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[1988–90 Gib LR 193]

VINET v. MONTAGU PROPERTIES LIMITED

COURT OF APPEAL (Spry, P., Fieldsend and Huggins, JJ.A.): October 25th, 1989

Landlord and Tenant—possession—notice to quit—counter-notice of tenant's unwillingness to quit—extension of time to serve counter-notice—requirements of Landlord and Tenant Ordinance, ss. 44(5) and 57(1) imperative, not directory—notice of unwillingness to quit to be served before end of tenancy—when both landlord and tenant in default, extensions of time to be granted to both or neither—court more disposed to grant extension where refusal would cause more proceedings and delay

Landlord and Tenant—possession—notice to quit—requirement for service of copy notice under Landlord and Tenant Ordinance, s.57(1) imperative, not directory—non-compliance renders notice unenforceable not void—landlord failing to comply with requirements of s.57(1) may apply for extension of time and application to be decided on merits without reference to other pending proceedings—landlord failing to comply with s.57(1) cannot obtain possession without seeking at least condonation of failure from Supreme Court, applying for extension, or serving fresh notice to quit

A tenant applied to the Supreme Court for an extension of time to serve notice on his landlord of his unwillingness to quit the business premises that he rented from the landlord.

The respondent landlord, on January 29th, 1988, served the appellant tenant with a notice to quit, appointing July 31st, 1988 as the date for termination of the tenancy; the notice required the tenant to give notice of any unwillingness to relinquish possession of the premises within two months of service of the notice (a requirement of the Landlord and Tenant Ordinance, s.44(5)). The tenant did not give notice; the landlord then failed to supply him with a copy of the notice to quit—which he was required by s.57(1) of the Ordinance to do no later than 14 days before the end of the tenancy—before August 31st, when, realizing its omission, it sent a copy of the notice to the tenant. The landlord issued a writ for possession on January 27th, 1989, and this was served on the tenant on February 8th; the tenant took out a summons applying for an extension of time on February 2nd, and filed an originating summons applying for a new lease on February 8th. The tenant's application for an extension of time was dismissed on the ground that it would unduly undermine the

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landlord's case; referring to the fact the landlord was also in default, the judge expressed the opinion that s.57(1) was for guidance only, and that its requirements had been fulfilled by the landlord's letter of August 31st.

The appellant submitted that (a) the landlord's failure to comply with the requirement under s.57(1) for service of a copy notice made the notice to quit void and ineffective; or (b) if the landlord's failure to comply with the requirements of s.57(1) were to be condoned, his own failure to respond to the notice to quit in time should be treated in a similar manner.

The respondent submitted in reply that (a) the failure to comply with s.57(1) did not render the notice to quit void, as the failure had in no way prejudiced the tenant, who had been aware of the notice since at least August 31st, 1988; (b) since a copy of the notice had been served on him before steps had been taken to gain possession of the premises, the requirements of s.57, which was directory in nature, had been complied with in spirit; (c) the tenant's delay had been unreasonable; and (d) the commencement of proceedings for possession prevented the granting of an extension of time.

Held, allowing the appeal,

(1) The extension sought by the tenant would be granted. An extension of time should be granted to both parties or to neither; while time limits were generally treated with too much levity by the relevant parties, with the consequence that the courts should take a more severe attitude to their enforcement, the refusal of extensions in the present case would mean more proceedings and more delay, and so the appellant would be granted an extension: the court would similarly be favourably disposed to the respondent were it to apply for an extension (paras. 12–13; paras. 24–25).

(2) Section 57(1) did more than provide directions for landlords: its requirements were imperative, as they imposed a simple requirement that was to be complied with within a set period, and as the wording of s.44(5) (which was also mandatory, rather than directory) seemed to require the tenant's counter-notice to be served before the end of the tenancy, in turn requiring the copy notice to be served on the tenant in time. Failure to comply strictly with the requirements of s.57(1), however, did not make a notice void but merely rendered it unenforceable. A landlord who had failed to comply with the provisions of the section could apply for an extension of time, as the wording of sub-s. (1) suggested that "notice" in sub-s. (2) was to be treated as including a copy notice; no sanction was provided in sub-s. (1); it would accord with the general pattern of Part IV of the Ordinance; and the power to extend time in the Landlord and Tenant Ordinance included s.57 (paras. 10–11; para. 13; para. 21; para. 25).

