[1988–90 Gib LR 17]

ANGLO WINES LIMITED v. LAU ANAYA LIMITED

SUPREME COURT (Alcantara, A.J.): January 27th, 1988

Landlord and Tenant—lease or licence—management agreement—management agreement for shop can confer licence on manager and description of manager as employee irrelevant—tenant delegating management of shop by licence to manager not entitled to protection of Landlord and Tenant Ordinance, s.38(1), as business not carried on by him

Landlord and Tenant—renewal of tenancy—business premises—occupation—for protection of Landlord and Tenant Ordinance, Part IV to apply, tenant to be in occupation of premises for purposes of carrying on business—can occupy premises through manager or agent genuinely employed by him—if business licensed to and carried on by third party, tenant not in occupation for purposes of carrying on business

Landlord and Tenant—renewal of tenancy—business premises—breach of covenant—when application for renewal of tenancy opposed under Landlord and Tenant Ordinance, s.49, for tenant's breach of obligations, court to determine whether breached, and whether "substantially"—if substantial, tenancy unlikely to be renewed in absence of exculpating circumstances

The plaintiff applied for a new tenancy of business premises owned by the defendant.

The defendant landlord leased the premises to the plaintiff tenant in January 1983, for a term of five years, subject to a number of covenants,

which included a covenant not to alter the premises, a covenant restricting the business carried out on the premises to the retail of alcoholic and non-alcoholic drinks and tobacco, and a covenant not to permit the consumption of drinks on the premises. In September 1986, the plaintiff entered into a management agreement with Aarsons Ltd., under which Aarsons Ltd. operated the shop, paying a fee of £7,800 to the plaintiff, in return for which it took the profits and bore the losses of the business. In October 1986, the defendant served the plaintiff with a notice to quit, stating that it would oppose an application for the grant of a new tenancy on the ground that the tenant had breached its obligations under the present tenancy.

The defendant submitted that (a) the plaintiff had substantially breached the covenants by installing an air-conditioner, selling groceries, confectionery and umbrellas, and allowing drinks to be consumed on the premises, all without consent, which militated against the court's exercising its discretion under the Landlord and Tenant Ordinance, s.49(1)(c), in the defendant's favour; and (b) the plaintiff did not have a protected tenancy under Part IV of the Ordinance, as it was not in "occupation" of the premises for the purposes of carrying on a business, having transferred operation of the business to Aarsons Ltd.

The plaintiff submitted in reply that (a) it had not breached the covenant restricting the scope of the trade to be carried out in the shop, because it had received verbal consent from the plaintiff to sell food; and (b) it was in occupation of the premises for the purposes of carrying on a business, as it had merely engaged Aarsons Ltd.—through which it was occupying the premises—in a managerial capacity, and had not granted it a licence of the premises.

Held, dismissing the application:

(1) The court would not exercise its discretion to grant a new tenancy in the plaintiff's favour. The plaintiff had breached two of the covenants, which constituted a "substantial" breach of its obligations for the purposes of s.49 of the Landlord and Tenant Ordinance, as there were no circumstances which might excuse these breaches. Although the evidence presented was not sufficient to hold that the plaintiff had permitted the consumption of drinks on the premises, there was ample evidence to prove that it had altered the premises and sold food, both without the consent of the defendant landlord, either verbal or written (paras. 8–9; para. 11; paras. 15–17).

(2) The plaintiff was not in "occupation" of the premises for the purposes of carrying on its business, and was therefore not entitled to the protection of Part IV of the Landlord and Tenant Ordinance. While it was possible to occupy premises through a manager or agent (as long as he was merely employed), in the present case the business had been licensed to Aarsons Ltd., which was carrying on the business, rendering the protection of s.38 of the Ordinance inapplicable to the plaintiff (paras. 20–21; paras. 24–25).

