

The applicant applied under the Landlord and Tenant (Miscellaneous Provisions) Ordinance, s.18, to have her rent determined by the Rent Assessment Tribunal. The Tribunal adjourned the hearing but before the matter came up, her landlords served her with notice to quit and applied to the Court of First Instance for possession of the property. The applicant applied to the Supreme Court for an order of mandamus to compel the Rent Assessment Tribunal to hear her application prior to the hearing in respect of possession of the flat.

She submitted that (a) the adjournment of the hearing of her case amounted to a denial of justice; (b) if an order of mandamus were not granted, landlords in similar cases could effectively transfer tenants' applications for determination of rent from the Rent Assessment Tribunal to the Court of First Instance by issuing a notice to quit and claiming possession, which would render the provisions relating to determination of rent practically useless for the tenant; (c) there was no guarantee that the landlords' application for possession would be heard that day but it might be adjourned, in which case an order of mandamus would not be superfluous; (d) she had been deprived of a possible ground for opposing the landlords' claim for possession of the flat as a result of the Tribunal's failure to hear her application; and (e) in considering extraneous factors such as public convenience, the saving of court time, reducing expense, *etc*., the Tribunal had abdicated its jurisdiction in favour of the Court of First Instance.

The respondent submitted that (a) an order of mandamus should not be granted, since if the Court of First Instance granted possession later that day, it would be rendered superfluous; and (b) as the question in issue before the Tribunal would have to be decided by the Court of First Instance 10 days later, there were strong grounds of public convenience, reducing expense, saving court time, *etc*. for allowing the Court of First Instance to deal with it in the claim for possession of the flat.

**Held,** granting the application:

(1) The applicant had a right to have her application heard and would be granted an order of mandamus, it being the correct remedy in the absence of a right of appeal against a decision of the Tribunal. The Tribunal, in adjourning the hearing, had taken into consideration extraneous circumstances which it was not entitled to take into account. This was an abdication of its jurisdiction, as a Tribunal could be deemed to have declined jurisdiction if it postponed a hearing for an unreasonable length of time (paras. 13–17).

(2) It was not a sufficient reason for refusing the order of mandamus that the Court of First Instance might hear the landlords' claim for possession of the flat later that day. There was only a *possibility* that this would happen; accordingly, an order of mandamus could be issued, notwithstanding that it might, later that day, be rendered superfluous (paras. 26–27).

**Cases cited:**

(1) *R.* v. *Adamson* (1875), 1 Q.B.D. 201, considered.
(2) *R.* v. *Central Professional Cttee. for Opticians*, *ex p. Brown*, [1949] 2 All E.R. 519, considered.
(3) *R.* v. *Evans* (1890), 17 Cox, C.C. 81; 62 L.T. (N.S.) 570, considered.
(4) *R.* v. *London County Council*, *ex p. Corrie*, [1918] 1 K.B. 68, considered.

**Legislation construed:**

Landlord and Tenant (Miscellaneous Provisions) Ordinance (Laws of Gibraltar, *cap.* 83), s.18: The relevant terms of this section are set out at para. 9.
s.19: The relevant terms of this section are set out at para. 9.

*R.M. Vasquez* for the applicant;
*J.E. Triay* for the respondent.

1 **DAVIS, C.J.:** This is an application for judicial review under O.53 of the Rules of the Supreme Court 1965 of England as applied to Gibraltar by r.8(1) of the Supreme Court Rules 1979. The applicant seeks an order of mandamus to require the Rent Assessment Tribunal to determine the correct amount of rent payable in respect of Flat 2(a), Victualling Office Lane, in accordance with s.19 and Part I of the Second Schedule to the

Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap.* 83) ("the Ordinance").

2 The facts giving rise to this application, as they appear from the affidavits and supporting documents filed by the applicant's solicitors, are as follows.

3 The applicant is the tenant of Flat 2(a), Victualling Office Lane. On December 12th, 1980, she applied to the Rent Assessment Tribunal under s.18 of the Ordinance to determine the correct amount of rent payable in respect of the flat. The hearing before the Tribunal was fixed for a date in January 1981, but this was adjourned and by the time the matter came up for hearing before the Tribunal on March 6th, 1981, the applicant's landlords had served the applicant with notice to quit and had applied to the Court of First Instance for possession of Flat 2(a). (In the copy of the landlords' plaint attached to Mr. Vasquez's affidavit of March 10th, 1981 the flat is referred to as Flat 2(1), Victualling Office Lane, but it has not been suggested that this not the same as the flat referred to in these proceedings as Flat 2(a) and I shall refer to it henceforth as Flat 2(a).) In this plaint the applicant's landlords seek possession of Flat 2(a) on the ground that the flat is a furnished flat and that the defendant (present applicant) has remained in possession of the flat as a trespasser after notice to quit.

