[1988–90 Gib LR 171]

NAN LIMITED v. A. HASSAN and S.S. CUBY (Trustees of the will of M. CUBY, deceased) and R. HASSAN

SUPREME COURT (Alcantara, A.J.): June 9th, 1989

Landlord and Tenant—possession—notice to quit—new notice to quit—tenant's issue of originating summons in response to new notice to quit not acceptance of validity of new notice or of invalidity of original notice—merely sensible precaution in light of strict time limits imposed by Landlord and Tenant Ordinance

Landlord and Tenant—renewal of tenancy—holding over—new annual tenancy not created by continued payment and acceptance of rent after expiry of tenancy—continued payment has effect of prolonging of existing tenancy—tenant's payment of rent not acquiescence in landlord's attempts to oppose grant of new tenancy if tenant has stated opposition to attempts

The plaintiff sought a new tenancy of business premises from its landlords.

The plaintiff became tenant of the premises by an assignment dated November 30th, 1983. In June 1984, the defendants (the landlords) issued a notice terminating the tenancy with effect from December 31st, 1984 (although the date of termination was extended until December 31st, 1985, owing to the moratorium on notices to quit in place at the time), stating that it would not oppose an application to the court for the grant of a new tenancy; in response, the tenant gave notice that it was not willing to give up the premises, and issued an originating summons seeking a new tenancy. At a hearing for directions by consent held in October 1984, both parties were ordered to file affidavits of value; neither did so. In December 1985, the defendants informed the plaintiff that they wished to oppose the grant of a new tenancy in order to enable a beneficiary under the will to occupy the premises for the purposes of her business; the plaintiff stated that it would oppose any steps taken by the defendants in this regard. In January 1988, the defendants issued two new notices to quit (which stated that they would oppose the grant of a new tenancy), and the parties took steps, including the issue of an originating summons asking for a new tenancy, as if there were no proceedings already pending in respect of the premises. In February 1989, the plaintiff issued a summons under both the first and the more recent originating summonses asking that the actions be consolidated and that the more recent notices to quit be declared invalid.

The court ordered that the actions be consolidated, and that the validity of the 1988 notices to quit be determined at a preliminary hearing.

The plaintiff submitted that (a) the 1984 notice to quit remained valid, and that the current proceedings were those arising from that notice; (b) the issue of new notices to quit (to which it had responded out of prudence, given the strict time-limits imposed by the Landlord and Tenant Ordinance) did not invalidate the 1984 notice to quit; (c) the delay in prosecuting the first originating summons was as much due to the defendants' fault as the plaintiff's, and, as it had been caused in part by the moratorium, could not be taken as significant; (d) no new annual tenancy (which the 1988 notice to quit purported to terminate) had been created at the expiry of the 1984 notice to quit, as there had been no agreement between the landlord and tenant on this point; (e) payment of rent, without anything more, supported the prolongation of an existing statutory protected tenancy (rather than the creation of a new tenancy), due to the three-month extension of business tenancies that were the subject of pending applications to the court granted by the Landlord and Tenant Ordinance, s.77; and (f) the court did not have the power to amend the 1984 notice to quit to reflect the defendants' intention to oppose the grant of a new tenancy.

The defendants submitted in reply that (a) the 1984 notice to quit had lapsed, due to effluxion of time and to the fact that the plaintiff had continued to pay rent despite knowing of the defendants' intent to oppose the grant of a new tenancy, and so the current proceedings were those stemming from the 1988 notice to quit, in which it was stated that the grant of a new tenancy would be opposed; (b) the plaintiff was estopped from relying on the 1984 notice to quit, as, by answering the 1988 notice and issuing an originating summons in response to it, it had accepted its validity; (c) the plaintiff had waived its right to object to the 1988 notice to quit due to lapse of time and to its failure to prosecute the first originating summons in a timely manner; (d) circumstances, especially the continued payment and acceptance of rent, suggested that a new annual tenancy had been created at the end of December 1985; and (e) the court had the power to amend the 1984 notice to quit to reflect the defendants' changed intentions.

Held, making the following order:

(1) The 1988 notices to quit were invalid, and the 1984 notice, which remained in force, could not be amended. No new tenancy had been created at the expiry of the 1984 notice to quit at the end of December 1985; the suggestion that the continued payment of rent might have resulted in the creation of a new annual tenancy did not take account of the effect of s.77 of the Landlord and Tenant Ordinance on protected business tenancies, which was to delay the end of the tenancy until three months after the expiry of the notice to quit when proceedings were pending in relation to the tenancy; the continued payment of rent resulted in the prolongation of the existing tenancy. As there was no new tenancy, the 1988 notices to quit were not valid (para. 19; paras. 25–26).