(3) The fact that proceedings had begun was no reason for refusing the extension; the application for extension of time should have been decided on its own merits, without reference to other pending proceedings (para. 6; para. 13).

(4) Having failed to comply with the requirements of s.57(1) (the effect

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of which did not fall to be decided definitively at this stage), the landlord could not succeed in an action for possession without seeking at least a condonation of its failure from the Supreme Court. Alternatively, it could either seek an extension of time to serve the copy notice as required in s.57(1) or serve a fresh notice to quit (paras. 13–14; para. 24).

Case cited:
(1) *Marcos Enterprises Ltd.* v. *Wheatley*, Supreme Ct., Case No. 1987 W. No. 130, unreported, *dictum* of Alcantara, A.J. referred to.

Legislation construed:
Landlord and Tenant Ordinance (1984 Edition), s.44(5): "A notice under this section shall not have effect unless it requires the tenant, within 2 months after the giving of the notice, to notify the landlord in writing whether or not, at the date of termination, the tenant will be willing to give up possession of the property comprised in the tenancy."
s.57(1): "Where under section 44 a landlord is required to give notice, and he does not receive within the specified time a notice from the tenant stating whether or not he is willing to give up possession of the property comprised in the tenancy, the landlord shall at least 14 days before the date of termination give a further copy of the notice to the tenant."

P.J. Isola for the appellant tenant;
A.V. Stagnetto, *Q.C.* for the respondent landlord.

1 **SPRY, P.:** This is an appeal by the tenant of certain business premises in Main Street against the refusal of an application for extension of time to serve notice on the landlord of his unwillingness to give up possession of the property.

2 The facts are as follows. On January 29th, 1988, the landlord served on the tenant a notice to quit under s.44 of the Landlord and Tenant Ordinance, appointing July 31st, 1988 as the date for termination of the tenancy. The notice contained the requisite warning to the tenant that any notice of unwillingness to give up possession had to be given within 2 months. The tenant gave no such notice. Under s.57(1) of the Ordinance, the landlord should then, after the expiration of the 2 months but not later than 14 days before July 31st, have given the tenant a copy of the notice to quit. On August 1st, 1988, the position was that the date appointed for the termination of the tenancy had passed but both parties were in default: the tenant had not given notice of his unwillingness to give up possession, and the landlord had not given him the required copy of the notice to quit.

3 On January 27th, 1989, the landlord issued a writ for possession, which was served on the tenant on February 8th, 1989. The tenant had, on

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February 2nd, 1989, taken out a summons for an application for extension of time for giving notice of unwillingness and for filing an originating summons by way of application for a new lease. This was also served on February 8th, 1989.

4 The summons came on for hearing first. It was heard by Alcantara, A.J. and, on March 10th, 1989, the application was dismissed. The learned judge gave as his reason for refusing an extension the fact that a writ of possession had already been issued and served. He expressed the view that to grant an extension would be "undermining the landlord's case even before it is heard on its merits." He commented that he thought that he would be justified in refusing an extension on the ground that the tenant had been dilatory, although that was not the actual reason for his decision.

5 The judge did refer to the fact that the landlord had failed to comply with s.57(1) and to the fact that a copy of the notice to quit had been sent to the tenant's solicitors on August 31st, 1988. He expressed the opinion that s.57(1) was to be interpreted as directory only and he considered that the letter of August 31st was sufficient compliance. He agreed that failure to comply was a factor to be taken into account but he did not give it great weight because there was no element of surprise.

6 I would begin by saying that, with the greatest respect, I think that the reason given by the judge for his refusal to extend time was wrong. If the circumstances were such that an extension would be reasonable and proper, I cannot see that the fact that proceedings for possession had begun was any reason for refusing the extension. The refusal operated to deprive the tenant of any ground for resisting the proceedings for possession unless he could prove that the notice to quit was invalid. I think that the application for extension of time should have been decided on its merits without regard to any other pending proceedings.