4 The applicant and her landlords were represented at the hearing before the Tribunal by their respective solicitors, Mr. Robert Vasquez and John Azzopardi, and it appears that the Tribunal heard submissions as to whether or not it had jurisdiction to deal with the applicant's application for determination of the correct rent for Flat 2(a). After hearing submissions, the Chairman of the Tribunal read the following decision:

> "1. We do not accept the second submission of Mr. Azzopardi. This Tribunal is competent to decide whether premises are subject to the Landlord and Tenant Ordinance.
>
> 2. Having regard to the application before the Court of First Instance in which plaint both counsel agree that the point at issue here is also at issue there. The Tribunal feels this application should be adjourned until after the hearing of the Court of First Instance.
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> 3. However, this Tribunal is concerned about the effect of the adjournment on the right of the tenant to recover any excess rent if excess there be.
>
> 4. Therefore this Tribunal will adjourn only on the undertaking of the landlord that if it is eventually decided that excess rent has been paid the tenant will be entitled to recover some back-dated to six months of today, *i.e.* September 6th, 1980."

5 The hearing was then adjourned for a date to be fixed by agreement with the secretary of the Tribunal to be not later than three months from March 6th, 1981.

6 Had the Tribunal proceeded with the hearing of the application for determination of the correct rent for Flat 2(a) instead of adjourning, it is clear that the first question it would have had to decide was whether Part II of the Ordinance (under which Part jurisdiction to determine rents is conferred on the Tribunal) applied to Flat 2(a) having regard to the landlords' claim that the flat was a furnished flat to which the provisions of Part II do not apply. The same question would have to be decided by the Court of First Instance in the landlords' claim for possession of the flat, and accordingly as stated in para. 2 of the Tribunal's decision set out above, the Tribunal decided to adjourn the hearing of the application for determination of the correct rent for Flat 2(a) until the Court of First Instance had dealt with the landlords' claim for possession of the flat.

7 In this court, Mr. Vasquez for the applicant has informed me from the Bar that the landlords' application for possession is listed for hearing in the Court of First Instance on Monday, March 16th, 1981 (today—and it was for this reason that the period prescribed by O.53, r.5(4) was abridged to enable the present hearing to take place before that in the Court of First Instance). Mr. Vasquez stated, however, that there was no guarantee that the landlords' application for possession of Flat 2(a) would be heard on March 16th, as this depended on the length of the cause list in the Court of First Instance on that day, what hearings there were before that relating to Flat 2(a), *etc*. And that it was possible that the hearing would be adjourned to the next sitting of the Court of First Instance in April or even later.

8 The grounds for the present application for an order of mandamus, as set out in the applicant's notice of motion, are—

> "1. That the respondents have a statutory duty to determine the said question), *i.e*. the correct amount of rent payable in respect of Flat 2(a) imposed on them by s.19 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance.
>
> 2. That the delay caused by the adjournment of the hearing of the applicant's case by the respondent amounts to a denial of justice and would unduly prejudice this applicant."

9 Sections 18 and 19 in Part II of the Ordinance provide, in so far as relevant, as follows:

> "18. (a) The landlord or the tenant may, in the prescribed form and subject to the prescribed conditions, apply to the Tribunal to determine—

(i) what is the correct amount of rent payable in respect of the dwelling-house in accordance with the provisions of Part I of the Second Schedule . . .

19. (1) Where an application is made to the Tribunal—

(a) under paragraph (a)(i) of section 18, the Tribunal shall determine the maximum rent payable in respect of the dwelling-house in accordance with the provisions of Part I of the Second Schedule . . ."

10 Section 31 in Part II of the Ordinance provides as follows:

"(1) Where any sum has, whether before or after the date of commencement of this Ordinance, been paid on account of any rent, being a sum which is by virtue of this Part, or in consequence of any determination made by the Tribunal under section 19, irrecoverable by the landlord, the sum so paid shall be recoverable from the landlord who received the payment or his legal personal representative by the tenant by whom it was paid, and any such sum, and any other sum which under this Part is recoverable by a tenant from a landlord or payable or repayable by a landlord to a tenant, may, without prejudice to any other method of recovery, be deducted by the tenant from any rent payable by him to the landlord.

