

[1980–87 Gib LR 386]

**BANK OF CREDIT AND COMMERCE LIMITED v.  
VASSALLO**

SUPREME COURT (Davis, C.J.): May 19th, 1986

*Civil Procedure—judgments and orders—consent order—consent order normally clear evidence of binding contract which court may not vary and to which will give effect if breached*

The applicant-defendant sought possession of business premises it had leased to the respondent-plaintiff.

The respondent occupied business premises under a five-year lease with the applicant. When there were still 12 months of the lease left, it was given 6 months' notice, in accordance with the terms of the lease, that the applicant required vacant possession of the premises in order to reconstruct part of the building. The respondent refused to vacate and applied for the grant of a new business tenancy under s.39 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap.* 83). The applicant opposed the grant of a new tenancy under s.43(1)(f) of the Ordinance, on the ground that, on the termination of the current tenancy, it intended to reconstruct part of the building and could not reasonably do so without first taking possession of the premises.

In the meantime, the respondent reached an agreement to lease alternative business premises from the end of April 1986. It informed the applicant and the parties obtained a consent order from the Supreme Court to the effect that, on the payment of £250 by the respondent and its agreeing to the dismissal of its application for a new tenancy, the order for possession would be suspended until April 1986. The agreement for the lease of alternative premises subsequently fell through, however, and although the respondent found other suitable premises, it was unable to take possession of them until September 1986. The applicant refused to allow the respondent to remain in the premises beyond April 1986 (as agreed in the Supreme Court) and sought possession of the premises.

The applicant submitted that the respondent was contractually bound to vacate the premises at the end of April in accordance with the terms of the consent order.

The respondent submitted that (a) it should be allowed to remain in the premises until it was able to take possession of its new premises; and (b) the consent order did not necessarily evidence any agreement reached between the parties.

**Held**, granting the application:

The applicant would be granted possession of the premises, as the consent order made by the Supreme Court was clear evidence of a contract by which the respondent had agreed, in return for being permitted by the applicant to stay in the premises until April 1986, to the dismissal of its application for a new tenancy. Since the order embodied the conclusion of negotiations between the parties, the court would not vary it and would give effect to it if one party acted in breach of it. Even if this had not been the case, however, the applicant would still have been entitled to possession of the premises as it had established, in accordance with s.43(1)(f) of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap.* 83), that it intended to demolish and reconstruct the premises (paras. 10–16).

**Cases cited:**

- (1) *Australasian Automatic Weighing Machine Co. v. Walter*, [1891] W.N. 170; (1891), 36 Sol. Jo. 42, referred to.
- (2) *Peachey Property Corp. Ltd. v. Robinson*, [1967] 2 Q.B. 543; [1966] 2 W.L.R. 1386; [1966] 2 All E.R. 981; (1966), 110 Sol. Jo. 426, distinguished.
- (3) *Siebe Gorman & Co. Ltd. v. Pneupac Ltd.*, [1982] 1 W.L.R. 185; [1982] 1 All E.R. 377; (1981), 125 Sol. Jo. 725, considered.
- (4) *Tigner-Roche & Co. v. Spiro* (1982), 126 Sol. Jo. 525, considered.

**Legislation construed:**

Landlord and Tenant (Miscellaneous Provisions) Ordinance (Laws of Gibraltar, *cap.* 83), s.39:

“A tenancy to which this Part applies shall not come to an end unless terminated in accordance with the provisions of this Part; and . . . the tenant under such a tenancy may apply to the court for a new tenancy—

- (a) if the landlord has given notice . . . to terminate the tenancy . . .”

s.43(1)(f): “(1) The grounds on which a landlord may oppose an application . . . are such of the following grounds . . . that is to say—

- (f) . . . that on the termination of the current tenancy, the landlord intends to develop the premises comprised in the holding or a substantial part of those premises and, in order to do so it is necessary to demolish or reconstruct or to carry out substantial works on the premises and it is not reasonably possible to do so without the landlord obtaining possession of the holding . . .”

*R.M. Vasquez* for the applicants;

*C. Gomez* for the respondents.

1 **DAVIS, C.J.:** This matter arose from proceedings under the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap.* 83), which has

now been repealed. The plaintiffs, a bank, occupy part of the ground floor of 153 Main Street (“the premises”). Their occupation of the premises stems from a lease from the defendants to the City Bank Ltd. for a term of five years from August 1st, 1980.

2 On July 2nd, 1984, the defendants gave six months’ notice to the plaintiffs, under cl. 2(5) of the lease, that they required vacant possession of the premises to enable them to reconstruct the building, part of which had been leased to the plaintiff. It appears, however, that the plaintiffs did not vacate the premises as a result of the defendants’ notice. They claimed the protection given to business premises under Part III of the Ordinance, s.36.

3 On January 16th, 1985, the plaintiffs, pursuant to s.39 of the Ordinance, requested a new tenancy from the defendants. On January 30th, 1985, the defendants notified the plaintiffs that they would oppose the grant of a new tenancy on the grounds contained in s.43(1)(f) of the Ordinance that, on the termination of the current tenancy, they intended to reconstruct the building comprising the premises and that they could not reasonably do so without first obtaining possession.

