[1988–90 Gib LR 44]

MARCOS ENTERPRISES LIMITED v. WHEATLEY

SUPREME COURT (Kneller, C.J.): April 20th, 1988

Landlord and tenant—lease or licence—criteria—court to look at whole relationship including parties' rights and obligations when determining whether tenancy created—no policy objection to sole-occupation licences—parties' description of agreement to be considered but not conclusive—exclusive possession important but not solely determinative—basis of tenancy interest in land for term absolute

Landlord and tenant—possession—action for possession—summary procedure under R.S.C., O.113, r.1 only to be used when allegedly unlawful occupier unambiguously non-tenant—to be strictly construed

The plaintiff applied for an order of recovery of possession of premises under the Rules of the Supreme Court, O.113, r.1.

The plaintiff was the lessee of premises at 44 Cornwall's Lane, which Mrs. Benson, its predecessor in title (and a director of the plaintiff company), had allowed the defendant to occupy at a monthly rent in 1977, under what was called a one-year licence agreement. The defendant carried on running "Strings," the restaurant business previously operated by Mrs. Benson, under the original agreement which was informally renewed from time to time. In March 1985, the lease was taken over by the plaintiff, which, in January 1987, gave the defendant four weeks' notice of the expiry of the licence, and at the same time issued him with a notice to quit pursuant to the provisions of the Landlord and Tenant Ordinance, stating that this was without prejudice to its right to deny the existence of a tenancy. The defendant replied in February 1987 that he was not willing to give up possession of the premises, and gave notice that he required a new tenancy. The plaintiff then commenced the present proceedings by originating summons under the Rules of the Supreme Court, O.113, r.1, to recover possession.

The plaintiff submitted that (a) the defendant, who had never been a tenant, but only a licensee, was occupying the premises after the expiry of his licence, and that it was therefore proper for an order for possession to be granted under O.113, r.1; and (b) if the defendant had, in fact, been a tenant, he had not applied within the correct window of time for the renewal of the tenancy.

The defendant submitted in reply that he had acted, and had been treated by the landlord, as a tenant at all material times: he had performed

extensive renovations on the premises, in contrast to Mrs. Benson, who had not done the work on the property that she had promised.

Held, dismissing the summons:

(1) The issue was not within the ambit of the Rules of the Supreme Court, O.113, r.1. An originating summons could only be brought under that rule for possession of property when it was unambiguous that the occupier was not, and had not been, a tenant. On the facts here, it was unclear whether the defendant was a licensee or a lessee, and that issue remained to be tried. The summary procedure provided by O.113, r.1 could not therefore be invoked (paras. 15–19).

(2) In determining whether an occupier was a tenant or a licensee, the court should look at the matter in the round. There was no public policy objection to property owners granting licences, rather than tenancies, of premises, even where, as here, there was exclusive occupation by the other party to the agreement. The description of an agreement as a licence carried some weight in determining its status, but the court had to be careful to ensure that such a description was not merely a device to circumvent the protection of the Landlord and Tenant Ordinance; here, the court was satisfied that the licence agreement was not such a sham. The nature of the premises and the rights and obligations imposed on the parties were important in determining the true nature of their relationship, as was the fact of exclusive possession, which, despite its weight, was by no means the sole determinant of the agreement's status: here, the fact that the premises were business premises assisted the plaintiff in showing that the agreement was genuinely a licence. At the basis of a tenancy was an interest in land for a term absolute; mere occupation for a specified purpose, as here, fell short of this, and constituted a licence (para. 25).

Cases cited:

(1) *A.G. Securities* v. *Vaughan*, [1988] 2 W.L.R. 689; [1988] 2 All E.R. 173; [1988] 1 E.G.L.R. 36, referred to.
(2) *Addiscombe Garden Estates Ltd.* v. *Crabbe*, [1958] 1 Q.B. 513; [1957] 3 All E.R. 563, referred to.
(3) *Antoniades* v. *Villiers*, [1988] 2 All E.R. 309; [1988] 3 W.L.R. 139; [1988] 1 E.G.L.R. 59, referred to.
(4) *Bracey* v. *Read*, [1963] Ch. 88; [1962] 3 W.L.R. 1194; [1962] 3 All E.R. 472, referred to.
(5) *Bristol Corp.* v. *Persons Unknown*, [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593, referred to.
(6) *Bristol Corp.* v. *Ross*, [1973] Ch. 447; [1973] 3 W.L.R. 71; [1973] 3 All E.R. 393, referred to.
(7) *Clore* v. *Theatrical Properties Ltd.*, [1936] 3 All E.R. 483, referred to.
(8) *Environment Dept.* v. *James*, [1972] 1 W.L.R. 1279; [1972] 3 All E.R. 629, referred to.

