[1980–87 Gib LR 474]

BENATAR BROTHERS LIMITED v. PLAZA (HOLDINGS) LIMITED, PRINCE PROPERTIES LIMITED, RADHA KISHIN LIMITED and VENERONI

SUPREME COURT (Kneller, C.J.): May 18th, 1987

Landlord and Tenant—renewal of tenancy—business premises—extension of time to apply—extension allowed under Landlord and Tenant Ordinance, s.57(2), if failure to apply in time not fault of plaintiff and no irreparable mischief caused which cannot be compensated for—other relevant factors include hardship to applicant if refused, difficulty in finding alternative accommodation, etc.

The applicant-tenant applied for permission to respond to a notice to quit and apply for a new business tenancy out of time.

The respondent-landlords served the applicant with notice to quit six months prior to the expiration of its tenancy. The notice stated that, if the tenant responded within two months of receiving the notice, the landlords would not oppose an application for a new tenancy under the Landlord and Tenant Ordinance, Part IV. The applicant instructed its solicitors both to respond to the notice and to apply for a new business tenancy, but they inadvertently failed to do so within the specified time frame. Five months later, having received no reply from the applicant, the respondents, in accordance with the Landlord and Tenant Ordinance, s.57(1), sent a second copy of the notice to quit 14 days before the expiration of the applicant's tenancy. The applicant eventually applied for a new business tenancy on the last day of the tenancy. The respondents refused to grant the application and the applicants applied for an extension of time in which to apply.

The applicant submitted that (a) the court should exercise its discretion under the Landlord and Tenant Ordinance, s.57(2), to grant it an extension of time in which to apply for a new tenancy; (b) if it were not allowed to apply it would, through no fault of its own, suffer gross prejudice in having to find new premises and accept whatever rent was demanded; and (c) the hardship it would suffer would be disproportionate to the slight inconvenience which might be caused to the respondents as it had agreed not only to pay the respondents' costs for the application but also whatever rent was agreed by the parties or fixed by the court.

The respondent submitted that the applicant should not be allowed to apply for a new business tenancy as (a) the time limits set out in the Landlord and Tenant Ordinance were strict and mandatory in order to

enable the landlord to make arrangements either to take possession of the premises itself or to find a new tenant if the tenancy was not renewed; (b) it had already given the applicant opportunity to respond and apply for a new tenancy out of time as it had sent a second copy of the notice to quit, in accordance with the Landlord and Tenant Ordinance, s.57(1), five months after the original; (c) the applicant's failure to respond swiftly after receiving the second copy of the notice to quit illustrated that it had not been acting in good faith; (d) the inadvertence of the applicant's solicitors was insufficient for the court to exercise its discretion—"inadvertence" being a broad concept which should not enable the tenant to act with impunity and did not excuse the aggravation that had been caused; and (e) the applicant would not suffer hardship if made to leave the premises.

Held, allowing the application:

The court, in the exercise of its inherent discretion and its discretion under the Landlord and Tenant Ordinance, s.57(2), would allow the applicant four extra days to respond to the notice to quit and apply for a new business tenancy. Although excessive delay would usually act as a complete bar to the exercise of the court's discretion, here the delay had not been excessive and was due entirely to the inadvertence of the applicant's solicitors so that it would be unjust to penalize the applicant who had acted in a *bona fide* manner. Further, account had to be taken of the difficulty the applicant would experience in finding suitable alternative accommodation and the fact that, extending the amount of time in which it was able to respond and apply for a new business tenancy would not cause irreparable mischief to the respondents which could not be compensated by the applicant having offered to pay their costs or its agreement to pay whatever rent the respondents felt was appropriate (paras. 20–24).

Case cited:

(1) *Atwood* v. *Chichester* (1878), 3 Q.B.D. 722, applied.

Legislation construed:

Landlord and Tenant Ordinance (1984 Edition), s.57:

> "(1) Where . . . a landlord is required to give notice, and he does not receive within the specified time a notice from the tenant stating whether or not he is willing to give up possession of the property comprised in the tenancy, the landlord shall at least 14 days before the date of termination give a further copy of the notice to the tenant.
>
> (2) The court may, in its discretion, grant to a landlord or tenant an extension of time for giving any notice or making any application or request under this Part."