4 It appears that, as from November 1984, the plaintiffs had been conducting negotiations with Pall Mall Ltd. for a lease of premises in Casemates Triangle. These negotiations met with various delays, but it seems that, in due course, the plaintiffs came to an agreement with Pall Mall Ltd., the effect of which would be that the plaintiffs would be in a position to start business in their new premises in Casemates Triangle by the end of April 1986.

5 Meanwhile, on May 10th, 1985, pursuant to s.37 of the Ordinance, the plaintiffs issued an originating summons applying for the grant of a new tenancy of the premises. Consequently, on October 14th, 1985 (the date of the hearing of the plaintiffs’ application) the parties appeared before the Supreme Court with an agreed order. This was in the following terms:

“Upon hearing counsel both for the plaintiffs and the defendants and the plaintiffs admitting that, on the termination of the current tenancy, the defendants intend to demolish and reconstruct the premises comprised in the holding.

This court does order, by consent of the plaintiffs and the defendants, that—

- (i) The said originating summons do stand dismissed out of this court;
- (ii) The plaintiffs do deliver up to the defendants possession of the premises comprised in the holding;

- (iii) Enforcement of the order for possession be suspended until April 30th, 1986; and
- (iv) The plaintiffs do pay to the defendants £250 agreed costs.

And it is hereby certified that this court is precluded by s.44 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap.* 83), from making an order under Part III of the Ordinance, for the grant of a new tenancy to the plaintiffs, of the holding demised to the plaintiffs. The defendants have, in accordance with s.43(1)(f) of the Ordinance, established that on the termination of the current tenancy, they intend to demolish and reconstruct the premises comprised in the holding and not by reason of the existence of any ground specified in any other paragraph of the said subsection.

And that consequently the plaintiffs are entitled to the rights conferred upon them by s.51 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap.* 83).”

6 Unfortunately, owing to circumstances which I need not go into here, the new premises in Casemates Triangle, for which the plaintiffs had been negotiating, have not materialized. In the meantime, the plaintiffs have been looking for alternative premises and have finally come to an agreement with Reliable Securities Ltd. for a lease of 20 years from July 1st, 1986, of premises at 20/22 Main Street. Reliable Securities Ltd. have allowed the plaintiffs to enter the new premises to undertake works of conversion and reconstruction, but they have been advised that the premises cannot be ready for the purposes of commercial banking until at least September 1st, 1986.

7 In March 1986, the plaintiffs wrote to the defendants asking them if they would agree to their remaining in the premises for a bit longer. The defendants, by letter of March 19th, 1986, refused the plaintiffs’ request, and told the plaintiffs that, if they had not vacated the premises by April 30th, 1986, in accordance with the consent judgment of October 14th, 1985, they intended to apply for a writ of possession to enforce that judgment. Further correspondence followed between the plaintiffs and the defendants but the defendants would not budge.

8 On May 2nd, 1986, as the plaintiffs had failed to vacate the premises, the defendants issued the present summons for leave to issue a writ of possession. This was heard *ex parte* in chambers on May 5th, 1986. It then appeared that on April 29th, 1986, the plaintiffs applied to extend the amount of time for which the court’s order for possession could be suspended from April 30th, 1986 until September 1st, 1986. This application had been set down for hearing on May 12th, 1986. Accordingly, I adjourned the defendants’ application for leave to issue a writ of possession of the premises to May 12th, 1986 in order that I might hear the

plaintiffs. On May 12th, with the agreement of counsel, I treated the plaintiffs' application as an application for relief in relation to the defendant's application under O.45, r.3(3)(a). Having perused the papers filed by the parties and after hearing counsel's arguments, I adjourned decision on this matter to today.

9 The decision I have come to is that the defendants' application for leave to issue a writ of possession should be granted. My reasons are as follows: as I understand it, in the consent judgment given on October 14th, 1985, the plaintiffs accepted that on the termination of their tenancy, the defendants intended to demolish and reconstruct the building partially occupied by them and they agreed to the dismissal of their originating summons for the grant of a new tenancy of the premises. The order for that dismissal having been made, there no longer existed an application by the plaintiffs for a new tenancy, and the order contained in para. 2 of the consent judgment which directed the plaintiff to deliver up possession of the premises to the defendants naturally followed. In consideration of the plaintiffs' agreeing to the dismissal of their application, paying the defendants £250 in costs and giving possession of the premises to the defendants, the defendants agreed not to enforce the order for possession before April 30th, 1986. That is over six months after the lease expired.

10 In other words, the court's order that possession be delivered to the defendants was suspended by consent until April 30th, 1986. The consent judgment went on to certify that, by s.44 of the Ordinance, the court was precluded from granting the plaintiffs a new tenancy of the premises on the ground that the defendants had established, in accordance with s.43(1)(f) of the Ordinance, that, on termination of the plaintiffs' tenancy, they intended to demolish and reconstruct the building which comprised the premises and that the plaintiffs were consequently entitled to the rights conferred upon them by s.51 of the Ordinance.