(9) *Errington* v. *Errington*, [1952] 1 K.B. 290; [1952] 1 All E.R. 149, referred to.
(10) *Greater London Council* v. *Jenkins*, [1975] 1 W.L.R. 155; [1975] 1 All E.R. 354; (1974), 119 Sol. Jo. 64, referred to.
(11) *Jaybee Holdings Ltd*. v. *French Caterers Ltd*., Supreme Ct., 1984 J. No. 100, November 29th, 1984, unreported, referred to.
(12) *McPhail* v. *Persons Unknown*, [1973] 1 Ch. 447; [1973] 3 All E.R. 393, referred to.
(13) *Moore Properties (Ilford) Ltd*. v. *McKeon*, [1976] 1 W.L.R. 1278; [1977] 1 All E.R. 262; (1976), 33 P. & C.R. 7; 120 Sol. Jo. 753, referred to.
(14) *Radaich* v. *Smith*, (1959), 101 C.L.R. 209; [1959] A.L.R. 214; 33 A.L.J.R. 214, referred to.
(15) *Shell-Mex & B.P. Ltd*. v. *Manchester Garages Ltd*., [1971] 1 W.L.R. 612; [1971] 1 All E.R. 841; (1971), 115 Sol. Jo. 111, referred to.
(16) *Street* v. *Mountford*, [1985] A.C. 809; [1985] 2 W.L.R. 877; [1985] 2 All E.R. 289; [1985] 1 E.G.L.R. 128; (1985), 50 P. & C.R. 258, referred to.
(17) *Swordheath Properties Ltd*. v. *Floydd*, [1978] 1 W.L.R. 550; [1978] 1 All E.R. 721; (1977), 121 Sol. Jo. 817, referred to.
(18) *Warr (Frank) & Co. Ltd*. v. *London County Council*, [1904] 1 K.B. 713; (1904), 2 L.G.R. 723; 73 L.J.K.B. 362; 90 L.T. 368, referred to.

Legislation construed:

Landlord and Tenant Ordinance (1984 Edition), s.48(3): The relevant terms of this sub-section are set out at para. 9.

Rules of the Supreme Court, O.113, r.1: The relevant terms of this rule are set out at para. 15.

A.V. Stagnetto, *Q.C.* for the applicant;
C. Finch for the respondent.

1 **KNELLER, C.J.:** Marcos Enterprises Ltd. ("Marcos") asks for an order of recovery of possession of 44 Cornwall's Lane, Gibraltar ("the premises") because it is entitled to possession of it and anyone in occupation of it is there without its licence or consent. Mr. Peter Wheatley is in occupation of the premises and he opposes this application.

2 The owners of the freehold are Mr. Ernest De Torres and Mr. and Mrs. Featherstone. Mrs. Benson ran "Strings" as a bar and restaurant. She equipped it and built up its business. It may be that she paid £5,000 for its lease in 1973, when it was only a warehouse.

3 On May 1st, 1977 she granted what was called a one-year licence to Mr. Wheatley to carry on that business in consideration for £150 sterling per month which the parties called "the licence fee." In the event of the frontier with Spain being re-opened, the fee was to be increased. Mr.

Wheatley covenanted with Mrs. Benson, among other things, to cease trading under the name of "Strings" and to vacate the premises at the end of the year. The licence was expressed to expire on April 30th, 1978.

4 Clause 3(b) of the licence agreement specifically stated that the agreement constituted a licence only and conferred on Mr. Wheatley no tenancy or interest in the premises. He had the option to renew the agreement for another year, provided that he gave notice of his intention to renew the licence six months before the date it ended. Mrs. Benson and Mr. Wheatley informally renewed the licence from time to time from April 30th, 1978.

5 Marcos became the tenant of the premises under a three-year lease dated March 30th, 1985. Mrs. Benson is a director of Marcos. On January 30th, 1987 Marcos's solicitor sent Mr. Wheatley a letter telling him that his licence would expire on February 28th, 1987, and that he would have to vacate the premises forthwith, and in any event not later than February 28th. The solicitors also sent him a notice to quit under the Landlord and Tenant Ordinance, adding that it was without prejudice to the existence of the licence.

6 The notice to quit stated that Marcos was the landlord of the premises and that Mr. Wheatley's tenancy would end on July 31st, 1987. Mr. Wheatley was required to tell Marcos in writing within two months of receiving the notice whether or not he would be willing to give up possession on that date.

