

[1988–90 Gib LR 180]**STC PROPERTIES LIMITED v. TOTALDAS LIMITED**

SUPREME COURT (Kneller, C.J.): June 16th, 1989

Landlord and Tenant—assignment of lease—landlord’s consent—refusal of consent not unreasonable if assignment would change from business to potentially protected residential tenancy—ongoing court proceedings also valid reason for refusing to consent to assignment

The plaintiff sought an order for the possession of residential premises and mesne profits against the defendant.

The plaintiff’s predecessor in title had demised the premises to the defendant on a three-year lease in 1979, after which the defendant held over as a monthly tenant. The defendant covenanted, amongst other things, not to assign the premises without the prior written consent of the lessor. In 1982, the predecessor served the defendant with a notice to quit, and in January 1987 sold the premises to the plaintiff, which applied under the Rules of the Supreme Court, O.14 for judgment against the defendant; the 1982 notice to quit was found to be invalid, and judgment against the defendant was refused. In May 1987, the defendant assigned its interest in the premises to one of its employees in his personal capacity, and informed the plaintiff. In June 1987, the plaintiff objected to the assignment and served the defendant with a second notice to quit.

The plaintiff submitted that its refusal to consent to the assignment was not capricious or unreasonable, as (a) the assignee, unlike the defendant, was subject to the protection of the Landlord and Tenant Ordinance, and therefore the nature of the tenancy was different; and (b) court proceedings between the parties relating to the premises had not yet been concluded.

The defendant submitted in reply that the plaintiff’s refusal to consent to the assignment was capricious or unreasonable, and that therefore it was entitled to assign without the plaintiff’s consent, notwithstanding the covenants that it had entered.

Held, granting the order:

The plaintiff’s refusal to consent to the assignment was not capricious or unreasonable. The ongoing court proceedings relating to the premises constituted a valid reason for refusing to consent to the assignment, as did the change that would take place in the nature of the tenancy—from a business tenancy, which could not become a protected tenancy under the Landlord and Tenant Ordinance, to a personal tenancy, which could. When

SUPREME CT. STC PROPERTIES V. TOTALDAS (Kneller, C.J.)

a tenant for a term of years held over after the end of the tenancy and paid rent (which was accepted by the landlord) at the previous rate, a new tenancy was created, according to the period for which the rent was paid, with the same conditions as the old tenancy; this continued until due notice to quit was given by the landlord. This had been given, and the plaintiff was therefore entitled to an order for possession and mesne profits (para. 7; para. 10; paras. 12–13).

Cases cited:

- (1) *Adler v. Blackman*, [1953] 1 Q.B. 146; [1952] 2 All E.R. 945; [1952] T.L.R. 809; (1952), 96 Sol. Jo. 802; 160 E.G. 536, applied.
- (2) *Aidasani v. Ouaknin*, Supreme Ct., Case No. 1983 A. No. 73, December 20th, 1989, unreported, referred to.
- (3) *Bates v. Donaldson*, [1896] 2 Q.B. 241; [1895–9] All E.R. Rep. 170; (1896), 60 J.P. 596; 65 L.J.Q.B. 578; 44 W.R. 659; 12 T.L.R. 485, applied.
- (4) *Bramwell v. Bramwell*, [1942] 1 K.B. 370; [1942] 1 All E.R. 137; (1942), 111 L.J.K.B. 430; 58 T.L.R. 148, applied.
- (5) *Houlder Bros. & Co. Ltd. v. Gibbs*, [1925] Ch. 198, applied.
- (6) *Lee v. K. Carter Ltd.*, [1949] 1 K.B. 85; [1948] 2 All E.R. 690; [1949] L.J.R. 7; (1948), 92 Sol. Jo. 586; 64 T.L.R. 536, applied.
- (7) *Mellows v. Low*, [1923] 1 K.B. 522; [1923] All E.R. Rep. 537; (1923), 21 L.G.R. 180; 92 L.J.K.B. 363; 67 Sol. Jo. 261; 128 L.T. 667; 39 T.L.R. 190, applied.
- (8) *Rendall v. Roberts & Stacey Ltd.*, [1960] E.G.D. 161; (1959), 175 E.G. 265, referred to.
- (9) *Treloar v. Bigge* (1874), L.R. 9 Exch. 151; 43 L.J. Ex. 95; 22 W.R. 843, applied.
- (10) *Williams v. Tobiasen*, [1955] S.A.S.R. 50, referred to.

L. Attias for the plaintiff;
A.A. Vasquez for the defendant.

1 **KNELLER, C.J.:** The second and third floors of 81–85 Main Street were owned by a company called Joclem (Gibraltar) Holdings Ltd. until January 1987. It let them to T. Totaldas Ltd. as housing for its staff of eight from December 1st, 1979 for three years. Totaldas covenanted not to assign, underlet or part with possession of the premises without the previous consent in writing of Joclem (such consent not to be unreasonably withheld), and, also, at the expiration or other sooner determination of the three years peaceably to surrender them to Joclem.

2 On November 31st, 1982, Joclem gave Totaldas notice to quit and in January 1987 sold the premises to STC, which in due course filed suit and applied under O.14 for judgment against Totaldas. The notice to quit was found to be invalid.