(3) When determining whether to exercise its discretion to grant a new tenancy in favour of tenants whose applications had been opposed in accordance with the provisions of the Landlord and Tenant Ordinance, s.49(1)(c), the court had to determine whether the tenant had breached its obligations, and if so, whether it had done so *substantially*; finally, it was to determine whether there were any exculpating circumstances, such as attempts by the tenant to remedy the breaches, which militated in favour of its exercising its discretion in its favour (para. 14; paras. 16–17).

Cases cited:

(1) *Anglo Hispano Bodega Co. Ltd.* v. *Marrache (No. 2)*, 1979 Gib LR 10, *dicta* of Spry, C.J. applied.
(2) *Cafeteria (Keighley) Ltd.* v. *Harrison* (1956), 168 E.G.D. 200, applied.
(3) *Eichner* v. *Midland Bank Executor & Trustee Co. Ltd.*, [1970] 1 W.L.R. 1120; [1970] 2 All E.R. 597; (1970), 21 P. & C.R. 503; 114 Sol. Jo. 373, observations of Lord Denning, M.R. applied.
(4) *Herro Traders Ltd.* v. *Sheraton Ltd.*, Supreme Ct., (1986 H 80), November 21st, 1986, unreported, applied.
(5) *Lyons* v. *Central Comm. Properties London Ltd.*, [1958] 1 W.L.R. 869; [1958] 2 All E.R. 767; (1958), 102 Sol. Jo. 600, *dictum* of Ormerod, L.J. applied.
(6) *Pegler* v. *Craven*, [1952] 2 Q.B. 69; [1952] 1 All E.R. 685; (1952), 96 Sol. Jo. 196; [1952] 1 T.L.R. 618, *dicta* of Jenkins, L.J. applied.
(7) *Teasdale* v. *Walker*, [1958] 1 W.L.R. 1076; [1958] 3 All E.R. 307; (1958), 102 Sol. Jo. 757, applied.

Legislation construed:

Landlord and Tenant Ordinance (1984 Edition), s.38: The relevant terms of this section are set out at para. 18.
s.44: "(1) Subject to section 77, the landlord may terminate a tenancy to which this Part applies by a notice given to the tenant in the prescribed form specifying the date of termination."
s.49: The relevant terms of this section are set out at para. 12.

H.K. Budhrani for the plaintiff;
A.V. Stagnetto, *Q.C.* for the defendant.

1 **ALCANTARA, A.J.:** This is an originating summons by the plaintiff seeking a new tenancy of business premises at 329a Main Street, pursuant to Part IV of the Landlord and Tenant Ordinance.

2 The tenant is a limited company. During the present hearing it was ordered on the granting of leave, with the consent of the defendant, that the name of the plaintiff be changed from that of Ratcliffe Ltd. In the course of this judgment I shall continue to refer to the plaintiff as Ratcliffe. The change of name came about by a special resolution of the company dated October 28th, 1986. The landlord is also a limited

company. The premises were originally owned by Mr. Charles Angel Vasquez, who is at present the *alter ego* of the company, Lau Anaya Ltd.

3 By a lease dated January 14th, 1983, Mr. Vasquez demised to the plaintiff the shop at 329a Main Street for a term of five years commencing on November 1st, 1987. The lease contained a number of covenants binding the plaintiff. For the purposes of these proceedings three of them are relevant, and I will set them out in full:

> "(g) Not to make alterations in or additions to the demised premises without the landlord's consent in writing first obtained.
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> (h) Not at any time to carry on or permit to be carried on upon the demised premises or any part thereof during the subsistence of the term hereby granted any business other than that of Wines Spirits Minerals Cordials and Tobacco Merchants without the written consent of the Landlord.
>
> (i) Not to allow or permit to be allowed on or upon the demised premises or any part thereof the consumption of any Wine Spirits Beer Minerals or Cordials without the written consent of the Landlord."

