

SUPREME CT.

CANDEAS V. MONTAGUE PROPS.

[1988–90 Gib LR 105]

**CANDEAS and VIAGAS v. MONTAGUE PROPERTIES
LIMITED**

SUPREME COURT (Alcantara, A.J.): October 14th, 1988

Landlord and Tenant—renewal of tenancy—business premises—extension of time to apply—Landlord and Tenant Ordinance, s.57(2) confers almost unfettered discretion on court to extend time for issue of originating summons seeking new tenancy—short delay and plaintiff’s lack of fault support exercise of discretion in plaintiff’s favour

The plaintiffs applied for an extension of time in which to issue an originating summons asking for a new tenancy.

The plaintiffs were tenants of business premises leased to them by the defendants. The defendants served the plaintiffs with a notice to quit expiring on July 31st, 1988; the plaintiffs notified the defendants of their unwillingness to give up possession, and of their intention to apply for a new tenancy, but failed to issue an originating summons seeking a new tenancy within the time-limits set by the Landlord and Tenant Ordinance.

The plaintiffs submitted that (a) the notice to quit had been invalid, and (b) the court should use its discretion under the Landlord and Tenant Ordinance, s.57(2) to grant an extension for the issue of an originating summons because the short delay had been the fault of their solicitors.

The defendants submitted in reply that (a) the notice to quit had been valid, the plaintiffs’ acceptance of this fact being indicated by their failure to object to it prior to the expiry of the period in which an originating summons could be issued, and (b) the court should not exercise its discretion in the plaintiffs’ favour, as they had caused the delay.

Held, allowing the application:

(1) Section 57(2) of the Landlord and Tenant Ordinance conferred on the court an almost unfettered discretion to extend time-limits. The fact that the plaintiffs had not themselves been at fault (the fault being attributable to their solicitors), the initial steps that had been taken to notify the defendants of their intention to apply for a new tenancy, and the short delay all militated in favour of the exercise of the court’s discretion in their favour (paras. 7–8; para. 10).

(2) The original notice to quit had been valid; it met the requirements imposed by the Landlord and Tenant Ordinance, and the plaintiffs’ application for an extension of time under s.57(2) pre-supposed their acceptance of its validity (para. 6).

Cases cited:

- (1) *Argyll Stores (Overseas) Ltd. v. Commercial & Gen. Invs. (Gib.) Ltd.*, Supreme Ct., 1988 A. 117, unreported, distinguished.
- (2) *Gareze v. Santos*, Supreme Ct., March 23rd, 1988, unreported, *dictum* of Kneller, C.J. applied.

Legislation construed:

Landlord and Tenant Ordinance (1984 Edition), s.57(2): The relevant terms of this sub-section are set out at para. 8.

P. Triay for the plaintiffs;
A.V. Stagnetto, Q.C. for the defendants.

1 **ALCANTARA, A.J.:** This is an application by the plaintiffs seeking that the time for the issuing of an originating summons be extended pursuant to the provisions of s.57(2) of the Landlord and Tenant Ordinance.

2 The facts can be stated briefly. The plaintiffs are the tenants of business premises at 4/14, Queensway, and have been the tenants for the past 13 years. The defendants are the landlords. In accordance with the provisions of the Landlord and Tenant Ordinance, the landlords issued a notice to quit expiring on July 31st, 1988. According to that notice, the plaintiffs had to notify the defendants in writing, within two months of receiving the notice, whether or not they were willing to give up possession on that date.

3 This the plaintiffs did. In a letter dated February 8th, 1988, the plaintiffs' solicitor wrote to the defendants' solicitors in the following terms:

“We act for Messrs. A. Candeas and A. Viagas in the above-captioned matter and we have been instructed to inform you that our clients are not willing to give up possession of the premises they occupy at 4/14, Queensway, Gibraltar, as more particularly specified in the notice of termination of tenancy dated January 28th, 1988 issued by yourselves as solicitors for the landlords.”

Thereafter the plaintiffs took no further steps. They should have caused to be issued an originating summons asking for a new tenancy. This they should have done not later than the end of May 1988, to fall within the time-limits set by the Landlord and Tenant Ordinance.

4 The solicitors for the plaintiffs realized that they had been amiss and wrote on July 5th, 1988 to the solicitors for the defendants as follows:

“We write in regard to the above matter and would inform you that we have advised our clients that the notice to quit dated January 28th, 1988 and served on Mr. Candeas on February 2nd, 1988, purporting

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to terminate the tenancy on July 31st is invalid for the purpose of giving the requisite six months' statutory notice. For that reason our clients will resist any attempts made by you on behalf of your clients, to obtain possession after July 31st, 1988."

5 The defendants' solicitors were quick to reply the next day. These are the two relevant paragraphs of their letter:

"It seems extraordinary to us that, having written to us on February 8th, 1988 without having questioned the validity of the notice on Mr. Candeas, you should have waited for nearly five months, and only after the time for taking out an application under the Landlord and Tenant Ordinance had elapsed, before taking the point.

As it turns out, the notice was sent to Mr. Candeas by registered post on January 29th, 1988 and a duplicate was delivered by hand on the same day."

6 A number of affidavits have been placed before me to prove or disprove whether there has been proper service of the notice to quit. It is not for me to make a finding of the proper service. It would have been a central issue if the defendants had issued proceedings for possession or if the plaintiffs had sought a declaration, but what the plaintiffs are doing is seeking the discretion of the court for an extension of time to issue an originating summons. In such circumstances I must assume—and the plaintiffs must accept—that all prior steps have been properly performed: in other words, that the notice to quit was a proper notice and that the notice to contest was also a proper notice.

7 The true reason why the time limits were not adhered to was the fault of the plaintiffs' solicitor: he just forgot. This can be gathered from para. 4 of the affidavit of Andrew Viagas (one of the plaintiffs) dated September 28th, 1988, wherein he deposes: "The matter was already in the hands of our solicitors who had confirmed to us that they had informed Messrs. Stagnetto & Co. that we were not willing to give up possession of the premises."

8 Section 57(2) of the Landlord and Tenant Ordinance reads: "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." This is a new provision of the landlord and tenant legislation in Gibraltar with no counterpart in the laws of England. There have been two rulings on it by the Supreme Court of Gibraltar. In both those cases, the tenants failed to obtain an extension of time. In the first case, *Gareze v. Santos (2)*, the Chief Justice on March 23rd, 1988 had this to say on the question of discretion:

"It is an almost unfettered discretion for there is no qualifying phrase such as 'for sufficient reason' or 'for good reason' annexed to it. It is,

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of course, like all discretions, one that must be exercised judicially and not according to whim or prejudice.”

In that case the tenant had done nothing, not even giving notice that he was not willing to give up possession, and the delay was longer than in the present case.

9 The next case is *Argyll Stores (Overseas) Ltd. v. Commercial & Gen. Invs. (Gib.) Ltd.* (1), where I cited *Gareze v. Santos* with approval. However, this particular case is of little help in the present application. I dismissed the application on technical grounds. What the tenant was seeking was leave to issue an originating summons after the original one had been dismissed for non-appearance, rather than asking for an extension of time.

10 Taking into account that the fault lies with the solicitors, rather than with the plaintiffs, and that the time that has elapsed is not lengthy, I am disposed to exercise the discretion in favour of the plaintiffs. Accordingly, I extend the time for the issue and service of the originating summons for 10 days from today. I think that the proper order is that the plaintiffs should pay the defendants’ costs of this application.

Application granted.