7 The other ground on which the judge thought that he would be justified in refusing an extension was the inordinate delay, particularly after an exchange of correspondence between solicitors in November 1988. This, as I understand it, is treating a letter dated November 22nd, 1988 as a final warning. If that is correct, the period highlighted is a period of 41 days, which includes the Christmas holidays.

8 Much of the argument before us concerned the interpretation of the Landlord and Tenant Ordinance, s.57(1). Mr. Isola submitted that failure to comply with that provision rendered the notice to quit void and ineffective. Mr. Stagnetto, on the other hand, argued that the failure had in no way prejudiced the tenant, since he had been aware of the notice at least as early as August 31st, 1988. There was, of course, no element of surprise on either side, as each was aware of the other's intention.

9 Mr. Isola raised the question whether a landlord could ask the court

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under s.57(2) for an extension of time to comply with sub-s. (1). Mr. Stagnetto submitted that sub-s. (2) refers to notices, applications and requests, and makes no mention of copies of notices.

10 The conclusions that I have reached are, first, that s.57(1) should be regarded as imperative, at least as regards the time limit: it imposes a simple requirement that is to be complied with within a limited period. That does not, however, mean that failure to comply renders the notice to quit void; it is merely unenforceable.

11 Secondly, I think that a landlord in default may apply to the court for an extension of time to comply with sub-s. (1). Several factors, I think, point to this conclusion. It will be noted that sub-s. (1) refers to a further copy of the notice, apparently treating the original notice as itself a copy: that suggests that "notice" in sub-s. (2) must include a copy notice. The fact that a landlord in default could obtain relief would explain the lack of a sanction in sub-s. (1). It would accord with the general pattern of Part IV of the Ordinance. Finally, it would offer some explanation of the curious fact that the power to extend time, which relates particularly to ss. 44–46, was included in s.57; on my interpretation, s.57(1) is the last of the provisions in relation to which time may be extended.

12 If I am right in my interpretation, the position when the matter came before Alcantara, A.J. was that both parties were in default. In that situation, it seems to me that an extension of time should be granted to both parties, or to neither. In general, I think that the courts will have to adopt a less liberal attitude to these applications, because it is clear from many appeals that we have heard that time limits are being all too lightly ignored, but in the circumstances of this case, to refuse extensions would mean more proceedings and more delay. For that reason, and after some hesitation, I would allow this appeal and grant the appellant an extension. I have little doubt that if the landlord were to apply for an extension, it would similarly be allowed.

13 **FIELDSEND, J.A.:** I agree with the conclusions of the learned President that this appeal should be allowed. Although the question of the effect of s.57(1) of the Ordinance was argued both below and before us, I am not convinced that it falls to be decided finally at this stage. At best for the landlord it seems to me that, having failed to comply with the requirements of the sub-section, it cannot succeed on an action for eviction without at least condonation of its failure. There is at present no application before us by the landlord either for condonation or for an extension of time.

14 The landlord will, therefore, have to decide whether to issue a fresh notice to quit, whether to apply for an extension of time for the giving of a further copy of the notice to quit to the tenant, or whether at the hearing of

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the main action to seek condonation of his failure to have given the copy of the notice in due time.

15 **HUGGINS, J.A.:** The tenant appeals against the refusal of an extension of time for the giving of a notice under s.44(5) of the Landlord and Tenant Ordinance that, at the date of termination of his tenancy, he would not be willing to give up possession of the property comprised in the tenancy and against the refusal of an extension of time under s.48(3) for making an application for a new tenancy.

16 The landlord's notice to quit was served on January 29th, 1988. The tenant should have served his counter-notice by March 29th, but he failed to do so. The landlord should then, on or before July 17th, have served under s.57(1) "a further copy of the notice to the tenant." There was nothing in the Ordinance which required the landlord to serve a previous "copy" of the notice to quit and I thought that it was accepted that the word "further" should be treated as surplusage and ignored. My Lord the President has suggested that the phrase appearing in sub-s. (2) is a result of the draftsman's having regarded the original notice to quit as a copy of itself. I hesitate to attribute such an elementary error to the draftsman and shall later endeavour to explain why I think that the scope of sub-s. (2) could have been deliberately limited.