4 On October 30th, 1986, the landlord served notice to quit on the tenant in accordance with s.44 of the Landlord and Tenant Ordinance, stating that the landlord would oppose an application to the court for the grant of a new tenancy on the ground that the tenant ought not to be granted a new tenancy in view of substantial breaches by him of his obligations under the current tenancy. That is one issue that I will have to decide but there is another issue which became clear on the making of an order for directions. The landlord contends that the tenant is not entitled to protection as he is not in occupation for the purposes of Part IV of the Landlord and Tenant Ordinance. This point is valid and can be raised even if not included as a ground of opposition on the notice of termination of the tenancy. The authority for this is a decision of mine in *Herro Traders Ltd.* v. *Sheraton Ltd.* (4).

5 On February 10th, Anglo Hispano Co. Ltd., the parent company of Ratcliffe Ltd., wrote to Mr. Vasquez asking for written consent under the lease "to enable Ratcliffe to carry on the business of grocers and confectioners as well as wines, spirits, beer, minerals and tobacco merchants." The reason for this request was that Ratcliffe was losing money and that their competitors were also engaging in those lines. Some time after that, but before March 17th, there was a meeting between Mr. Charles Isola, the Managing Director of Anglo Hispano Co. Ltd. and director of the plaintiff, and Mr. Vasquez.

6 What transpired at this meeting is in dispute. Mr. Isola, who went into the witness-box, said that Mr. Vasquez agreed that the plaintiff should be allowed to sell groceries and confectionery, but not open food. Mr. Vasquez also gave evidence and said that he agreed to no such thing. He

admitted that he was favourably disposed towards the plaintiff and was prepared to consider giving his consent to confectionery but not to groceries, and certainly not to open food, but first he wanted a list from the plaintiff of the articles that they were proposing to sell. That list the plaintiff never supplied. Having seen and heard both witnesses, I accept the evidence of Mr. Vasquez without hesitation. This conclusion is reinforced by the fact that when Mr. Isola wrote to Messrs. Vasquez Benady & Co., Solicitors, who were acting for both parties, he did not mention that he had already obtained the verbal consent from Mr. Charles Vasquez.

7 These are some excerpts of that letter dated March 17th, 1986: "We had a useful meeting during which we each disclosed our respective positions, fears, *etc*."; "He was particularly anxious to ensure that the premises did not become another 'Ramsons' or 'Peters' both of which are convenience stores run by Indians"; "I would be grateful if you would obtain his approval to amend clause l(b) of the lease accordingly." It is agreed that the reference to "clause l(b)" in this last quotation is a mistake, and that it should have read "clause 2(h)."

8 It is common ground that the plaintiff never obtained the written consent as required by cl. 2(h) of the lease. I find as a fact that the plaintiff never obtained verbal consent to sell groceries and confectionery.

9 Notwithstanding that there was no consent, written or otherwise, the plaintiff entered into an arrangement (to use a neutral term) with Aarsons Ltd. about two months later, and Ratcliffe (the shop) started to sell groceries, confectionery, and umbrellas. I shall later revert to this arrangement with Aarsons Ltd. as it is very relevant on the issue of whether the plaintiff is, in any case, entitled to the protection of Part IV of the Ordinance. But first I am going to deal with the alleged breaches of covenant.

10 On August 4th, 1986, new solicitors for the defendant wrote to the plaintiff in the following terms:

> "Our clients who are the successors in title of Mr. Charles Angel Vasquez have instructed us that you are in breach of clauses 2(h) and 2(i) of the said lease inasmuch as you are carrying on on the demised premises business other than that of wines, spirits, beer, minerals, and cordials without the written consent of our clients."

Four days later, the solicitors wrote again to the plaintiff pointing out that he was also in breach of cl. 2(g) of the lease in that he had "made alterations to the demised premises by removing a number of glass bricks on the facade of the premises in order to install an air-conditioner unit."

