practice may decide not to take her out of class. The Admiralty Marshal's application succeeds and I will make that order.

Application allowed.

[1980–87 Gib LR 442]

ATTORNEY-GENERAL v. S. LOPEZ, K. LOPEZ and K. LOPEZ

SUPREME COURT (Kneller, C.J.): February 25th, 1987

Land Law—action for possession—procedural irregularity—under Rules of Supreme Court, O.2, r.1 court may rectify procedural irregularity, e.g. if originating summons (under R.S.C., O.113) not sealed with Supreme Court seal, if no doubt defendant aware of proceedings and not prejudiced by irregularity

Landlord and Tenant—possession—holding over—tenants holding over after termination of tenancy (within Rules of Supreme Court, O.113, r.1) only include those with tenancies binding on person claiming possession, i.e. not unlawful sub-tenants

The Attorney-General applied under the Rules of the Supreme Court, O.113, r.1 to recover possession of Government premises from the respondents.

Since 1980, the Government had leased the premises (a flat) to a Mrs. Peliza. She had allowed the respondents—a family of three, the father of which was her grandson—to stay there contrary to the terms of her tenancy agreement. She died in 1986, and her grandson, Mr. Stephen Lopez applied for the tenancy to be made over to him. This was refused as the respondents had too few points on the Gibraltar housing scale, which determined priorities for housing, to be allotted that particular tenancy. When they refused to leave, a Government official attached an unsealed copy of the originating summons and supporting affidavit to the door of the flat—although R.S.C., O.113, r.4(2A) required the seal of the Office of the Supreme Court to be present—and later served sealed copies on each of the respondents in person.

The Attorney-General submitted that the respondents were trespassers, as they were not in the flat on the authority of the Government or any of its predecessors in title, and Mrs. Peliza could not have granted any licence or sub-tenancy which would be binding on the Government. The

respondents submitted in reply that the court should dismiss the application as (a) the originating summons attached to the door was not sealed with the seal of the Office of the Supreme Court, and service had therefore not been effected in the manner required by the R.S.C., O.113, r.4(2A); (b) that the family, as sub-tenants of Mrs. Peliza at the time of her death, fell within the scope of "tenants holding over after the termination of the tenancy" under O.113, and the summary procedure available under that order was therefore inappropriate; and (c) Mr. Lopez could not afford to buy a home of his own, and so the respondents would have nowhere else to live. The court considered the application of R.S.C., O.2, r.1, which provided that failure to comply with the formal requirements of the rules should be treated merely as an irregularity, and should not nullify the proceedings.

Held, allowing the application:

(1) The Attorney-General was entitled to possession as the respondents were occupying the flat without authority and were therefore trespassers. They were not entitled to a tenancy as they had insufficient points under the Government housing scheme and the fact that they had nowhere else to live did not affect this (para. 16).

(2) The procedural defect of attaching an unsealed summons to the door of the flat did not nullify the proceedings, as it was simply an irregularity of form which R.S.C., O.2, r.1 allowed the court to rectify if this could be done without injustice. Here it was just to exercise this discretion in the Attorney-General's favour, as there was no doubt that the respondents knew about the proceedings, and they were not prejudiced by the lack of a seal on the documents (para. 24).

(3) The summary procedure under O.113 was appropriate. The words "tenants holding over after the termination of the tenancy" included only those who could establish that the tenancy under which they were holding over was binding on the person seeking possession. The respondents clearly could not do so; for the purposes of O.113, unlawful sub-tenants were the same as unauthorized occupiers (para. 13).

Cases cited:

(1) *9 Orpen Road, Stoke Newington*, *In re*, [1971] 1 W.L.R. 166; [1971] 1 All E.R. 944, referred to.

(2) *Att.-Gen.* v. *Avelino Castle*, Supreme Ct., unreported, not followed.

(3) *Att.-Gen.* v. *Moreno*, Supreme Ct., April 21st, 1986, unreported, referred to.

(4) *Bristol Corp.* v. *Persons Unknown*, [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593; referred to.

(5) *Burston Fin. Ltd.* v. *Wilkins* (1975), 240 E.G. 375; *The Times*, July 17th, 1975, followed.

