31 In my view there are no grounds in all the circumstances of this case for granting leave to appeal against the order of this court given on October 4th, 1983.

32 This application is accordingly dismissed with costs.

Application dismissed.

[1980–87 Gib LR 182]

LOTUS HOUSE LIMITED v. ABRINES

SUPREME COURT (Alcantara, A.J.): December 8th, 1983

Landlord and Tenant—renewal of tenancy—business premises—court may refuse grant of new tenancy if landlord can prove under Landlord and Tenant (Miscellaneous Provisions) Ordinance (cap. 83), s.43(1)(f), intention to commence substantial construction work on premises—tentative plans, rough estimates, etc. insufficient to prove intention—to be proved by detailed specifications for work, bill of quantities, etc.

Landlord and Tenant—rent—renewal of business tenancy—rental value of renewed business tenancy to be set taking into account market rental value of comparable business premises and also scarcity of premises in reduced market, features, etc.

The plaintiffs applied under the Landlord and Tenant (Miscellaneous Provisions) Ordinance for a new tenancy of business premises.

The defendant landlords leased business premises to the plaintiff under a seven-year lease, with an option to commence a new term of seven years at market rent value following the end of the first lease. The plaintiffs applied for a new tenancy but the landlords opposed the application under the Landlord and Tenant (Miscellaneous Provisions) Ordinance, s.43(1)(f) on the ground that it was their intention to either demolish or reconstruct the premises.

It was submitted by the plaintiffs that (a) they were entitled to a new lease of the business premises by virtue of their option; and (b) the rent proposed by the landlords was too high and should be no more than £8,100 per annum.

It was submitted by the landlords that (a) the tenants were not entitled to a new tenancy since, on the termination of the current tenancy, it was their intention to commence substantial construction work on the site,

which they would be unable to do without first gaining possession; (b) their intention to complete such work was evidenced by plans and costing estimates which had been drawn up for the construction work; and (c) the rent payable should be £11,000 per annum, the method of zoning used in England being used to calculate the rental value of the premises.

Held, granting the application for a new tenancy:

(1) A new business tenancy would be granted for three years. The landlords had not demonstrated that they had firm plans to carry out substantial work on the premises since they had only tentative plans for the work which had been drawn up just a few days before the hearing of the application. The defendants had neither looked into the economic implications of the work nor sought advice from others such as estate agents. While a rough estimate of costs had been produced, it had been arrived at with no bill of quantities or proper specification and as such was an unreliable estimate (paras. 13–14; para. 23).

(2) The rent for the property would be assessed at £8,400 per annum, the question of rent having been approached as though the premises were vacant. In reaching a figure, it was necessary for the court to take into account the rents of comparable business premises as well as considering various other factors such as location, the fact that, proportionally, smaller premises usually have a higher rent than larger shops, the scarcity of such premises in a reduced market, the particular features of the premises, *etc.* (paras. 15–22).

Cases cited:

(1) *Anglo-Hispano Bodega Co. Ltd.* v. *Marrache*, (1978) Gib LR 110, considered.

(2) *Atkinson* v. *Bettison*, [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340, referred to.

(3) *Biles* v. *Caesar*, [1957] 1 W.L.R. 156; [1957] 1 All E.R. 151, referred to.

(4) *Cadle (Percy E.) & Co. Ltd.* v. *Jacmarsh Properties Ltd.*, [1957] 1 Q.B. 323; [1957] 2 W.L.R. 80; [1957] 1 All E.R. 148, referred to.

(5) *Cunliffe* v. *Goodman*, [1950] 2 K.B. 237; [1950] 1 All E.R. 720, considered.

(6) *Espresso Coffee Machine Co. Ltd.* v. *Guardian Assur. Co. Ltd.*, [1959] 1 W.L.R. 250; [1959] 1 All E.R. 458, referred to.

(7) *Fisher* v. *Taylor's Furnishing Stores*, [1956] 2 Q.B. 78; [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78, referred to.

(8) *Fleet Electric Ltd.* v. *Jacey Invs. Ltd.*, [1956] 1 W.L.R. 1027; [1956] 3 All E.R. 99, referred to.