(2) Both parties had been to blame for the delay in prosecuting the first originating summons. Although a greater level of fault may have been attributable to the plaintiff, it was certainly not enough to constitute a waiver. The plaintiff's issue of another originating summons in response to the 1988 notices to quit was a sensible precautionary measure for it to take given the strict time-limits imposed by the Landlord and Tenant Ordinance, and could not be taken as an acceptance of the validity of the 1988 notices, or as a representation that the first notice was no longer valid. The plaintiff had told the defendants that it would oppose any measures taken by them to oppose the grant of a new tenancy, and so could not be taken to have acquiesced in this by the continued payment of rent; accordingly, there was no merit in the defendants' argument that the plaintiff was estopped from relying on the 1984 notice to quit (para. 17; paras. 22–23).

Cases cited:

(1) *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*, [1957] Ch. 67; [1956] 3 W.L.R. 1134; [1957] 1 All E.R. 1; (1956), 100 Sol. Jo. 946; 168 E.G. 641, *dicta* of Romer, L.J. applied.

(2) *Bristol Cars Ltd.* v. *R.K.H. (Hotels) Ltd.* (1979), 38 P. & C.R. 411; 251 E.G. 1279, referred to.

(3) *British Rys. Bd.* v. *A.J.A. Smith Transp. Ltd.*, [1981] 2 E.G.L.R. 69; (1981), 259 E.G. 76, referred to.

(4) *Loewenthal* v. *Vanhoute*, [1947] K.B. 342; [1947] 1 All E.R. 116; [1947] L.J.R. 421; (1946), 177 L.T. 180; 63 T.L.R. 54, *dictum* of Denning, J. applied.

(5) *Marcroft Wagons Ltd*. v. *Smith*, [1951] 2 K.B. 496; [1951] 2 All E.R. 271; (1951), 95 Sol. Jo. 501, *dictum* of Denning, L.J. applied.

(6) *Tennant* v. *L.C.C.* (1957), 169 E.G. 689; 121 J.P. 379; 55 (1) L.G.R. 421, applied.

Legislation construed:

Landlord and Tenant Ordinance (1984 Edition), s.77:

"(1) Notwithstanding any other provisions of this Ordinance, in any case where—

(a) a notice to terminate a tenancy has been given under Part III or Part IV or a request for a new tenancy has been made under Part IV; and

(b) an application to a court has been made under Part III or Part IV, as the case may be; and

(c) apart from this section, the effect of the notice or request would be to terminate the tenancy before the expiration of the period of 3 months beginning with the date on which the application is finally disposed of—

the effect of the notice or request shall be to terminate the tenancy at the expiration of the said period of 3 months and not at any other time."

A.V. Stagnetto, *Q.C.* and *Miss J. Evans* for the plaintiff;
D.J.V. Dumas for the defendants.

1 **ALCANTARA, A.J.:** There is a preliminary issue to be decided: whether a second or subsequent notice to quit under the Landlord and Tenant Ordinance is valid or invalid; and, if it is invalid, whether the court has the power to grant leave to amend the previous or first notice to quit.

2 The plaintiff is the tenant of business premises at 303 Main Street. The defendants are the landlords. The plaintiff, by an assignment dated November 30th, 1983, became the tenant of the said premises under a lease which was due to expire on December 31st, 1984.

3 On June 29th, 1984, the landlords served a notice terminating the tenancy on December 31st, 1984, under the provisions of the Landlord and Tenant (Miscellaneous Provisions) Ordinance. In the notice, the landlords stated that they "would not oppose an application to the court under Part III of the Ordinance for the grant of a new tenancy."

4 The tenant, quite properly, gave the required notice under the Ordinance that he was not willing to give up possession of the premises on the date set in the notice to quit. The tenant did this although there was a moratorium at the time, to the effect that the expiry date on the notice to quit was extended until such time as the moratorium came to an end. The moratorium did come to an end on December 31st, 1985.

5 The tenant, quite rightly, issued an originating summons under the Ordinance requesting a new tenancy. This was a proper step notwithstanding the moratorium. Time limits under the Landlord and Tenant legislation are very important, and have to be complied with.

6 There was also an order for directions by consent on October 22nd, 1984, and on September 19th, 1985, the landlords drew to the attention of the tenant the fact that he had not filed the affidavit of value in accordance with the consent order of directions. The plaintiff complied with the order. The landlords failed to file their own affidavit of value.

7 On December 18th, 1985, the tenant received this letter from the landlords' solicitors:

> "We are instructed by the landlords in this matter that they intend to allow one of the beneficiaries under the trust of the will of Mary Cuby deceased, the same person being a direct relation of the other landlord, Rebecca Hassan, [to occupy,] for the purposes of carrying on the business from the premises in question, 303 Main Street, Gibraltar.
>
> Because of the moratorium and because of the delay that you have taken in preparing any affidavit, events have changed such that the

landlords do have the aforesaid intention and do hereby request that the proceedings herein be withdrawn by the plaintiff upon service by the landlords of a fresh notice to quit expiring on June 30th, 1986.