(2) Any sum paid by a tenant which under subsection (1) of this section is recoverable by the tenant shall be recoverable at any time within six months from the date of payment but not afterwards."

11 There is no provision in the Ordinance for an appeal from the decision of the Tribunal.

12 *De Smith's Judicial Review of Administrative Action*, 4th ed., at 540 (1980), states as follows:

"Mandamus lies to secure the performance of a public duty, in the performance of which the applicant has a sufficient legal interest. The applicant must show that he has demanded performance of the duty and that performance has been refused by the authority obliged to discharge it. It is pre-eminently a discretionary remedy, and the court will decline to award it if another legal remedy is equally beneficial, convenient and effective."

13 There is no dispute in this case that the determination of rent under s.19 by the Tribunal is a public duty or that the applicant has a sufficient legal interest in the performance of that duty and that she has demanded performance of the duty. Nor is it disputed that an order of mandamus is the proper remedy in the absence of a right of appeal against a decision of the Tribunal.

14 As pointed out by Mr. Vasquez, the provisions of s.19(1)(a) are clearly mandatory, as are the provisions of Part I of the Second Schedule. Can it be said therefore that the Tribunal has refused to perform the duty imposed upon it by s.19(1)(a)? See *de Smith's Judicial Review of Administrative Action* (*ibid.*, at 123):

> "A refusal to exercise jurisdiction may be conveyed by express words or by conduct. Thus, a tribunal is deemed to have declined jurisdiction . . . if it postpones the hearing for an unreasonable length of time or on inadmissible grounds."

15 Mr. Vasquez referred me to the following cases: *R.* v. *Central Professional Cttee. for Opticians*, *ex p. Brown* (2) and *R.* v. *Evans* (3).

16 I was also referred to the case of *R.* v. *Adamson* (1) (cited in *R.* v. *Evans*). In *R.* v. *Evans*, a magistrate adjourned a hearing before him of a charge of libel on the ground that civil proceedings arising out of the same facts were pending. It was held that the adjournment was wrongful. Lord Esher, M.R., citing the case of *R.* v. *Adamson*, said (17 Cox, C.C. at 86):

> "Cockburn, C.J., who there lays it down that if the magistrates had exercised their discretion on something extraneous or something illegal, it is the same as declining jurisdiction, and if a magistrate declines to exercise his jurisdiction, he must be compelled to exercise it by a writ of *mandamus*."

17 I am quite satisfied on these authorities and on consideration of para. 2 of the Tribunal's decision to adjourn the hearing before it that the Tribunal did take into consideration in exercising its discretion to adjourn extraneous circumstances which it was not entitled to take into consideration and thereby declined to exercise its jurisdiction. It is quite clear from para. 2 of the Tribunal's decision that in view of the fact that the same question that was in issue before the Tribunal would have to be decided by the Court of First Instance 10 days later there were strong grounds of public convenience, reducing expense, saving of court time, *etc*., for allowing the Court of First Instance to deal with the claim for possession of Flat 2(a) first, as this might well render superfluous the hearing by the Tribunal of the application for determination of the correct rent for Flat 2(a). However, as Mr. Vasquez has stated, this amounted to an abdication of its own jurisdiction in favour of the Court of First Instance.

18 Mr. Triay, for the Tribunal, has suggested that the case of *R.* v. *Evans* (3) can be distinguished from the present case on the grounds that the case before the magistrate was a criminal matter, and the parties in that matter were not the same as those in the pending civil proceedings, in respect of which the magistrate decided to adjourn the proceedings before him. In the present case, not only are the proceedings before the Tribunal and the Court of First Instance, civil proceedings, in the Court of First Instance the

roles of the parties are reversed, as in that court it is the landlords who are the plaintiffs and the applicant who is the defendant.

19 In my view, however, with due respect, these factors are immaterial. Once an application had been made to the Tribunal under s.18 of the Ordinance for the determination of the correct rent of Flat 2(a), the performance of a duty was imposed on the Tribunal by s.19, namely to hear the application, and if it were decided that Part II of the Ordinance applied to the flat, to determine the maximum rent payable. To adjourn the hearing because there was pending in the near future a claim of possession of the flat by the landlords in the Court of First Instance based on the grounds that Part II of the Ordinance did not apply to the flat, was in my view to exercise its undoubted discretion to adjourn on an extraneous consideration, which it was not entitled to do.

20 It is not disputed, however, that an order of mandamus is discretionary and that it is open to the court to refuse the order where the circumstances are such that an order would be futile.