(9) *Khubchand & Co. Ltd.* v. *Key City Properties*, (1979) Gib LR 15, considered.

(10) *Reohorn* v. *Barry Corp.*, [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742, referred to.

Legislation construed:
Landlord and Tenant (Miscellaneous Provisions) Ordinance (Laws of Gibraltar, *cap.* 83), s.43(1)(f): The relevant terms of this paragraph are set out in para. 3.

J. Levy for the plaintiff.

1 **ALCANTARA, A.J.:** This is an application by way of originating summons for the grant under Part III of the Landlord and Tenant (Miscellaneous Provisions) Ordinance of a new tenancy of the business premises known as 292 and 294, Main Street.

2 Numbers 292 and 294, Main Street consist of a bar/restaurant on the ground floor, kitchens and stores on the first floor and stores and staff accommodation on the second and third floors. The plaintiff holds the premises under an assignment of a seven-year lease with the option to take the premises for another seven years dated April 19th, 1968 at an annual rental of £1,800 before the expiration of the second term of seven years at a market value rent.

3 This is opposed by the landlords (the defendants) under s.43(1)(f) of the Ordinance, on the ground that—

> "on the termination of the current tenancy the landlord intends to develop the premises . . . and, in order to . . . it is necessary to demolish or reconstruct or to carry out substantial works on the premises; it is not reasonably possible to do so without the landlord obtaining possession."

4 There is further opposition to the plaintiff's application, which is stated in the affidavit of Mr. L.E. Abrines: "If a new tenancy is granted the defendants object to the following terms proposed by the plaintiff, namely rent and term."

5 As regards the first issue, I agree with Spry, C.J. in the case of *Anglo-Hispano Bodega Co. Ltd.* v. *Marrache* (1), when he said ((1978) Gib LR at 110):

> "The law on this subject has been exhaustively examined in England, and since the Gibraltar Ordinance is derived from the English statutes, the English decisions must be highly persuasive here and I see no reason to depart from them. Their application, however, is not easy."

6 Spry, C.J. then went on to examine the leading English authority of *Cunliffe* v. *Goodman* (5). Counsel for the defendants has cited three other cases: *Reohorn* v. *Barry Corp.* (10), *Fleet Electric Ltd.* v. *Jacey Invs. Ltd.* (8) and *Espresso Coffee Machine Co. Ltd.* v. *Guardian Assur. Co. Ltd.* (6).

7 In turn, counsel for the plaintiff has not only referred me to *Cunliffe* v. *Goodman* but has drawn my attention to the following authorities: *Biles* v. *Caesar* (3), *Fisher* v. *Taylor's Furnishing Stores* (7), *Atkinson* v. *Bettison* (2), and *Percy E. Cadle & Co. Ltd.* v. *Jacmarsh Properties Ltd.* (4).

8 There is one aspect in this case which is not without interest and that is that there is really no dispute as to what the law is, that is well settled. For the defendants to succeed they have to satisfy me, on the balance of probabilities, that (a) the work they intend to carry out is substantial, and (b) that they intend to carry it out.

9 As to (a) it is a question of fact whether the work can reasonably be carried out without obtaining possession of the holding. Substantial is a question of degree, but its primary meaning is considerable, solid, big.

10 As to (b) the intention must be genuine and not colorable. It must be firm and settled, not likely to change. It was said in *Cunliffe* v. *Goodman* ([1950] 2 K.B. at 254, *per* Asquith, L.J.) that it must have moved out of the zone of contemplation—the sphere of the tentative, the provisional and exploratory—and have moved into the valley of decision.

11 Applying the facts to the law, I find the work to be carried out is substantial. The building of three self-contained flats on the first, second and third floors by the defendants cannot reasonably be carried out without possession of the whole.

12 Counsel for the plaintiff has put forward a very interesting argument supported by authorities on the question of improvements, as opposed to reconstruction. Because of my conclusion on the next issue I do not think it necessary to deal with the matter on this occasion.