11 Three breaches are alleged, one each in respect of paras. (g), (h) and (i) of cl. 2 of the lease. Dealing with them in alphabetical order, (g) has been admitted by the defendant. No consent was sought for this

alteration of installing an air-conditioner. As regards (h), I have already found the absence of written or verbal consent to the selling of groceries or confectionery. Insofar as para. (i) is concerned, I am unable, on the evidence adduced, to find that the tenant is in breach of this particular covenant. The evidence, at the very highest, is that Mr. Vasquez on some odd occasions had seen a person (presumably a customer) inside Ratcliffe drinking either 7Up or Pepsi from the can. On that alone, I would not be justified in drawing the inference that the tenant has permitted the consumption of liquor inside the premises. I come to the conclusion that the breaches of cll. 2(g) and (h) have been proved, but not that of para. (i).

12 The grounds on which a landlord can oppose the grant of a new tenancy are contained in the Landlord and Tenant Ordinance, s.49: the relevant provision for the purpose of this case is contained in s.49(1)(c), which states that—

> "the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding."

13 The interpretation of the English equivalent of the above has been the subject of two decided cases, which counsel for the plaintiff has brought to my attention: *Lyons* v. *Central Comm. Properties London Ltd.* (5) and *Eichner* v. *Midland Bank Executor & Trustee Co. Ltd.* (3).

14 The approach of the court should be this. First, decide whether there has been a breach, then whether the breach is substantial and, finally, whether in the exercise of judicial discretion a new tenancy should be granted or refused. I think I need only quote a remark in the *Lyons* case by Ormerod, L.J., where he said ([1958] 1 W.L.R. at 878): "Without attempting to define the precise limits of that discretion, the judge, as I see it, may have regard to the conduct of the tenant in relation to his obligations." Lord Denning, M.R. quoted the above passage with approval in the *Eichner* case ([1970] 1 W.L.R. at 1124).

15 I have already found that there were breaches of the tenant's obligations. I now find that they were substantial breaches. As regards (h), the tenant converted Ratcliffe into a convenience shop against the express wishes of the landlord. Insofar as obligation (g) is concerned, I also come to the conclusion that the breach was substantial. The façade of the building was altered by installing an air-conditioner. It was more than just a cosmetic alteration: nine bricks were in fact removed.

16 How should the discretion be exercised? I have come to the conclusion that I should exercise my discretion against the tenant by refusing a new tenancy for the following reasons:

(a) Although the tenant was well aware that he did not have the consent of the landlord, he proceeded to sell other goods than those authorized by the lease.

(b) Not only did he proceed to sell other goods, but he converted the premises into a convenience shop. This is clear on the evidence before me, particularly on the photographs exhibited.

(c) He installed an air-conditioner after he had been refused permission to sell groceries. He admits that he did not seek the consent of the landlord. Consent would hardly have been forthcoming taking into account that the landlord was refusing his consent to the sale of groceries and confectionery.

(d) He could have remedied the breaches on two occasions: first, when the solicitors for the landlord drew his attention to them on August 4th, 1986 and, secondly, when on October 7th, 1986 he was served with notice of forfeiture pursuant to the Conveyancing Act 1881, s.14.

17 Although the relations between the tenant and the landlord prior to the tenant's request to sell groceries and confectionery were good and cordial, I find that subsequently the tenant disregarded the rights of the landlord under the lease, and I can find no exculpating circumstances which would excuse his misdoing.

18 This could well be the end of this case, were it not for the fact that, should it be reversed on appeal, the question of whether the tenant is in any case entitled to protection under Part IV of the Ordinance would be left unanswered. I must now proceed to that issue. First, the law. Section 38 of the Landlord and Tenant Ordinance reads:

> "(1) Subject to the provisions of this Ordinance, this Part applies to any tenancy where the property comprised in the tenancy is or includes premises that are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.
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> (2) In this Part the expression 'the holding', in relation to a tenancy to which this Part applies, means the property comprised in the tenancy, excluding any part that is not occupied either by—
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> (a) the tenant; or
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> (b) a person who—
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> (i) is employed by the tenant; and
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> (ii) is so employed for the purposes of a business by reason of which the tenancy is one to which this Part applies."