21 Mr. Vasquez has urged that it is most desirable in the public interest, as well as in the interest of the applicant, that the court should grant the order sought. Not to do so, he suggests, would leave it open to a landlord in future cases of this sort, on an application by the tenant for the determination of the rent payable to the landlord under s.18, to issue a notice to quit and to claim possession, thus effectively removing the matter from the Rent Assessment Tribunal to the Court of First Instance, delaying consideration of the tenant's application, increasing the expense for the tenant, placing the tenant in the less advantageous position of defendant in the Court of First Instance and to a large extent rendering otiose the provisions in the Ordinance relating to reference to the Tribunal, by the tenant, for the determination of rent. He emphasized that it was not certain, in so far as this case is concerned, that the landlords' claim for possession would be heard by the Court of First Instance on March 16th, 1981, and suggested that having regard to the terms of s.31 of the Ordinance it was by no means certain that the undertaking from the landlords required by the Tribunal, referred to in para. 4 of its decision, was sufficient in law to enable the applicant to recover excess rent (if any) paid to the landlords outside the six-month time limit prescribed by s.31(2).

22 Mr. Triay submitted that even if the court were to find that this was a case where the Tribunal had wrongly failed to perform its statutory duty, nevertheless, circumstances were such that the court should, in the exercise of its discretion, refuse to issue an order of mandamus requiring the Tribunal to hear the application of the tenant of Flat 2(a). He pointed out that, were the court to issue an order of mandamus in this case, this would not preclude the Court of First Instance from hearing the landlords'

application for possession of Flat 2(a) on March 16th, and in the event of that court's finding in favour of the landlords, and granting them possession of Flat 2(a), that would render this court's order of mandamus nugatory and futile.

23 I also heard argument as to whether, had the Tribunal proceeded to hear the present applicant's application on March 6th, 1981 and had it found the provisions of Part II of the Ordinance applied to Flat 2(a), and consequently that the Tribunal had jurisdiction to determine the correct amount of rent payable in respect of Flat 2(a), the decision of the Tribunal on that issue would have stopped the landlords raising the same issue again in their claim for possession of Flat 2(a) in the Court of First Instance. Mr. Vasquez suggested that this was a further ground for his claim that the applicant had been prejudiced by the Tribunal's failure to deal with her application in that had the Tribunal decided that Part II of the Ordinance did apply to Flat 2(a), this would have afforded the applicant a further ground for opposing the landlords' claim for possession in the Court of First Instance. The Tribunal's failure to hear her application and decide this point had deprived her of this possible ground for opposing her landlord's claim for possession of Flat 2(a).

24 The fact that the Court of First Instance may decide to hear the applicant's landlords' claim for possession of Flat 2(a) on March 16th (today), and so render nugatory an order of mandamus issuing from this court, is not, in my view a sufficient reason for refusing the order. I refer in this connection to the following passage in *de Smith's Judicial Review of Administrative Action* (*ibid*., at 561):

> "Generally, however, apprehension of the probability (as distinct from the certainty) that the applicant will ultimately fail to attain the objective at which he aims has not been regarded as a sufficient reason for the court to exercise its discretion against him."

25 In the case of *R.* v. *London County Council, ex. p. Corrie* (4), cited by *de Smith* in this connection, the prosecutrix had applied to the council under a by-law relating to the selling of articles in parks, gardens and open spaces for permission to sell, in a park, literature relating to a society for the blind. After making the by-law the council, by resolution, had decided that all existing permissions to sell articles under the by-law should be withdrawn and that no new permissions should be granted. Accordingly, acting on this resolution, the prosecutrix's application was refused. The prosecutrix applied for mandamus to require the council to hear her application. Avory, J., concurring with Darling, J. that the rule nisi for mandamus should be made absolute, said ([1918] 1 K.B. at 73):

> "I have come to the same conclusion, though somewhat reluctantly, because I doubt whether the rule will be of any effective service to the prosecutrix, inasmuch as, when the application for permission is

considered, the council will probably refuse to give it. We have to decide whether the prosecutrix has any legal right which is being withheld. I think she has a legal right to have her application considered."

26 In the present case there is only a possibility that the Court of First Instance will hear the landlords' application for possession of Flat 2(a) later today.

27 Accordingly I have come to the conclusion, albeit like Avory, J. with some reluctance, that an order of mandamus requiring the Tribunal to hear the applicant's application to determine the correct amount of rent payable in respect of Flat 2(a) should issue, and I so order, even though there is a possibility that, later today, the Court of First Instance may determine the landlords' claim for possession of Flat 2(a), thus rendering superfluous the order of this court.

*Order accordingly.*

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