3 During 1987, the number of Totaldas' staff needing accommodation in

the premises fell from eight to two and it wished to avoid this litigation, so it decided to assign its interest to a resident employee with a British passport, Kanayalan Hathiramani; its solicitors wrote and told STC this on May 27th, 1987. It assigned its interest by the end of the month without STC's consent.

4 On June 2nd, 1987, STC objected to the assignment because there were earlier unfinished court proceedings between Joclem or STC and Totaldas concerning the premises. Also, it did not relish having an individual who could obtain protection under the Landlord and Tenant Ordinance as its tenant, rather than a company, which cannot do so.

5 STC began again by serving Totaldas with a second notice to quit at the end of June which Totaldas rejected, pointing out that it was no longer the tenant. Hathiramani's rent was not accepted by STC; STC then began this action for possession, mesne profits from January 1st, 1987, and costs.

6 So much for the evidence. The common law rules and the rules of equity from time to time in force in England are also in force in Gibraltar if they are applicable to the circumstances here and subject to any modifications that those circumstances may require, save to the extent that they are modified by an Order in Council, an Act of the Parliament of Westminster applied by express provision or necessary implication to Gibraltar, or by any ordinance: see the English Law (Application) Ordinance, s.2.

7 Where a tenant for a term of years holds over after the expiration of its lease it becomes a tenant on sufferance. If it pays any subsequent rent due at the previous rate and this is accepted by the landlord, a new tenancy is created according to the period for which the rent is paid, on the same conditions and terms as those contained in the expired lease: *Adler v. Blackman* (1). It continues until determined by due notice to quit: *Mellows v. Low* (7).

8 A lessee can assign without previous consent if the lessor's refusal is capricious or unreasonable (*Treloar v. Bigge* (9)), or apply to the court for a declaration that he can assign; he cannot, though, obtain damages: *Rendall v. Roberts & Stacey Ltd.* (8). The assignee is not a trespasser because the assignment from the tenant is valid in every respect except that the landlord's consent has not been previously obtained: *Lee v. K. Carter Ltd.* (6).

9 The lessee must prove that the lessor's consent was capriciously or unreasonably withheld, unless he gives no reason at all, when it will be presumed that consent was unreasonably withheld. This will depend on all the circumstances of the case in which it was refused, and not abstract considerations, and this is so if a company assigns the lease to an individual. One factor is what was in the contemplation of the parties

SUPREME CT. STC PROPERTIES V. TOTALDAS (Kneller, C.J.)

when the contract was made: this would normally be that the premises were duly and properly managed. So objections unconnected with the personality of the assignee or user or occupation of the premises are not reasonable: *Bates v. Donaldson* (3); *Houlder Bros. & Co. Ltd. v. Gibbs* (5).

10 Suppose, however, that the tenant is a company and it intends to assign its interest to an individual; is it reasonable or unreasonable for the landlord to refuse consent for that reason? The Court of Appeal (Tucker, Bucknill and Somervell, L.JJ.) in *Lee v. K. Carter Ltd.*, dismissed an appeal from the county court judge who held that the landlord was within his legal rights in refusing to consent to the assignment because it would effect a change in the whole nature of the tenancy since the assignee would be, whereas the tenant company could not be, entitled to the protection of the Rent Restriction Acts.

11 Back now to this action. Totaldas' lease expired on November 30th, 1982. It held over and paid a monthly rent for the premises which Joclem and STC accepted, so Totaldas became a monthly tenant upon the same conditions and terms as those contained in the expired lease. This continued until it was determined by due notice. In correspondence STC refused to agree to Totaldas's proposed assignment to Hathiramani because court proceedings between them relating to the premises had not been resolved, which in my view was not a capricious or unreasonable refusal.

12 It was not agreed by counsel on both sides at the hearing of this matter, as it was in *Lee v. K. Carter Ltd.* (6), that the reason for the landlord's refusal was a wish to prevent a statutory tenancy from arising as a result of the assignee being accepted, but on the evidence here I find that, in fact, it was another very real reason since I accept the evidence of STC's director on this point. So, as in *Lee v. K. Carter Ltd.*, STC, the landlord, was within its legal rights in refusing to consent to the assignment because it would effect a change in the whole nature of its tenancy, because Hathiramani would be—whereas the company would not be—entitled to the protection of the Landlord and Tenant Ordinance. STC's refusal was reasonable. In short, then, the purported assignment was unlawful.

13 That being so, STC is entitled to an order for possession against Totaldas and for mesne profits. STC's rights to possession, recovery for use and occupation of the premises, or to rents and profits from them were lost to it because Totaldas wrongly excluded it from them. See *Bramwell v. Bramwell* (4). See also *Williams v. Tobiasen* (10) and *Aidasani v. Ouaknin* (2).

14 Hathiramani was not joined so no order can be made against him. It may be that he is not a trespasser but it will be seen that the Court of

THE GIBRALTAR LAW REPORTS

1988-90 Gib LR

Appeal upheld the county court judge's order for possession against Mrs. Bowman in *Lee v. K. Carter Ltd.*

Order accordingly.