Alternatively, we are instructed by our clients to take out a summons in the action seeking as a preliminary point a declaration from the court that the landlords are entitled to object to the grant of a new tenancy and that the ground for such objection be tried in the action."

8 On January 10th, 1986, the tenant's solicitor wrote back, and I quote from part of his letter:

"We refer to your letter of December 18th, 1985, and regret to say that we cannot accede to your request that the proceedings issued on behalf of the plaintiff be withdrawn.

In any event, the landlords have already expressed their intention not to oppose the application and, as you know, there is authority for the view that at this stage they are estopped from changing their minds.

Needless to say, any proceedings that you may issue to attempt to prevent the grant of a new tenancy to our clients will be strongly contested."

9 Then nothing more happened until January 20th, 1988. The parties did not take any active steps in the prosecution of that action. The landlords did not file their affidavit of value or press the tenant to get on with the originating summons, or with their intention of seeking a court ruling, in accordance with the third paragraph of their letter of December 18th, 1985. The tenant, in turn, did nothing to secure a new lease. He just continued to pay the old rent, which was accepted by the landlord.

10 There are two new notices to quit, one issued on January 20th, 1988, and the other on January 21st, 1988, but nothing arises out of that and they can be taken as just one notice. This new notice of January 21st, 1988 issued by the landlords to the tenant gave notice "terminating your tenancy" on July 31st, 1988, and further stated that—

"we would oppose an application to the court under Part IV of the Ordinance [this refers to the present Ordinance, but nothing arises out of this either] for the grant of a new tenancy on the following ground mentioned in s.49(1) of the Ordinance:

'(e) that on the termination of the current tenancy, the landlord intends to occupy the holding for the purposes of a business to be carried on by him in it . . .'"

11 Notwithstanding that there were proceedings pending in respect of the same premises, the parties merrily went through all the steps in this new action, and it did not occur to any of them to dispose of or eliminate

the previous originating summons. The tenant gave notice that he was not willing to give up possession. The tenant, on May 3rd, 1988, issued an originating summons under the new Landlord and Tenant Ordinance requesting a new tenancy. There was a consent order for directions. Affidavits of value were filed. There was a request by consent that the action be set down for hearing.

12 The action was due to be heard on May 25th, 1989. On February 17th, 1989, the tenant issued a summons both under the first original originating summons and under the second or latest originating summons asking that both actions be consolidated and further—

> "that the notices to quit dated the 20th and 21st day of January 1988 served by the defendants on the plaintiff which gave rise to the second action be declared as invalid, the notice to quit dated the 29th day of June 1984 being valid and subsisting."

13 In support of this application there is an affidavit by Miss Janis Evans. In paras. 9 and 10 of the said affidavit she deposes as follows:

> "9. That on the 17th day of January 1989 the parties lodged a consent application to set the matter down for hearing.
>
> 10. That subsequent to the 17th day of January 1989, whilst perusing the rather large office file in this matter, the earlier application came to light and hence this application for the two actions to be consolidated."

14 On April 24th, 1989, the following order was made:

> "It is ordered that the above-numbered actions be consolidated and that the validity or invalidity of the Notice to Quit of the 20th and 21st days of January 1988 be tried first as a preliminary point on the date of the hearing on the 25th day of May 1989."

15 Mr. Stagnetto for the plaintiff contends that the first notice to quit is the valid notice; that the proceedings arising from that notice are still pending. He maintains that both parties were guilty of delay, largely because of the moratorium. He attacks the defendants' contention that a new yearly tenancy was created. He has referred me to *Loewenthal* v. *Vanhoute* (4), the headnote to which in *The All England Law Reports* reads ([1947] 1 All E.R. at 116):

> "Where a notice to quit has been given, a subsequent notice to quit is of no effect unless it can be inferred from other circumstances that a new tenancy has been created after the expiry of the first notice. If there is no agreement, express or implied, for a new tenancy, the mere fact that the landlord's solicitor, to get possession, gives another notice to quit is not any reason for inferring any agreement for a new tenancy, and the first notice is not waived by the subsequent notice."

Denning, J. (as he then was) puts the matter thus ([1947] 1 All E.R. at 117):

> "When a valid notice has been given, a new tenancy can be created only by an express or implied agreement. A subsequent notice to quit is of no effect unless other circumstances form the basis for inferring a new tenancy having been created after the expiry of the first notice."

16 Mr. Dumas for the defendants argues that there are circumstances in this case from which it can be inferred that a new yearly tenancy was created at the expiration of the first notice, *i.e.* on December 31st, 1985. The two central pillars that he relies on are (a) that the plaintiff knew that the defendants wanted to oppose a renewal, and (b) payment of the old rent.