(6) *Greater London Council* v. *Jenkins*, [1975] 1 W.L.R. 155; [1975] 1 All E.R. 354, referred to.

(7) *Harkness* v. *Bell's Asbestos & Engr. Ltd.*, [1967] 2 Q.B. 729; [1967] 2 W.L.R. 29; [1966] 3 All E.R. 843, followed.
(8) *Health Minister* v. *Bellotti*, [1944] K.B. 298; [1944] 1 All E.R. 238, referred to.
(9) *Moore Properties Ltd.* v. *McKeon*, [1976] 1 W.L.R. 1278; [1977] 1 All E.R. 262; (1976), 33 P. & C.R., referred to.
(10) *Winter Garden Theatre (London) Ltd.* v. *Millennium Prods. Ltd.*, [1948] A.C. 173; [1947] 2 All E.R. 331; (1947), 63 T.L.R. 529, referred to.

Legislation construed:
Rules of the Supreme Court, O.2, r.1. The relevant terms of this rule are set out at para. 21.
O.113, r.1: The relevant terms of this rule are set out at para. 10.
r.4: "(2) The summons shall, in addition to being served on the named defendants . . . be served, unless the court otherwise directs, by—
(a) affixing a copy of the summons and a copy of the affidavit in support to the main door or other conspicuous part of the premises . . .
(2A) Every copy of an originating summons for service . . . shall be sealed with the seal of the Office of the Supreme Court out of which the summons was issued."

J. Nuñez, *Crown Counsel*, for the plaintiff;
M. Isola for the defendants.

1 **KNELLER, C.J.:** The Attorney-General by an originating summons of August 4th, 1986 asks for an order of possession of premises known as 11 Royal Sovereign House, Varyl Begg Estate, Gibraltar, on the grounds that he is entitled to it and Mr. and Mrs. Lopez and their child Kirian are in occupation of it without licence or consent.

2 Mr. Angel de las Heras, the Government of Gibraltar's housing manager, in his supporting affidavit of August 1st, 1986, provides the facts behind this application. The Crown was and is, he says, the owner of the premises and entitled to possession of it. It consists of two rooms, a kitchen, and a bathroom. He manages and controls it for the Government of Gibraltar.

3 On March 5th, 1980, the Government let these premises to Mrs. Angeles Peliza. Clause 6 of the tenancy agreement (AH1) bound her not to permit more than one person to sleep on the premises without the previous consent in writing of the Government. Another clause was a conditional prohibition against her sharing, assigning or parting with possession of the premises or any of them without first obtaining in writing the consent of the Government. Mrs. Peliza did not ask for either indulgence.

4 She died on May 14th, 1986. Mr. Stephen Lopez, the first defendant, applied on a form dated February 2nd, 1985 (but changed to 1986) for a change of tenancy in his favour. This is three months before Mrs. Peliza died. Mr. Stephen Lopez submitted the form to the housing manager on May 23rd, 1986 which was nine days after Mrs. Peliza died. The relevant parts of this form read as follows:

> "I should be glad if authority could be given for the above tenancy to be made over to me. I certify that I have lived at the above address as a member of the tenant's household since November 17th, 1985 . . . The reason for the submission of this application is the following: She is very old and needs taken [*sic*] care of. The following persons have been residing at the above address and will continue to reside after the change of tenancy:

Surname	*Forename*	*Born*	*Relationship to Applicant*
Lopez	Stephen	9.12.63	Grandson
Lopez	Karen	19.11.66	Wife
Lopez	Angela	1.6.01	Sister"

5 He has some incorrect entries in the relationship column, of course, because those are their relationships to Mrs. Peliza. The landlord had no idea until May 27th, 1986 that anyone but Mrs. Peliza was in possession or occupation of the premises.

6 The housing manager sent a letter dated May 29th telling Mr. Lopez his application was not approved and so he was not authorized to live there. Mr. Lopez was also told that Mrs. Angeles Peliza was in breach of her tenancy agreement by allowing him to live there without the Government's consent in writing. Mrs. Peliza was untroubled by this assertion because she had died a fortnight before this letter was dated, let alone posted. The Lopez family had too few points according to the Gibraltar Housing scale to be allotted this tenancy.