C.A. Gomez for the applicant;
H.K. Budhrani for the respondents.

1 **KNELLER, C.J.:** The applicant, Benatar Bros. Ltd., by a summons in chambers dated January 30th, 1987, applied under s.57(2) of the Landlord and Tenant Ordinance for an extension of the time allowed to reply to a notice of termination of tenancy and for the grant of an originating summons under ss. 43 and 44 of the same Ordinance, notwithstanding that the prescribed time limit for doing so had elapsed. This was opposed by the respondents. There was a supporting affidavit of January 30th, 1987 from the applicant's counsel, Mr. Gomez. He deposed in that affidavit to the facts that follow.

2 The respondents' solicitors served upon the applicant a notice to terminate its tenancy of the premises in question. The date of service was on or about July 30th, 1986. The notice stated that the respondents would not oppose an application for a new tenancy under Part IV of the Landlord and Tenant Ordinance. Upon receipt of this notice, the Managing Director of Benatar Bros., the applicant, sent a copy to the senior partner of J.A. Hassan & Partner with instructions to take the steps required by law. Unfortunately, due to inadvertence, no further action was taken and neither the reply to the notice, nor the intended summons for a new tenancy were issued in time.

3 By a letter dated January 5th, 1987, the respondents' solicitors sent the applicant a copy of the notice of July 30th, 1986. This was in compliance with the provisions of s.57(1) of the Ordinance. A copy of that letter was annexed to the affidavit.

4 On January 12th, 1987, there was a telephone conversation between Mr. Budhrani and Mr. Gomez. Afterwards, Mr. Gomez sent a letter to Mr. Budhrani asking whether the respondents would object to an application for the late issue of a reply and a summons. The applicant instructed Mr. Gomez to offer to pay any new rent which the parties agreed between themselves should be paid or any new rent decided by the court and that the payment of this new rent would commence from the date on which the earlier tenancy expired.

5 On January 19th, Mr. Budhrani replied on behalf of the respondents. A copy of that letter was annexed to the affidavit. Apparently, the applicant has been in possession of the premises in this suit for over nine years and has always complied with its obligations under the present tenancy.

6 The omission to reply to the notice and issue the subsequent summons was caused by the pressure of work at the applicant's solicitors' office. It was submitted that the hardship which the applicant might suffer, if leave to extend the time in which to make the next moves were not granted, would far outweigh the inconvenience caused to the respondents if it were. The various documents annexed to the affidavits reveal the following matters.

7 The notice terminating the tenancy was clear enough. It gives the last day as January 31st this year. It required the applicant to write to Mr. Budhrani within two months of the date of receiving the notice to inform him whether or not the applicant would be willing to give up possession of the premises on January 31st, 1987. It also declared that the landlord would not oppose an application, under Part IV of the Ordinance, for the grant of a new tenancy.

8 The next annexure is the letter of January 12th from Hassan & Partner to Mr. Budhrani which repeats the claim that the respondents had inadvertently omitted to reply to the notice and issue the necessary originating summons in the Supreme Court. The respondents had been told that they could apply to a judge in chambers under s.57 of the same Ordinance. It is not clear, however, for what they could apply. It goes on to say that the rent under the new lease would be paid from January 31st, 1987. I suppose this means that it would be the rent which the parties agreed should be paid or the rent which this court would fix. It is not, however, so clearly set out in that letter.

9 Mr. Budhrani replied, on behalf of the respondents, on January 19th and thanked Mr. Gomez for his letter of January 12th. He said that, because the reason for the inadvertence of the applicant was not known to him, the respondents must reserve their position regarding any application the applicant might wish to make for an extension of time or anything else.

10 So far as its submissions in chambers are concerned, Mr. Gomez had this to say on behalf of the applicant:

> "The time limits are set out in the Landlord and Tenant Ordinance which took effect from January 1st, 1986 and made certain changes to the law. Before January 1st, 1986, the applicant would have lost his tenancy if he had not applied in time. The new provisions protect the landlord but preserve the rights of a *bona fide* tenant who does not comply with the provisions for seeking a new tenancy. It refers to retrospective and interim awards. Notice that the first move must be made within 2 months and the next within 14 days, thus the originating summons should have been issued within 4 months of the first notice being received according to s.48(3) of the Ordinance. Section 57(2), however, gives the tenant a second chance to rectify its position, which is exactly what he is trying to do now. There is no limit to the discretion which the court has, except that it should be exercised judicially."