19 Consideration was given to similar provisions by Spry, C.J. in *Anglo*

Hispano Bodega Co. Ltd. v. *Marrache (No. 2)* (1), where he said (1979 Gib LR at 13):

> "I think 'occupied' must be given a restricted meaning and in the case of a company, means occupied by the company itself or by an employee of the company, employed for the purposes of the business which brings the premises under Part III. Occupation by a sub-tenant or by a licensee who has been given exclusive possession is not occupation by the sub-lessor or licensor."

20 Spry, C.J. also cited with approval the views expressed by Jenkins, L.J. in *Pegler* v. *Craven* (6), where he said ([1952] 1 All E.R. at 689) that—

> "the meaning of the word 'occupation' is one which must be determined by reference to the context in which the expression is used, and, in my view, the context makes it reasonably plain that the occupation by a third party under a licence otherwise than for the purpose of carrying on a business belonging to the tenant himself does not suffice to make the tenant the occupier of a shop under a tenancy within the meaning of the Act."

21 The above case, together with *Teasdale* v. *Walker* (7) and *Cafeteria (Keighley) Ltd.* v. *Harrison* (2), was relied on by counsel for the plantiff for the proposition that a tenant could occupy premises through a manager or agent. I do not disagree with that proposition, so long as the manager or agent is in his employment, but not otherwise. Your servant can be your agent, but your agent is not necessarily your servant. Quoting again from Jenkins, L.J. in *Pegler* v. *Craven* ([1952] 1 All E.R. at 687):

> "I agree that the conception of 'occupation' is not necessarily and in all circumstances confined to the actual personal occupation of the person termed the occupier himself. In certain contexts and for certain purposes it obviously extends to vicarious occupation by a caretaker or other servant or by an agent. Clearly the tenant of a retail shop who, through persons in his employment, carried on business there for his own benefit under a tenancy with respect to which he was tenant would properly be described as the occupier of the shop and the person carrying on business there, though not himself in actual personal occupation of it."

22 I have already referred to the arrangements with Aarsons Ltd. when Ratcliffe started to sell groceries and confectionery and other items. I will now consider them in more detail. First, the evidence of Mr. Charles Isola as to his intentions. This is what he said in evidence:

> "We had in mind specifically a licence for the operation of business. Licence to operate a business. The business is licensed out to an individual to run it on our behalf. The business continues to belong to owner. Simply it is let or licensed to another individual. Business

> continues to be my company. The same system operates in UK and other countries for petrol stations. Petrol companies continue to be owners of business and are. This is precisely the arrangement I had in mind."

And further on he said: "Relationship with Aarsons is contained in my letter of June 9th, 1986." In cross-examination he stated: "Original intention was to grant a licence. On change of solicitor I was advised on a management agreement."

23 The letter above referred to is a letter sent by Mr. Isola to a Mr. Radhakishen of Aarsons Ltd. dated June 9th, 1986. The first paragraph reads:

> "Further to our various discussions regarding premises at 329a Main Street trading under the name Ratcliffe Ltd., I now confirm hereunder the terms of the licence we are prepared to grant you to trade therefrom under Trade Licence No 1082."

24 A management agreement was entered into on September 1st, 1986 between the plaintiff and Aarsons Ltd. Aarsons Ltd. was appointed manager to run the shop for one year. For that privilege, Aarsons Ltd. would have to pay £7,800. However, Aarsons Ltd. could keep whatever profits were made, apart from certain deductions. The management agreement is very detailed, referring to the plaintiff all the time as the employer.

25 I have come to the conclusion that the management agreement is nothing more than a variation of a *mai toi* agreement, which is very well known by the Chinese community in England (see Wilkinson, *Business Premises: Escaping Protection*, 137 *New Law Journal* 782 (1987)). It is nothing more than a licence with a different name. A licence is what the plaintiff originally intended and a licence is what it is. In the circumstances, I hold that the plaintiff is not entitled to protection under Part IV of the Landlord and Tenant Ordinance as the premises are not occupied by the tenant for the purposes of a business carried on by him. The business is carried on by Aarsons Ltd.

Application dismissed.