[1988–90 Gib LR 52]

INTERNATIONAL PROPERTIES (GIBRALTAR) LIMITED v. RENT TRIBUNAL

SUPREME COURT (Kneller, C.J.): June 30th, 1988

Landlord and Tenant—rent—rent control—residential tenancy—word "may" in Landlord and Tenant Ordinance, s.22(1) confers discretion on Rent Tribunal to lift rent control if structural alterations enlarge or divide property—contains no requirement that alterations be "substantial" but suffices that more than minimal or decorative and carried out with bona fide intention of increasing housing stock—incentive for landlords to fulfil Ordinance's aim of increasing housing stock, so discretion not unfettered

The appellant appealed against the decision of the Rent Tribunal not to lift rent control from two flats to which structural alterations had been, or were to be, carried out.

The appellant owned the freehold of the premises, the top two floors of which were divided into flats to be let to tenants. It was given permission to convert one floor into two self-contained flats, and the other into a self-contained flat and a bed-sitter; each floor had previously been let as one flat. It applied to the Rent Tribunal for an order declaring that Part III of the Landlord and Tenant Ordinance no longer applied to the floors; the Tribunal refused to grant an order on the basis that the works effected had been minimal, and were insufficient to bring the premises within the provisions of the Landlord and Tenant Ordinance, s.22.

On appeal, the appellant submitted that (a) the works were within the provisions of s.22(1) of the Ordinance, as their *bona fide* effect was to reconstruct the dwellinghouses into two separate self-contained flats; (b) there was no requirement in s.22 that the works carried out be "substantial" for rent controls to be lifted, and that in any case the works carried out were, in fact, more substantial than those that had been held to surmount the more demanding barrier present in the equivalent English legislation; (c) the structural alterations caused neither a decrease in the overall housing stock nor undue hardship to any tenant, and that in fact they achieved the opposite, which was to be encouraged given the state of Gibraltar's housing stock, and (d) the use of the word "may" in s.22 did not necessarily mean that the decision whether to lift rent control was entirely at the discretion of the Rent Tribunal.

The Tribunal submitted in reply that (a) although the flats were to be, or had been, converted into two separate dwellinghouses, the alterations that had taken place to achieve this had been minimal, with the result that the

provisions of s.22 did not apply; (b) the character of the dwellinghouses had not been changed, and that it was not the appellant's *bona fide* intention to reconstruct them; and (c) that, even if the provisions of s.22 had been met by the appellant in carrying out the alterations, the Tribunal had a discretion whether it should lift the rent control.

Held, allowing the appeal:

(1) Both decisions of the Tribunal not to lift the rent controls on the flats would be set aside, and the controls would be lifted. In looking for "substantial" alterations to the premises, the Tribunal had erred in law as substantiality was not a requirement stated in s.22 of the Ordinance. It was enough that the alterations should be more than minimal or decorative when combined with a *bona fide* intention to increase the housing stock (para. 22; para. 27).

(2) One of the objects of the Landlord and Tenant Ordinance was to secure an increase in the quantity and quality of Gibraltar's housing stock. Social policy, as well as the spirit of the Ordinance, dictated that landlords should be encouraged to increase the stock of housing available for occupation. Without the incentive of the lifting of rent controls where renovations had been carried out with a view to increasing the housing stock, landlords would have little incentive to make such alterations (paras. 24–26).

(3) It was unnecessary for the purposes of the present appeal to determine whether the word "may" in s.22(1) conferred discretion on the Tribunal as to whether to lift the rent control, or whether it should be read as "must." However, if the discretion of the Tribunal in this regard were unfettered, it would provide little incentive for landlords to reconstruct premises, an outcome that would frustrate one of the objects of the Ordinance (para. 31).

Cases cited:

(1) *ACT Constr. Ltd.* v. *Customs & Excise Commrs.*, [1981] 1 W.L.R. 1542; [1982] 1 All E.R. 84; [1982] S.T.C. 25; [1981] T.R. 489, applied.

(2) *Bickmore* v. *Dimmer*, [1903] 1 Ch. 158; (1903), 72 L.J.Ch. 96; 15 W.R. 180; 47 Sol. Jo. 129, applied.

(3) *Brooklands Selangor Holdings Ltd.* v. *Inland Rev. Commrs.*, [1970] 1 W.L.R. 429; [1970] 2 All E.R. 76; [1969] T.R. 485; (1969), 114 Sol. Jo. 170, referred to.