11 Mr. Gomez admitted, quite frankly, that the fault was that of the solicitors for the applicant. There were still negotiations without prejudice proceeding. The application should be granted because if it were refused, then the applicant, through no fault of its own, would suffer gross

prejudice. It would have to accept whatever rent was demanded or would have to move out and try to find new premises, which would be very difficult in a place like Gibraltar at this time. Mr. Gomez went so far as to say that they would be unobtainable. He said that the applicant had offered to pay the costs of the application and reminded the court that the applicant would pay whatever rent was agreed or fixed by the court starting from February 1st, 1987. In support of all his submissions he cited *Atwood* v. *Chichester* (1).

12 Mr. Budhrani, in his submissions, quoted the Rules of the Supreme Court, O.3, r.5. He said that the time limits in that rule were different from those in the Landlord and Tenant Ordinance. He went on to say that the Ordinance was different from the common law provisions. The time limits in the Ordinance were strict and mandatory. Section 48, he pointed out, declared that there was to be six months' notice for the termination of the tenancy, with two months in which the tenant was to reply stating what it wanted to do. This was so even if the landlord had already said he would not oppose any new tenancy. He underlined the fact that all this was so that the landlord would know what the state of the game was. The landlord needed to know what would happen to the premises at the end of the six-month period so that he could arrange either to take them over for himself or find someone who would pay the same rent or a greater one.

13 At the end of the two months the landlord should be in a position to know what is going to happen. This period expired two months before the end of the six months. The Ordinance deprived the landlord of his common law right to recover his own premises at the end of a tenancy. It was true that the tenant was sometimes unable to take all the necessary steps because, for example, he was trying to buy some other property or he was trying to lease other property—the list was not exhaustive. He agreed that the discretion of the court was unfettered. This was one of the matters in which the legislature had not said that there should be good cause or sufficient excuse, or something like that, for extending the time which had been set out. He agreed that the exercise of the discretion must still be judicial and there must be no whim or prejudice about it. It was for the applicant to make out its case with sufficient clarity. Inadvertence, however, covered a multitude of sins and should not constitute a passport for the tenant to get away with absolutely anything.

14 Paragraph 4 in the affidavit of Mr. Gomez was certainly insufficient for any court to exercise its discretion judicially. Moreover, said Mr. Budhrani, this sort of application should always be made before the time in which to do it has already passed. He also pointed out that, in a letter of January 5th, the applicant's memory had been jogged, under s.57(1) of the Landlord and Tenant Ordinance, with a reminder that it was 14 days before the Ordinance's provisions began to bite. The application was eventually made on Friday, January 31st, 1987, which was exactly the last

possible day on which it could be made. He asked the court to take this into account and declared that it revealed the attitude of the applicant.

15 Turning to the letter of January 12th, 1987, which asked Mr. Budhrani either to consent or not on behalf of the respondent. He said that whatever his answer had been, the application still had to be made (although he had in fact written back on January 19th reserving the position of the respondents). There had been delays and the convenience of the parties ought to be considered together with all the other matters. He underlined the fact that, since this was an application by the tenant, the tenant must show, on the balance of probabilities, that the discretion should be exercised in its favour. He asked what hardship the applicant would suffer as no details had been given by the tenant—there had been no suggestion of impecuniosity as he called it and there had been no suggestion that alternative accommodation would not be available.

16 All in all, he said, the tenant had not given the court enough material on which to make a decision. It was true that the tenant had agreed to pay whatever the new rent was from February 1st, 1987, but this was only a small consolation. He invited the court to consider the position if the landlords were able to re-let the premises at any rent fixed by the court. The aggravation, as well as the cost of the proceedings and the delay, might well continue until November this year. Mr. Budhrani asked rhetorically: "Would backdating the rent to February 1987 be any consolation at all? Furthermore, who was to pay the costs of the application or the costs of the litigation?"

17 At this point, Mr. Gomez interjected by saying that the applicant had already offered to pay the costs of the application. Mr. Budhrani, however, responded that this would be no consolation at all. If the application were rejected, the landlords could get the premises back and re-let them at market rent. The balance of convenience should be considered. The landlord might well be prejudiced because the tenant might get revocation of the tenancy under s.55 of the Ordinance.