7 Marcos also informed Mr. Wheatley that it would oppose an application to the court under Part IV of the Ordinance for the grant of a new tenancy because on the termination of the current tenancy Marcos intended to occupy the holding for the purpose of a business to be carried on by itself. In the corner of the notice was added by Marcos the warning: "This notice is sent without prejudice to the right of Marcos Enterprises Limited to deny the existence of a tenancy."

8 Mr. Wheatley gave notice on February 10th, 1987 of his not being willing to give up possession of "Strings," and at the same time gave notice that he required a new tenancy. He asked for a seven-year lease at a fair market rent. The lease was to have the same terms and conditions as the previous one.

9 Marcos denies that Mr. Wheatley was ever a tenant of the place and claims that, if he were, he failed to make an application for a new tenancy within the period stipulated in s.48(3) of the Landlord and Tenant Ordinance, which is specified as "not less than 2 nor more than 4 months after the giving of [the notice to quit]." So, according to Marcos, Mr. Wheatley's licence ran out and he never was a tenant (or, if he had been, then he did not apply for a new tenancy in time), so he is there without licence or consent.

10 Mr. Wheatley's account is different. The premises were occupied before July 1975 by Mr. Neil Cocker who ran it as a "fast food" business called "Chicken Inn and Strings." He employed Mr. Wheatley as its chef from July 1975 to April 1st, 1977. "Chicken Inn and Strings" lost money and closed down.

11 The lease of the premises was owned in 1977 by Mrs. Benson, and Mr. Wheatley suggested a new business for it, as an outlet for "The Ice Box Ltd.," her frozen food supply business. So in February 1977, Mrs. Benson offered to let the premises to Mr. Wheatley at a rent of £150 per month for one year. He paid the rates, municipal charges, electricity, water and telephone bills, licence fees, wages, taxes and social insurance contributions. The rent went up from £150 to £250, and then to £300 per month, which is more than Marcos paid the landlords. Mrs. Benson has sold Mr. Wheatley about £12,000 worth of goods from "The Ice Box Ltd."

12 Mr. Wheatley has replaced the original fixtures and fittings in the bar, restaurant and kitchen, including the plumbing, drainage and electrical systems, at a cost of about £16,500. Much of this should have been done by the landlords. It is due to his expenditure, work and ability, claims Mr. Wheatley, that "Strings" is a popular, successful business with high standards and a good reputation. It is Mr. Wheatley's sole livelihood and he has serious and substantial commitments because he has maintained and improved this business.

13 Mrs. Benson promised to install air conditioning and to extend the room in the rear. She agreed to sell him the lease for £10,000 and to act as his guarantor at the bank if he proved himself in the first year. She failed to do either. She told him she could not sell him the premises by way of assignment, so would not fulfil her promises. Mr. Wheatley declares that this is untrue because the landlords would not have objected to any assignment of the lease to him.

14 Mrs. Benson had not troubled him while the frontier was closed. Once it was opened, she plagued him with demands for higher rents and offers to sell the lease at extortionate prices. Finally, Mr. Wheatley claims, he has at all times been treated as a tenant.

15 The application is made under O.113, r.1 of the English Rules of the Supreme Court which apply to practice and procedure in this court (Supreme Court Ordinance, s.15). Order 113, r.1 provides as follows:

> "Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order."

It provides an exceptional procedure for recovery of possession of land which is in wrongful occupation by trespassers. Amongst other things, it truncates the steps and time taken for obtaining a final order for possession of land because it can be made on such an application as this one. There is to be no delay, expense or technicality. The applicant does not have to file suit and strive for a final judgment or order. He does not have to claim it by writ followed by judgment in default or under O.14.

16 So it is strictly construed and confined to claims for possession of land occupied solely by a person or persons who entered into or remain in occupation without the licence or consent of the person in possession or any predecessor of his. It does not cover a claim for possession of land against a tenant holding over after the termination of a tenancy.

17 Equally, if the circumstances are such as to bring the application within its terms, the court has no discretion to thwart the use of this summary procedure. It is, therefore, apt relief against a person who has held over without consent after his licence to occupy has been terminated: *Greater London Council* v. *Jenkins* (10). And so it is against unlawful sub-tenants (*Moore Properties (Ilford) Ltd.* v. *McKeon* (13)). It may not perhaps be appropriate where there has been a grant of a licence for a long time and the licensee holds over after his licence to occupy has ended (*Bristol Corp.* v. *Persons Unknown* (5)).

18 Usually it is appropriate in uncontested cases, or cases in which there is no issue or question to try. The plaintiff must prove his right to recover the land and the defendant's occupation of it without licence or consent (or indeed any right or title to or interest in it). The court will dismiss the summons if at its hearing it appears that the claim of the plaintiff is not within the ambit of this order.