17 On the question of opposition to the renewal this is true, but it is also similarly true that the plaintiff had told the defendants that he would not accede to their request of serving a new notice to quit, and that they would be contesting any application to the court (see the plaintiff's letter dated January 10th, 1986, *supra*). It cannot be said that on January 1st, 1986 a new contractual yearly tenancy came to be created.

18 On the question of payment of rent, Mr. Dumas has referred me to 1 *Woodfall's Landlord & Tenant*, 27th ed., para. 2038, at 953 (1968) for the following proposition:

> "Acceptance by the landlord of rent due after the expiration of a notice may be evidence upon which the court will infer the creation of a new tenancy. However, in each case the question is, *quo animo* the rent is received, and what is the real intention of the parties."

19 Mr. Stagnetto submits that the above quotation from *Woodfall* does not refer specifically to protected tenancies. In the case of business premises, the effect of s.77 of the Landlord and Tenant Ordinance is such that the termination of a tenancy, where there is an application to the court pending, is prolonged until three months after such application has been finally disposed of. Therefore, payment of rent, without anything more, is referable to the prolongation of the tenancy (which becomes a statutory tenancy) and not to the creation of a new yearly tenancy. I agree with him, and find support for that view in the case of *Marcroft Wagons Ltd.* v. *Smith* (5). That was a case under the Rent Restriction Acts. Denning, L.J. ([1951] 2 K.B. at 506) had this to say in relation to protected tenancies:

> "If the acceptance of rent can be explained on some other footing than that a contractual tenancy existed, as, for instance, by reason of an existing or possible statutory right to remain, then a new tenancy should not be inferred."

I find that in the circumstances of this case a tenancy from year to year was not created on the expiration of the notice to quit or subsequently.

20 Mr. Dumas also seeks to rely on waiver and estoppel to validate the second notice to quit. The argument here is that the plaintiff has led the defendant up the garden path by his conduct. I have been referred to *Bristol Cars Ltd.* v. *R.K.H. (Hotels) Ltd.* (2), and to *British Rys. Bd.* v. *A.J.A. Smith Transp. Ltd.* (3). I have not found them helpful. Anyhow, counsel contends that the conduct which the defendants put forward is capable of supporting both waiver and estoppel, jointly or severally. The conduct put forward is this:

(a) payment of rent after the tenant knew the defendant wanted to oppose the renewal of the tenancy;

(b) lapse of time;

(c) the tenant not prosecuting the first originating summons expeditiously; and

(d) the tenant not taking prompt steps to declare the second notice to quit invalid.

21 On this last point counsel has cited *Tennant* v. *L.C.C.* (6), in which Jenkins, L.J. said (55(1) L.G.R. at 434):

> ". . . I do regard it as most desirable in cases under the Landlord and Tenant Act, 1954, where time may be an important consideration, that parties who wish to take objection to the form or the validity of the proceedings should act promptly and not reserve objections of this sort until the preceedings [*sic*] have been on foot for a matter perhaps of months. Accordingly, had it been necessary for me to arrive at a conclusion this part of the case, I would have been prepared to hold that any otherwise well-found objection there might be to the notice was, on the facts to which I have briefly referred, waived, so that the objection is no longer available to the tenant as a bar to the proceedings."

22 In the case before me, both parties are at fault in not prosecuting the first originating summons promptly. Possibly the plaintiff is more at fault, but the defendant is not devoid of fault. He was going to seek a declaration from the court, and so informed the plaintiff.

23 I have come to the conclusion that a waiver has not been made out and that in the circumstances of this case estoppel does not arise. Answering the second notice to quit and issuing the second originating summons is a precautionary measure (because of time limits) and is not a clear and unequivocal representation that the first notice to quit no longer applied, on the facts of this case.

24 Finally the question of whether the court has power to grant leave to amend a notice to quit so that the new and real issue now between the parties can be litigated and disposed of. In *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.* (1), Romer, L.J., referring to the notice, had this to say ([1957] 1 All E.R. at 14): "It is, I think, intended to be in the nature of a pleading and its function, as in the case of all pleadings, is to prevent the other party to the issue from being taken by surprise when the matter comes before the judge."

25 If the notice to quit is in the nature of a pleading one would have thought that on terms and for good reason it would have been capable of being amended, with the leave of the court. Such does not appear to be the case. In Blundell & Wellings' *The Landlord & Tenant Acts*, 2nd ed., at 32 (1957), we find that "it is an unusual type of pleading in that it cannot subsequently be amended." This view is also held by the learned editors of *Woodfall on Landlord & Tenant.*

26 I intend to follow those two views and hold that the first notice is not capable of being amended. I also declare that the notices to quit dated January 20th and 21st, 1988 are invalid, for the reasons already stated.

Order accordingly.