17 The landlord did not serve any copy of the notice to quit before the tenancy terminated on July 31st. Realizing this omission, the landlord's solicitors sought to remedy it by serving a copy notice under cover of a letter dated August 31st, 1988. It was the service of that copy which, it has been suggested, set time running again against the tenant for him to make the present application. However, his contention is that the landlord itself was in default and that if the landlord's default is to be condoned he should be granted a like grace.

18 The argument on behalf of the landlord is that its failure to serve a copy of the notice to quit was not fatal: such service was intended to warn the tenant of his imminent peril of dispossession, and, provided that the copy was served (as it was here) before the landlord took steps to dispossess the tenant, the purpose of the legislation was met. Nevertheless it was conceded that the tenant would have a reasonable time after service of the copy notice to put his house in order. The material date would appear to be September 1st, 1988, the day on which the letter enclosing the notice should have been received in due course of post. In fact the tenant's solicitors continued in correspondence with the landlord's solicitors, and nothing practical was done until the landlord issued a writ for possession on January 27th, 1989. That writ was served on February 8th, and, by coincidence, the tenant's application for extensions of time was served on the same day, having been lodged on February 2nd.

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19 The landlord goes on to contend that the tenant's delay in following the procedures prescribed by the Landlord and Tenant Ordinance was unreasonable and that, in any event, institution of the landlord's action for possession was a bar to the grant of the extensions of time sought by the tenant.

20 I now return to the interpretation of s.57(2), for there was discussion before us whether the landlord could and should itself have sought an extension of time for serving the copy notice to quit. Even assuming that the requirement under s.44(5) was directory only (as the judge held), a failure to comply strictly with that subsection produces a difficulty. I agree that the object of the service of a copy notice is to give the tenant a reminder of his right to apply for a new lease, but it is a prerequisite of such an application that there shall have been served a counter-notice that "at the date of termination . . . the tenant will [not] be willing to give up possession . . ."

21 The wording of s.44(5) appears to contemplate that such counter-notice will be served before the tenancy expires, even where it has been necessary for the tenant to obtain an extension of time by reason of his failure to act upon the original notice to quit. After the termination of the tenancy any counter-notice would have to state that the tenant *was* not willing at the date of termination to give up possession. That being so, it is strongly arguable that strict compliance by the landlord with the provisions as to time in s.57(1) was intended to be mandatory. That would support the view that, although s.57(2) was enacted as a subsection and would, therefore, appear to relate to the subject matter of sub-s. (1), its provisions are limited to extension of time for "giving notice or making any application or request under this Part" and do not mention the giving of the "further copy of the notice" required by sub-s. (1). Undoubtedly there may be circumstances in which plain words may be given an artificially wide interpretation, but that is not appropriate where the strict interpretation will produce a result which, on balance, the court thinks was deliberately intended. Here an extension of time for serving the copy notice to quit would, in effect, have required the tenant to apply for an extension of time to serve a counter-notice which he was no longer able to give.

22 These points were not argued before the judge in chambers, whose decision was confined to a consideration of the tenant's delay. He thought that the delay was not sufficiently explained, but made the basis of the decision the fact that the Landlord had already taken out a writ for possession. It is right to point out that the judge referred to his own interlocutory decision in a prior case (*Marcos Enterprises Ltd*. v. *Wheatley* (1)) and said:

> ". . . I refused an extension of time on the ground that proceedings for possession were pending. This is, of course, not a universal rule,

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> but it is a factor to take very much into account when the judge comes to exercise his discretion."

23 Even accepting that that is what the judge intended to say in the present case, I think that he attached too much weight to this factor. On the other hand, I think that he did not give sufficient weight to the fact that the landlord was in default.

24 At one stage I was inclined to hold that, by reason of that default, the landlord forfeited its right to recover possession under the Ordinance pursuant to the notice to quit served on January 29th, 1988. However, both my Lords are of the view that the fact that the power to extend time has been enacted as a sub-section to s.57, sub-s. (1) of which requires service of the "further copy notice," is a consideration which outweighs the others, and I am not disposed to dissent.

25 Accordingly I, too, would allow the appeal and grant the extensions sought.

Appeal allowed.

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