13 As to the defendant's intention, I find that the defendants have failed to satisfy me that they have approached the boundary of the valley of decision. One of the defendants and co-owner of the property has given evidence to the effect that he has the means, together with his sisters, to develop the property and that he has the intention to go ahead with the scheme. In cross-examination, it transpired that no proper plans have been prepared. Draft plans have been prepared for the purpose of this case and only a few days before the day set for the hearing of the case. He has not gone into the economic implications of the scheme, nor sought independent advice from estate agents or others. An estimate has been produced for £37,850 by another witness for the defendants, Mr. Suetta. According to him, the contractors arrived at that figure by information given to them by himself, some in writing, but with no bill of quantity or proper specifications. The estimate to me is unreliable, particularly when Mr. Suetta had this to say in cross-examination:

> "Two weeks ago I prepared a tentative proposal at his request. These are not plans which can be submitted as planning applications. These

> are tentative plans. More details are needed for planning applications. Such plans have not been prepared."

14 I therefore find that the defendants fail in their opposition to the granting of a new lease.

15 I shall deal now with the other issue, rent and term. As to rent, s.47 of the Ordinance provided that a rent determined by the court is to be that for which the premises might reasonably be expected to be let in the open market by a willing lessor, disregarding the fact that the tenant has been in occupation. In other words, the court has to approach the question as if the premises were vacant. In the case of *Khubchand & Co. Ltd.* v. *Key City Properties Ltd*. the test to be applied was set out ((1979) Gib LR at 17, *per* Spry, C.J.):

> "I think the proper course is for the court to access the general factors, the special factors, the actual rents, taking into account the dates when they were agreed or assessed, of comparable properties and the opinions of the professional witnesses and then arrive at its own conclusion."

16 Dealing with the general factors, Spry, C.J. first considered location. Secondly, the fact that proportionally smaller shops (premises) have a higher rent than larger shops. Thirdly, scarcity, and fourthly, special features, which, owing to their scarcity, played a disproportionate role in many lettings.

17 I do not know whether it was the intention of Spry, C.J. that scarcity should play an all-important or vital role in the assessment of rents. If that is so, I respectfully disagree with him. Section 47 of the Ordinance speaks of rent at which it "might reasonably be expected to be let in the open market by a willing lessor." "Open market" can only mean that there is a market: in other words that there are other properties available.

18 The court has to consider not only one hypothetical lessor and one hypothetical lessee, but more than one lessor and one lessee. Consequently, scarcity should be taken into account in relation to a reduced market but not to no market at all.

19 Before applying the above test to the case before me I should set out some of the relevant facts of the application. The premises were let 15 years ago at an annual rental of £1,800. I have to assume that that was the proper rent at the time. Today, 15 years later, has the rent doubled, trebled, quadrupled, *etc*.?

20 Each side has called a professional witness to give their opinion of what the market rent should be. For the defendants, Mr. Schembri, says that the proper annual rent should be £11,001, whereas Mr. Levy, for the plaintiff, is of the opinion that the market rent is £8,100. I have also been

provided with tables of comparable business premises in Main Street to help me arrive at the open market figure.

21 I have been impressed with something Mr. Schembri has said about the valuation of property, that is zoning, which is used in England but not in Gibraltar. Zoning, from what I have been able to gather, is giving different values to different parts of a given premises. The valuer sets a norm for an area inside the shop in the vicinity of the frontage of the shop or business premises. For zones behind the prime one, there is a reduction in value, thus arriving at a figure for the whole. In this case before me, Mr. Schembri in arriving at his figure applied the zoning process, but only vertically in relation to the stores *etc*. on the first, second and third floors. He did not apply it horizontally in relation to the ground floor. It is a matter of speculation whether, had he used the zoning process both vertically and horizontally, he might possibly have arrived at a figure nearer to that of Mr. Levy.

22 Taking all the factors set out in the *Khubchand* case (9) and paying regard to two properties which I consider relevant, that of the Bank of Indochine and Bernards, I have arrived at a figure. Both the Bank and Bernards, though not in prime location insofar as Main Street is concerned, are better situated than Lotus House. I find confirmation of my figure in the valuation of Mr. Levy. I find that the monthly rental for this property should be £700 per month, making it an annual rental of £8,400.

23 I think that there should be a three-year term. This accords with present practice in the commercial world and although the court is at liberty to give a longer term, I do not feel justified in so doing.

Order accordingly.