19 If the court holds that there is some issue or question that requires it to be tried, or that for some other reason there ought to be a trial, it may give directions as to the further conduct of the proceedings (O.28, r.4), or may order (under O.28, r.8) the proceedings to continue as if begun by writ.

20 The court has no power to suspend an order for possession against a trespasser unless the owner consents (*Environment Dept.* v. *James* (8); *McPhail* v. *Persons Unknown* (12); *Bristol Corp*. v. *Ross* (6); *Swordheath Properties Ltd.* v. *Floydd* (17)).

21 The learned editors of *The Supreme Court Practice 1988*, when treating of O.113, r.7(1), which provides that the leave of the court is necessary to issue a writ of possession to enforce an order made under this Ordinance after the expiry of three months from the date of the order, explain, at para. 114/1–8/10, at 1473, that—

> "the reason for this requirement is to discourage the use of proceedings under O.113 except in case of emergency. The procedure under O.113 is meant to be truly summary, and it loses this character if a plaintiff were to employ this extraordinary machinery to obtain his order for possession and then delay enforcement, especially if he does so for a considerable time."

22 Mr. Finch mentioned an unreported decision of the Supreme Court of Gibraltar, namely *Jaybee Holdings Ltd*. v. *French Caterers Ltd*. (11), which is a decision Davis, C.J., delivered on November 29th, 1985, wherein he was asked to decide whether a 1967 agreement relating to Paddington's Restaurant was a licence or a tenancy.

23 The learned Chief Justice was referred to *Warr (Frank) & Co. Ltd*. v. *London County Council* (18); *Clore* v. *Theatrical Properties Ltd*. (7); *Errington* v. *Errington* (9); *Addiscombe Garden Estates Ltd.* v. *Crabbe* (2); *Radaich* v. *Smith* (14); *Bracey* v. *Read* (4); *Shell-Mex & B.P. Ltd.* v. *Manchester Garages Ltd.* (15); and *Street* v. *Mountford* (16) and he applied their principles in his search for a solution to the conundrum set before him.

24 Recently, there have been two English Court of Appeal decisions on whether an agreement is a licence or a tenancy of residential accommodation (*A.G. Securities* v. *Vaughan* (1) and *Antoniades* v. *Villiers* (3)).

25 The Gibraltarian and English authorities appear to me to be sound and relevant law, and I propose respectfully to adopt them. A summary of their guidelines is:

(a) it is not contrary to public policy for a property owner to license occupiers to occupy premises on terms which do not give rise to a tenancy;

(b) the court should be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Landlord and Tenant Ordinance;

(c) each case depends on its own facts;

(d) the whole of the document must be read in relation to the relevant surrounding circumstances, particularly the nature of the premises, for—as with every other instrument—it is to be interpreted having regard to its subject-matter;

(e) if the parties describe the agreement as a licence or as a tenancy it does not necessarily follow that it is one, but such an assertion should not be ignored;

(f) the test is whether the document imposes on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord;

(g) the fact of exclusive possession, if not decisive against the view that it is a mere licence as distinct from a tenancy, is at all events a consideration of the first importance;

(h) a fundamental right which a tenant has that distinguishes his position from that of a licensee is that he has an interest in land for the term of the lease as distinct from personal permission to enter on the land and to use it for some stipulated purpose or purposes;

(i) if the grantee is given a legal right of exclusive possession of the land for a term, or from year to year, or for a life or lives, it is an interest in land—a demise—and he is a tenant; and

(j) pointers one way or the other include (i) specific mention of the right of the grantor and his agents and servants to enter in order to view and to repair the premises; (ii) a term; (iii) whether the landlord also occupies the premises; (iv) whether another occupier is let in, and (v) a rent.

26 In this case, the premises are business premises and it is probable that Mrs. Benson, upon advice, intended to create a relationship which was outside the operation of the Landlord and Tenant Ordinance. Mr. Wheatley (with or without advice) may well have been content to accept that, in order to begin his business. They created rights and the effect of those was either a licence or a lease. It is not yet clear what the effect was.

27 If it were a licence, it may be proved that it had been lawfully terminated and that Mr. Wheatley has remained in occupation without the consent of Marcos or Mrs. Benson. But if it were a tenancy that was created, an application for possession of the premises against Mr. Wheatley, who is holding over after the termination of the tenancy, should not have been made under O.113, r.1. There are issues or questions to be tried.

28 It appears, then, that this claim is not within the ambit of this Order. The summons is dismissed with costs.

Summons dismissed.