7 Mr. Martinez, a professional and technical officer in the department, went to the premises on July 9th, 1986 and asked the Lopez family to leave but they refused to do so. He handed them a letter the next day asking them to leave within 24 hours, and still they did not budge.

8 Mr. and Mrs. Lopez are still there and they have their daughter Kirian, aged one, with them. The whereabouts of "Angela" has not been furnished. Mr. Angel de las Heras, the housing manager, roundly declares they are all trespassers.

9 Mr. Parody, another professional and technical officer, also swore a supporting affidavit, on September 25th, 1986. He says he affixed an unsealed copy of the summons and affidavit in support to the door of the premises on September 1st, 1986. He served sealed copies of the same documents on Mrs. Lopez and little Kirian on September 2nd, 1986 at the

Housing Department. He served sealed copies on Mr. Lopez the next day in the Gibraltar telephone workshop. All this shows O.113, r.4 was not strictly observed.

10 Order 26, r.1 of the County Court Rules and O.113 of the Rules of the Supreme Court 1965 are in almost the same terms. Order 113, r.1 reads as follows:

> "Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order."

The English authorities on this order have thrown up these principles. The expression "or remained" is disjunctive, bears its plain meaning and covers someone who entered with a licence and remained in occupation without a licence (see *Bristol Corp.* v. *Persons Unknown* (4) ([1974] 1 W.L.R. at 369, *per* Pennycuick, V.-C.)).

11 The order supplies exceptional machinery to remedy a mischief different from that created by a licensee continuing after his licence has ended, against whom the ordinary procedure by writ followed by judgment in default or under O.14 is adequate. It is narrowly confined to the particular circumstances described in r.1, and the court has no discretion to prevent the use of this procedure where the circumstances are such as to bring them within its terms (see *Greater London Council* v. *Jenkins* (6) ([1975] 1 W.L.R. at 157, *per* Diplock, L.J.)).

12 But if a person is on the premises under a contractual licence, he cannot be treated as a trespasser until a reasonable time after the licence has been withdrawn (see *Winter Garden Theatre (London) Ltd.* v. *Millennium Prods. Ltd.* (10)) and what is a reasonable time depends on the facts of the case, *e.g.* the time in which the former licensee can take his effects from it if he has been living there (see *Health Minister* v. *Bellotti* (8)).

13 What, however, do the words "not being a tenant or tenants holding over after the termination of the tenancy" mean? The answer is persons who, as against the person claiming possession, can establish that they were holding over under tenancies binding upon him. Unlawful subtenants are, on the other hand, the same as unauthorized occupiers for the purpose of this order (see *Moore Properties Ltd.* v. *McKeon* (9) ([1976] 1 W.L.R. at 1280, *per* Fox L.J.)).

14 These principles were adumbrated by Alcantara, A.J. in this court in *Att.-Gen.* v. *Moreno* (3) and, with respect, they are clearly those that I

should apply. Order 113 is applicable in Gibraltar by virtue of ss. 12 and 15 of the Supreme Court Ordinance (1984 Edition).

15 The circumstances of this application are that each defendant was in the premises in breach of conditional prohibitions in the agreement. Indeed there was no suggestion of any consent or waiver by the landlord. The fact is Mr. and Mrs. Lopez and Kirian Lopez entered into possession without the knowledge of the Government of Gibraltar. They are not in possession with the consent of any predecessor in title of the Government, or the Government themselves. Mrs. Peliza claimed under the Government. Any licence or sub-tenancy which any of the Lopez family may have or may have had is not and never was binding upon the Government.

16 Mr. Mark Isola did what he could for the Lopez trio. He submitted the court should repel this application because the family would have nowhere to go since Gibraltar was chronically short of housing and Mr. Stephen Lopez could not afford to buy a house of his own. This was, in essence, a plea *ad misericordiam*. I have some sympathy for the plight of Mr. Lopez and his family but I must pay heed to the reminder of Mr. Joseph Nuñez, Crown Counsel, that there is a lengthy waiting list for such accommodation, which the Government tries to allot fairly. To exempt the Lopez family from the provisions of this order and rule would mean that they had not taken their place in the queue, and the Government had not allotted the flat to the family that had waited the longest, or had more points entitling it to the tenancy.