11 Referring to 2 *The Supreme Court Practice 1985*, para. 4608, at 4607, which relates to consent judgments and orders, it appears to me that the consent judgment in this case is clear evidence of a contract made between the parties. In such a case, the court will only interfere on the grounds on which it would be open for it to interfere in any other contract. If, therefore, as in the present case, it appears that the court's order embodies the conclusion of negotiations between the parties, the court will give effect to its order if one party is in breach and will not vary it, e.g. by giving extra time to perform its terms (*ibid.*) (citing *Tigner-Roche & Co. v. Spiro* (4), which unfortunately is not available to this court). I refer also to the case of *Australasian Automatic Weighing Machine Co. v. Walter* (1), in which North, J. refused an application made by the plaintiffs for an extension of time within which the defendant had been ordered, by consent, to transfer shares to the plaintiffs. The consent order had been entered but had not been complied with as it had never been served on the

defendant. North, J. refused to make the order sought on the ground that an order made by consent could not be altered without consent.

12 Mr. Gomez, for the plaintiffs, referred me to the case of *Siebe Gorman & Co. Ltd. v. Pneupac Ltd.* (3) as an example of a case in which a consent order did not evidence a contract between the parties. It merely demonstrated that one party had not objected or had merely submitted to the order made. The consent judgment in the present case was not of this kind, however, and I am quite satisfied that it evidenced an agreement between the parties.

13 I have given careful consideration to the case of *Peachey Property Corp. Ltd. v. Robinson* (2), referred to in 1 *The Supreme Court Practice 1985*, para. 45/3/3, at 662, under the heading "Rent Act 1977." This was a case of a lease of a flat to which the Rent Acts applied. On the failure of the tenants to pay the rent, the landlords, in exercise of the express power of re-entry contained in the lease for breach of the covenant to pay rent, issued a writ claiming possession of the flat on the grounds that the tenants had fallen into substantial arrears with the rent. On the tenants' failure to enter appearance, the landlords signed judgment for possession. They then applied *ex parte* for a writ of possession, having informed the tenants of their intention to do so. The application was refused on the ground that the requirements of s.3 of the Rent and Mortgage Restrictions (Amendment) Act 1933 (which corresponds to s.22(1) of the Ordinance) had not been complied with. On appeal, it was held that a judgment for recovery of possession of any premises to which the Rent Acts applied, was prohibited by s.3 of the Act of 1933 unless there had been a prior determination by the court that it was reasonable to give such a judgment; since no such determination had been made, the requirements of s.3 had not been complied with and therefore the judgment in default of appearance obtained by the landlords was a nullity and their application for a writ of possession had been properly refused.

14 The learned editors of *The Supreme Court Practice 1985* suggest that, similarly, a writ would not issue in such circumstances had the order for possession been by consent. I have considered whether this reasoning could be applied by analogy to s.44(1) of the Ordinance, which applied in the present case. This sub-section reads as follows:

"If the landlord opposes an application under subsection (1) of Section 37 on grounds on which he is entitled to oppose it in accordance with Section 43 and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy."

15 I have come to the conclusion that the reasoning in the case of *Peachey Property Corp. Ltd. v. Robinson* (2) cannot be applied here. This is not only because here the facts are entirely different, relating as they do



in that case to the protection of the tenants of a dwelling-house, but also because the terms of the consent judgment in this case clearly evidence the agreement reached by the parties and the certificate included in the judgment.

16 In the circumstances, while having considerable sympathy for the plaintiff, I find that in the absence of any consent by the defendants to further withhold enforcing the court's order that the plaintiffs deliver up possession of the premises, the defendants' application for leave to issue a writ of possession to enforce the consent judgment of October 14th, 1985 should be granted, and I so order.

*Application granted.*

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[1980–87 Gib LR 392]

**IN THE MATTER OF CULATTO AND LANGDON**

SUPREME COURT (Alcantara, A.J.): September 26th, 1986

*Administrative Law—judicial review—legitimate expectation—legitimate expectation not created by single speech of Minister—applicant may not legitimately expect opportunity to be heard on matters concerning town planning or demolition merely because Chairman/Deputy Chairman of Gibraltar Conservation Society*

*Town Planning—development—public participation—under Town Planning Ordinance, public entitled to seek judicial review of decision of Development and Planning Committee to demolish building intended to be conserved under City Plan—public to be informed about City Plan and involved in every stage of development process*

The applicants sought judicial review of a decision of the Development and Planning Commission, to grant a demolition permit, contrary to the 1976 City Plan, for the Old Command Education Centre; an order prohibiting the redevelopment of that area; and a declaration that the Commission had acted in breach of its statutory duties under the Town Planning Ordinance.

The Government of Gibraltar offered for development the area in which the Old Command Education Centre was located. The development guidelines for the Centre specified that it was to be conserved, but stated that prospective developers were free to make proposals as to the potential