(4) *Cadle (Percy E.) & Co. Ltd.* v. *Jacmarch Properties Ltd.*, [1957] 1 Q.B. 323; [1957] 2 W.L.R. 80; [1957] 1 All E.R. 148; (1956), 101 Sol. Jo. 62, distinguished.

(5) *Eyre* v. *Haynes*, [1946] 1 All E.R. 225; (1945), 90 Sol. Jo. 55; 62 T.L.R. 63, distinguished.

(6) *Granada Theatres Ltd.* v. *Freehold Inv. (Leytonstone) Ltd.*, [1958] 1 W.L.R. 845; [1958] 2 All E.R. 551; (1958), 102 Sol. Jo. 563; on

appeal, [1959] Ch. 592; [1959] 1 W.L.R. 570; [1959] 2 All E.R. 176; (1959), 103 Sol. Jo. 392, applied.

(7) *Hemns* v. *Wheeler*, [1948] 2 K.B. 61; [1948] L.J.R. 1024; (1948), 92 Sol. Jo. 194; 64 T.L.R. 236, distinguished.

(8) *Joel* v. *Swaddle*, [1957] 1 W.L.R. 1094; [1957] 3 All E.R. 325; (1957), 101 Sol. Jo. 850, distinguished.

(9) *Khiani* v. *Rent Tribunal* (1987), Supreme Ct., January 29th, 1988, unreported, observations of Alcantara, A.J. applied.

(10) *Langford Property Co. Ltd.* v. *Batten*, English C.A., *The Times*, July 22nd, 1949, distinguished.

(11) *Langford Property Co. Ltd.* v. *Sommerfeld*, [1948] W.N. 287; (1948), 92 Sol. Jo. 408, distinguished.

(12) *Marchbank* v. *Campbell*, [1923] 1 K.B. 245; [1922] All E.R. Rep. 358; (1922), 21 L.G.R. 90; 92 L.J.K.B. 137; 67 Sol. Jo. 184, *dicta* of Salter, J. applied.

(13) *Palser* v. *Grinling*, [1946] K.B. 631; [1946] 2 All E.R. 287; [1947] L.J.R. 97; on appeal, [1948] A.C. 291; [1948] 1 All E.R. 1; [1948] L.J.R. 600; (1947), 92 Sol. Jo. 53, distinguished.

(14) *Pearlman* v. *Harrow School (Keepers & Governors)*, [1979] Q.B. 56; [1978] 3 W.L.R. 736; [1979] 1 All E.R. 365; (1978), 38 P. & C.R. 136; 122 Sol. Jo. 524, applied.

(15) *Peterborough Corp.* v. *Holdich*, [1956] 1 Q.B. 124; [1955] 3 W.L.R. 626; [1955] 3 All E.R. 424; (1955), 54 L.G.R. 31; 99 Sol. Jo. 798, referred to.

(16) *Phillips* v. *Barnett*, [1922] 1 K.B. 222; [1921] All E.R. Rep. 385; (1921), 20 L.G.R. 1; 91 L.J.K.B. 198; 66 Sol. Jo. 124, not followed.

(17) *Shuter (No. 2)*, *Re*, [1960] 1 Q.B. 142; [1959] 3 W.L.R. 652; [1959] 3 All E.R. 481; (1959), 103 Sol. Jo. 855, referred to.

(18) *Sinclair* v. *Powell*, [1922] 1 K.B. 393; [1921] All E.R. Rep. 379; (1921), 20 L.G.R. 73; 91 L.J.K.B. 220; 66 Sol. Jo. 235; 126 L.T. 210, applied.

(19) *Smith* v. *Portsmouth JJ.*, [1906] 2 K.B. 229; (1906), 75 L.J.K.B. 851; 50 Sol. Jo. 575; 70 J.P. 497; 54 W.R. 598, applied.

(20) *Solle* v. *Butcher*, [1950] 1 K.B. 671; [1949] 2 All E.R. 1107, referred to.

(21) *Thorneloe & Clarkson Ltd.* v. *Board of Trade*, [1950] 2 All E.R. 245; (1950), 1 P. & C.R. 139, distinguished.

(22) *Woodward* v. *Samuels*, [1920] All E.R. Rep. 659; (1920), 84 J.P. 105; 89 L.J.K.B. 689; 122 L.T. 681, not followed.

Legislation construed:

Landlord and Tenant Ordinance, s.22(1): The relevant terms of this sub-section are set out at para. 11.

Landlord and Tenant (Miscellaneous Provisions) Ordinance (Laws of Gibraltar, 1965–69, *cap*. 83, s.7(2): The relevant terms of this section are set out at para. 14.