17 Mr. Isola also raised a matter of procedure. It was this: the copy of the originating summons for service affixed to the main door or other conspicuous part of the premises was not sealed with the seal of the Office of the Supreme Court out of which the summons was issued. This is confirmed by Mr. Parody in his affidavit. Therefore, Mr. Isola submitted, service was not effected, according to O.113, r.4(2A) and the originating summons should be dismissed. He did not take the point that a sealed copy of the originating summons must (if practicable and the court does not otherwise direct, by the same order and rule) also be inserted through the letter box at the premises and Mr. Parody's affidavit is silent about this.

18 Do either of these lapses vitiate the service of the originating summons? Must the applicant begin all over again? The primary consideration is that the specified manner of service should probably bring the application to the notice or knowledge of the named defendant, or the occupier (if the name is unknown) of the premises. The one affixed to the outside of the premises would also warn off others ready to occupy it unlawfully.

19 Order 113 (and its rules) was described by Pennycuick, V.-C. as a very special procedure enabling a person claiming possession to proceed on an originating summons and he declared that it must be complied with. It would not be right, he went on, to waive a right of this kind even if he had jurisdiction to do so (see *In re 9 Orpen Road, Stoke Newington* (1) ([1971] 1 W.L.R. at 168, *per* Pennycuick, V.-C.)). The summons in that case did not name the alleged occupant, and the applicant did not take reasonable steps to identify everyone occupying the land, which he had to do under O. 113, r. 2(2). This requirement was later substituted by the Rules of the Supreme Court (Amendment No. 2) 1977 and it is no longer mandatory, nor even required to be asserted in its Form 11A. The application before me is not on all fours with the one in *In re 9 Orpen Road*.

20 Davis, C.J. declared that the summons in *Att.-Gen.* v. *Avelino Castle* (2) did not fulfil the conditions required by O.113, rr. 2 and 4 and had to be dismissed because, among other things, the summonses served on the named occupants of the premises were not sealed. But in this matter the summonses served on the Lopezes were sealed.

21 The provisions of O.2, r.1 were not drawn to the attention of Davis, C.J. and nor were *Harkness* v. *Bells Asbestos & Engr. Ltd.* (7) or *Burston Fin. Ltd.* v. *Wilkins* (5). Order 2, r.1 provides:

> "Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, or any document, judgment or order therein."

22 A unanimous Court of Appeal in *Harkness* regularized a failure to comply with a rule concerning the Limitation Act 1963. Lord Denning, M.R. explained ([1967] 2 Q.B. at 735) that "every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice."

23 In *Burston Fin. Ltd.* v. *Wilkins* (5), Oliver, J. found that all reasonable inquiries to discover the identities of the occupants of a flat in Ladbroke Gardens had not been taken. He concluded (*The Times*, July 17th, 1975) that in the circumstances of that case—

> " . . . there was clearly jurisdiction to waive the irregularity . . . and he had to exercise his discretion. The Rules of the Supreme Court were the instrument through which the courts acted to secure justice, their servants not their tyrants. Order 2 seemed to be specifically

> designed to enable the court to avoid just that rigid formalism which brought the law into disrepute and encouraged self help."

24 O.2, r.1 and those two decisions embolden me to decline with profound respect to follow the decision of Davis, C.J. in *Att.-Gen.* v. *Avelino Castle* (2). There has been a defect in the form of the proceedings here and the defendants have not waived the irregularity. The statutory rule in O.2 applies to O.113 and I must now exercise this discretion. There is no doubt that the respondents knew about these proceedings and of the hearing date because their counsel was here to do what he could for them. They have not been prejudiced by the lack of a seal on the copy of the summons affixed to the outside of the premises or the failure to put another such copy into the flat if that were possible.

25 So, in my discretion, I waive these irregularities and make the possession order.

Application allowed.