18 Should the tenant agree, however, to pay the respondents' notion of market rent from February 1st, 1987, there would be no hardship at all. If not, the court would have to fix the market rent, whatever that was. The notice was repeated on January 5th and yet the application for extension of time was left until January 30th, which was the very last moment. This may or may not have been for an ulterior motive on the part of the tenant. From January 5th to 19th there had been negotiations, it was true, but none since then.

19 Mr. Budhrani submitted that the tenants had not made out a sufficient case. He also said that there would be no hardship, even if they were made to leave the premises at this point. Mr. Gomez added some new material in his reply to all this. He said that, after January 19th, the Managing

Director of the applicant company had been out of Gibraltar. He was away until February 8th. This accounted for the lack of further negotiations and the lateness of the application. He agreed that the balance of convenience was certainly not the test for exercising the discretion of the court or for proving hardship. He maintained, however, that so far as the general law and the Landlord and Tenant Ordinance were concerned, *Attwood* v. *Chichester* (1) remained the authority. There was no irreparable damage just because this application was tardy. There was no suggestion that the person at fault was the Managing Director of the applicant. Whoever it was that was at fault ought to suffer. So much for the submissions for each side in the hearing of this summons.

20 The Rules of the Supreme Court, O.3, r.5, do not apply here. The application is under the inherent jurisdiction of the court and the Landlord and Tenant Ordinance, s.57(2). The inherent jurisdiction to extend the time for doing anything is wide and it is wider at chambers than it is in court. The jurisdiction under s.57(2) of the Ordinance is not (as was pointed out by Mr. Budhrani) fettered by such phrases as "for sufficient reason" or "for reasonable cause" but on the contrary it is left to the court to exercise, with the usual qualification that this discretion should be exercised in a judicial manner on the facts in the summons itself. The object of this discretion—either the inherent one or the one under the Ordinance—is to avoid injustice to one or both parties. Excessive delay, of course, will usually be a complete bar to the exercise of the discretion. Otherwise it would seem that the test is whether or not irreparable mischief would be done by acceding to such an application and whether or not any injury caused by the delay can be compensated for by the payment of costs or any other imposition which the applicant undertakes or is made to bear.

21 Further questions which ought to be asked are whether or not any harm will be done to the respondent by allowing the applicant to have further time and whether or not the conduct of the applicant had been *bona fide*. The court should really discover to whom the failure to make the application earlier could be attributed. These tests are, it is true, taken from the judgments of Bramwell and Cotton, L.JJ. in *Atwood* v. *Chichester* (1), which is an authority on setting aside a judgment in default of appearance and the test to be applied in allowing an application for such. They will, however, do just as well for the application now before the court, which is under the inherent jurisdiction of the court and/or s.57(2) of the Landlord and Tenant Ordinance, for an extension of time allowed to reply to a notice to quit and for the issuing and serving of an originating summons under ss. 43 and 44 of the same Ordinance, even though the prescribed time limits for doing so have elapsed.

22 The delay is due to inadvertence by a partner of the applicant's solicitors. Now, "inadvertence" means that someone has not been properly

attentive and it carries with it the notion that this is unintentional. The fault, therefore, is not to be laid at the door of the Managing Director of the applicant tenant. The delay is not excessive, the application was made on the last possible day on which it could have been made. It would be unjust to the applicant tenant to deprive it of the opportunity to take steps to reply to the notice and to issue and serve the originating summons. The difficulty of obtaining alternative business premises in Gibraltar has been underlined by Mr. Gomez in his submissions. The mischief to the respondent landlords would not be irreparable and it would be an injury that was caused by the delay. The applicant's solicitor has been instructed to agree to payment of the new rent back to the day after the tenancy was ended by notice and the day after the contractual tenancy ended.

23 The costs of this application are to be paid to the respondent landlords. Therefore, in the exercise of the discretion of the court, on the material before it, the application will be allowed. The next move is to hear counsel on whether the solicitors for the applicant should be ordered to pay the costs of this application to the respondents.

24 The application should be granted with the running of time extended by four days to noon on May 22nd, 1987. In any event, the costs of the application are to be paid by the applicant to the respondent.

Application granted.