Landlord and Tenant Act 1954, s.30(1)(a): The relevant terms of this paragraph are set out at para. 22.

L.W.G.J. Culatto for the appellant landlord;
D. Robinson, *Crown Counsel*, for the respondent Tribunal;
The tenants did not appear and were not represented.

1 **KNELLER, C.J.:** The freehold premises No. 99 at 13 Parliament Lane are owned by International Properties (Gib.) Ltd. (the appellant). On the top floor there are two tenants: Catalan Enterprises Ltd. in Suite 1 and the family Gracias in Suite 1A. They were served but have not appeared or been represented in the appeals. The other floor is unoccupied. The Catalan Enterprises and Gracias suites are the subject of one appeal and the vacant floor the other. The appeals have been consolidated.

2 On August 26th, 1986, the Development and Planning Commission received plans and specifications from the appellant for the conversion of each of these floors into two separate units, and a month later gave the appellant Permit No. 2999, authorizing it to execute the building work. Work has only been done, so far, on the top floor.

3 The appellant's solicitors applied, on January 8th, 1987, to the Rent Tribunal for an order declaring that Part III of the Landlord and Tenant Ordinance no longer applied to these floors.

4 Each floor used to be let as one flat but both were empty when the application was made. One floor would be turned into two self-contained flats, and the other had become a self-contained flat and a bed-sitter.

5 At the Tribunal's hearing on July 7th, 1987, Mr. Peter Isola represented the appellant. Catalan Enterprises Ltd. was not present or represented, but the Gracias couple appeared in person and Mr. Isola did not object, though he pointed out that they had become tenants of Suite 1A after the work had been done.

6 Mr. Isola explained that the structural alterations had been made in accordance with the plans supplied. A new bathroom, kitchen and entrances had been put in, at a total cost of £6,000. One flat had now become a self-contained flat and a self-contained bed-sitter.

7 The Tribunal considered all this and decided on July 14th, 1987 that the self-contained flat and self-contained bed-sitter should not be decontrolled because the works effected had been minimal, with the result that s.22 of the Ordinance did not apply. The appellant was told this a month later.

8 That was the result for the top floor. The application for the floor below was heard on November 12th, 1987. The same Mr. Isola told the Tribunal that this floor was one flat which was now vacant, and that the

proposed works on it would cost (in November 1987) £15,000. An extra bathroom, kitchen, partitions, a fire-resistant door and the refurbishment of the existing kitchen would make it into two self-contained flats.

9 Again, the Tribunal decided that the application failed. It found that, from the plans and information put before them, the proposed works did not suffice to warrant decontrol. The chairman of the Tribunal told the appellant this on December 10th, 1987.

10 The memorandum of appeal in each appeal has four grounds, namely that—

(a) the Rent Tribunal erred in law and on the facts in holding that it would not grant an order for decontrol on the ground that the provisions of s.22 of the Landlord and Tenant Ordinance had not been complied with;

(b) the Rent Tribunal erred in law and on the facts in holding that the appellant, in making its application under s.22 of the Landlord and Tenant Ordinance, had not satisfied the Tribunal under sub-ss. 22(1)(a), (b), (c) and (d);

(c) the Rent Tribunal failed to give sufficient weight or any weight to the evidence of the appellant on the structural alterations that were to be carried out to its property resulting in the reconstruction of one dwelling-house into two separate self-contained flats; and

(d) the Rent Tribunal misdirected itself in law and in fact and failed to exercise its discretion in favour of the appellant as it was obliged to do once the appellant had shown that structural alterations were to be or had been carried out which satisfied the conditions set out in sub-ss. 22(1)(a), (b), (c) and (d).

11 When a landlord of a dwellinghouse to which Part III of the Ordinance applies asks the Rent Tribunal to decontrol it, if the Rent Tribunal is satisfied, under s.22(1) of the Landlord and Tenant Ordinance, that—

> "(a) structural alterations have been carried out, or are to be carried out, to the dwellinghouse on or after the commencement of this Ordinance; and
>
> (b) the bona fida [*sic*] effect of the structural alterations is or will be, when carried out, to reconstruct the dwellinghouse either—
>
> (i) into a unit that is substantially a larger unit than it was before the alterations; or
>
> (ii) into 2 or more separate, self-contained flats; and
>
> (c) the structural alterations do not or will not, when they are

carried out, have the effect of decreasing the overall housing stock; and

(d) no undue hardship will be caused to any tenant of the dwellinghouse by the structural alterations—

[it] may make an order declaring that [Part III] shall not apply to the dwellinghouse or to any separate and self-contained units resulting from the structural alterations."

12 It is clear that these building works that turned or will turn one unit on each floor into two separate self-contained units have not decreased or will not decrease the overall housing stock, and have caused or will cause no undue hardship to any tenant of the dwellinghouse.

13 The Tribunal found, however, that because the structural alterations were minimal or did not suffice, their *bona fide* effect was not to reconstruct these dwellinghouses.

14 Earlier English legislation had the phrase "being *bonâ fide* reconstructed by way of conversion into two or more separate and self-contained flats or tenements": Increase of Rent and Mortgage Interest (Restrictions) Act 1920, s.12(9), which was echoed in Gibraltar's Landlord and Tenant (Miscellaneous Provisions) Ordinance, s.7(2).

15 In reported decisions interpreting that phrase in the English Act, there emerged the principle or doctrine that the alterations have to be substantial enough to change the previous identity of the dwellinghouse into something different, namely, a new and separate dwellinghouse. A bomb-damaged house which was repaired was held not to have been so substantially changed in reconstruction as to become a new dwelling-house: *Hemns* v. *Wheeler* (7); *Eyre* v. *Haynes* (5); and nor did adding a garage to a protected dwellinghouse: *Langford Property Co. Ltd.* v. *Batten* (10). Reconstruction of some flats, however, was held to have made them new flats: *Langford Property Co. Ltd.* v. *Sommerfeld* (11). See, generally, the note to para. 1790 of *13 Halsbury's Statutes*, 2nd ed., at 1015: a dwellinghouse within the ambit of that Act that was "subject to such substantial structural alteration that it [lost] its former identity . . . became a new and separate dwelling-house" and therefore was not protected by the Act in any event, so the statutory provision was unnecessary.

16 "Structural repairs" have been defined as repairs of, or to, a structure by Vaisey, J. in *Granada Theatres Ltd*. v. *Freehold Investment (Leytonstone) Ltd*. (6), a definition adopted in the Court of Appeal by Jenkins, L.J. ([1959] 2 All E.R. at 181). The learned authors of *Woodfall on Landlord & Tenant*, 25th ed., para. 1732, at 770 (1954) submit that they are "those which involve *interference* with or alteration to the framework of the house . . ." [Emphasis supplied].

17 "Substantial" means "considerable" according to the circumstances in each case. See *Palser* v. *Grinling* (13) and *Thorneloe & Clarkson Ltd.* v. *Board of Trade* (21) which are decisions on what was a "substantial portion" of the rent.

18 "Alteration to premises" in a covenant was construed by Vaughan Williams and Cozens-Hardy, L.JJ. to mean alterations that affect the form or structure of the premises in *Bickmore* v. *Dimmer* (2) ([1903] 1 Ch. at 167 and 169). And for the purposes of the Licensing Act 1902, s.11(4), the Court of Appeal said that the term meant alterations of a permanent physical character to the structure of the premises which can be indicated on a plan, and not merely to their user which might involve only the shutting or opening of a door: *Smith* v. *Portsmouth JJ.* (19).

19 "Structural alteration . . . or addition" includes the installation of central heating for the purposes of the Housing Act 1974, Schedule 8: *Pearlman* v. *Harrow School (Keepers & Governors)* (14), applied in *ACT Constr. Ltd.* v. *Customs & Excise Commrs.* (1). This was an alteration to or addition to the structure or fabric of a house, and involved more than providing equipment.

20 So much for "structural alterations." What does "reconstruction" mean? Pennycuick, J. thought that in ordinary speech it meant refurbishing something in such a way as to leave its basic character unchanged: *Brooklands Selangor Holdings Ltd*. v. *Inland Rev. Commrs.* (3), but when it was used in the Rent Restriction Acts it was interpreted to mean "loss of identity": *Woodward* v. *Samuels* (22); *Phillips* v. *Barnett* (16); *Sinclair* v. *Powell* (18) ([1921] All E.R. Rep. at 381). It was a question of fact: *Marchbank* v. *Campbell* (12); *Solle* v. *Butcher* (20) ([1949] 2 All E.R. at 1112).

21 Here in Gibraltar, Alcantara, A.J. has held that it means "a substantial interference with the structure of the premises and then a rebuilding, in probably a different form, of such part of the premises as has been demolished by reason of interference with the structure." That is also how Ormerod, J. defined it in *Percy E. Cadle & Co Ltd.* v. *Jacmarch Properties Ltd.* (4), a definition which was adopted in *Joel* v. *Swaddle* (8). Alcantara, A.J. added to it the word "rehabilitation": *Khiani* v. *Rent Tribunal* (9).

22 Section 30(1) of the Landlord and Tenant Act 1954 set out, amongst other things, the grounds on which a landlord might oppose a tenant's application for a new tenancy of business premises. These included the ground, in s.30(1)(a)—

> "that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

Hodson, L.J. noticed that "reconstruct" followed the word "demolish" in the section, and Omerod, L.J. has included "demolished" in his exposition of the word "reconstruct." It will be recalled, however, that s.22 of the Gibraltar Landlord and Tenant Ordinance does not mention "demolish" or "demolished."

23 Supposing that the Tribunal was satisfied that the conditions laid down in s.22 had been met, would it have to make an order decontrolling the dwellinghouse or units? The word used is "may," but that does not always confer a discretion, and "may" can mean "shall": *Peterborough Corp.* v. *Holdich* (15); *Re Shuter (No. 2)* (17). Alcantara, A.J. left the issue open in *Khiani* v. *Rent Tribunal* (9) because it was not essential to answer it for the purpose of that appeal.

24 Generally, however, Part III of the Landlord and Tenant Ordinance applies to dwellinghouses that were erected on or before January 1st, 1945. Here in Gibraltar, some of those are in a poor state of repair. The Ordinance restricts the amount of rent that landlords can get for them, so there is little incentive to improve them.

25 There is also a severe shortage of housing in Gibraltar and not much space on which to build new dwellinghouses. So the Ordinance, in s.22, provides a means by which landlords can have the restrictions on the rent that they get for them lifted. They must carry out structural alterations on them which will reconstruct them into units that are the same size as, or larger than, before the alterations or into two or more separate self-contained flats; the Rent Tribunal may then make an order declaring that Part III of the Ordinance does not apply to them. Mere decoration and cosmetic repairs are not structural alterations, and nor is a simple sub-division of the tenancy.

26 Salter, J., in an appeal from a county court judge's dismissal of an application by a tenant for apportionment under s.12(3) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, said, in *Marchbank* v. *Campbell* (12) ([1923] 1 K.B. at 251), that—

> "one of the objects of the Act, so far as it deals with tenancy, is to promote the provision of dwellings. When a landlord, by enterprise and expenditure in altering and adapting a large house, has provided two or three decent and separate homes where only one existed before, it seems reasonable that he should be allowed to get what rent he can for the new dwelling houses thus created."

and Darling, J. agreed. And, in my judgment, so it should be and is here under the Ordinance.

27 The alterations need not be, in my respectful view, substantial. The section does not mention the word "substantial." *Cadle* v. *Jacmarch* (4) and *Joel* v. *Swaddle* (8) are decisions on the meaning of "reconstruction"

in s.30(1) of the Landlord and Tenant Act 1954 and there, it has been seen, "reconstruction" follows the word "demolish." It does not do so in s.22 of the Landlord and Tenant Ordinance.

28 Here in these appeals, the alterations are set out in plans, and have been—or will be—carried out. They alter the physical character of the premises or its structure. They are not minimal or merely decorative improvements. The *bona fides* of the effect of these structural alterations was never in doubt. They reconstruct each of the two dwellinghouses into two separate self-contained flats. They do not, as a matter of simple arithmetic, decrease the overall housing stock. Their tenants will be caused no undue hardship by these structural alterations.

29 So, with respect, the Tribunal erred in finding that the alterations to the top floor were minimal and did not merit an order under s.22 of the Landlord and Tenant Ordinance declaring that Part III of the Ordinance shall not apply to the separate and self-contained units resulting from the structural alterations. And the same goes for its decision that the proposed structural alterations to the dwellinghouse on the other floor were insufficient to warrant such a declaration. The Tribunal has looked for substantial alterations to the structure of each dwellinghouse, which is in my view an error of law.

30 The appeal must therefore be allowed, the decision of the Tribunal on each application set aside and an order substituted under s.22 of the Landlord and Tenant Ordinance declaring that Part III of the Landlord and Tenant Ordinance shall not apply to the separate and self-contained units resulting from the structural alterations from the date on which they were or are completed as certified by the Director of Crown Lands.

31 I, too, will not decide if "may" in that section means "shall" because, again, there is no need to do so; for the moment, though, I am inclined to agree with Mr. Culatto that, if it does not mean "shall," very few landlords will attempt to make one dwellinghouse into two or more separate decent ones because of uncertainty over the Rent Tribunal's decision on an application for decontrol and thus one of the objects of the Ordinance will be frustrated.

Appeals allowed.