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[1988–90 Gib LR 269]

ALLIED BAKERIES LIMITED v. ATTORNEY-GENERAL

SUPREME COURT (Kneller, C.J.): June 19th, 1990

Landlord and Tenant—breach of covenant—covenant not to sue—covenant with Ministry of Defence not breached by claim against Government for damage caused by "fire" when Government occupying land formerly owned by Ministry—incinerator not "fire" for purpose of covenant—"fire" envisages damage caused by sudden unexpected fire, not smoke damage from controlled incinerator—non-party wishing to claim benefit of covenant to instigate re-drafting of document to ensure privity

Tort—nuisance—exclusion of claim—plaintiff not precluded from bringing claim against Government by covenant with Ministry of Defence not to sue for damage caused by "fire" when Government occupying land formerly owned by Ministry—incinerator not "fire" for purpose of covenant—"fire" envisages damage caused by sudden unexpected fire, not smoke damage from controlled incinerator

The plaintiff brought an action in nuisance against the defendant.

The plaintiff company occupied premises in the Industrial Area, North Front, under leases from the Government of Gibraltar. It had leased one of the three plots that it occupied—Crown Property No. 1469—directly from the Government in 1967; the other two—Crown Properties Nos. 1471 and 1472—had been leased by the Government to E. Falquero & Sons Ltd. in 1969 and 1973, and the leases had since been assigned to the plaintiff. All three properties had previously been owned by the Ministry of Defence, and had been transferred to the Government of Gibraltar. The plaintiff entered into several covenants, including one not to claim compensation against the Crown or the Government of Gibraltar in respect of any damage arising from or attributable to any fire or explosion in, originating in or arising in any property, pipe or vessel occupied by the Ministry of Defence. In 1973, an incinerator was erected on an adjacent piece of land, which was transferred free of consideration to the Government in 1975, subject to the Government agreeing to indemnify the Ministry of Defence in respect of any claims arising at the date of, subsequent to, and as a consequence of the transfer. The plaintiff brought an action for nuisance, on the ground that the Government had let dust, grit, ashes, fumes and other noxious and offensive matter escape from the incinerator onto the plaintiff's premises, endangering the health of the plaintiff's employees and forcing it to incur expense to mitigate the pollution.

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The plaintiff submitted that (a) it was not precluded from bringing an action in nuisance by the covenants associated with the lease, as the word "fire" in the relevant sub-clause did not cover the operation of an incinerator; (b) the relevant sub-clause of the covenant related to fires in property occupied by the Ministry of Defence only, and not by the Government of Gibraltar, which had been mentioned in contradistinction to the Ministry of Defence in the original agreement; (c) there had been no suggestion that the covenants should run with the land; and (d) if the Government of Gibraltar had wanted to gain the protection of the covenants, it should have entered into new covenants with the plaintiff, or arranged for the re-drafting of the existing covenants.

The Government submitted in reply that (a) the incinerator was a fire, and the plaintiff had covenanted not to claim for damage caused by or arising from fire; (b) the reference to the Ministry of Defence in the covenant should be construed as including the Government of Gibraltar; and (c) the covenant should be construed as running with the land.

Held, allowing the plaintiff to proceed with its claim,

The plaintiff was not precluded from bringing a claim by the covenant not to bring any action relating to damage caused by or arising from fire arising in any property occupied by the Ministry of Defence. The incinerator was not, and had never been, owned by the Ministry of Defence; the Government had occupied it since its construction. The word "fire" in the clause was designed to protect the Ministry of Defence and the Government from claims arising as a result of sudden outbursts of fire, such as that arising from the explosion of H.M.S. *Bedenham*, rather than from a steady, controlled fire that burned day and night. Had the Government wished to avail itself of the relevant sub-clause, it should have instigated the re-drafting of the document (para. 13; paras. 27–31).

Case cited:

(1) *Turner* v. *Civil Service Supply Assn. Ltd.*, [1926] 1 K.B. 50; (1925), 95 L.J.K.B. 111; 134 L.T. 189, applied.

A.V. Stagnetto, *Q.C.* for the plaintiff;
Miss K. Ramagge, *Crown Counsel*, for the defendant.

1 **KNELLER, C.J.:** The preliminary issue between the parties in this action is whether or not cl. 2(xii)(iv) of the three leases between them under which Allied Bakeries Ltd. occupies the premises referred to in para. 2 of the Bakeries' statement of claim—namely, Crown Properties Nos. 1469, 1471 and 1472 in the Industrial Area, North Front, Gibraltar—precludes the Bakeries from making any claim against the Gibraltar Government for any loss or damage of any nature caused by a fire beginning in any property which the Gibraltar Government occupies or owns.

2 The sub-clause in question reads as follows:

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"2. The tenants hereby covenant with the landlords as follows:—

. . .

(xii) not to claim compensation against the Crown or any officer or person in the service or employment of the Government of the United Kingdom of Great Britain and Northern Ireland or the Government of Gibraltar in respect of any damage to the demised premises or any part thereof or in respect of any loss of life, injury or damage to persons or chattels therein arising or in any way attributable to any of the following acts or occurrences, that is to say—

. . .

(iv) fire or explosion in or originating or arising in any property, pipe or vessel occupied by the Ministry of Defence;

(v) whether as a result of accident or by reason of any negligence or other acts of either of the said governments or any officer or other person occupied in the services or any agent of either of the said governments."

3 Miss Ramagge, Crown Counsel, on behalf of the defendant Attorney-General, submits that the answer to this conundrum is "Yes," and Mr. Stagnetto, Q.C. for the Bakeries urges the court to answer the issue with the word "No."

4 The Bakeries' claim is against the Government of Gibraltar, and the Attorney-General for Gibraltar is sued under the provisions of the Crown Proceedings Ordinance, s.12. The Bakeries, as their name might suggest, manufacture bread and cakes, buns and other confectionery. The Bakeries are—and have been at all material times—the lessees and occupiers of properties 1469, 1471 and 1472 down in the Industrial Area at the North Front.

5 The Government of Gibraltar owns a refuse destructor, located on Devil's Tower Road, near to the Bakeries. The Bakeries allege that from 1982 onwards the Government has wrongfully discharged from the refuse destructor (commonly called "the incinerator") dust, grit, ashes, fumes and other noxious and offensive matter over the Bakeries, all of which have caused damage to the Bakeries. The dust, grit, ashes, fumes and other noxious and offensive matter endanger the health of the people working in the Bakeries. The owners of the Bakeries have been put to expense to mitigate the pollution and their business has suffered loss and damage.

6 The Bakeries say further, or in the alternative, that the Government of Gibraltar is negligent in its control and management of the incinerator

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because it has failed—and continues to fail—to take any (or any sufficient) precautions against the discharge from the incinerator into the Bakeries' property of this dust, grit, ashes, fumes and other noxious and offensive matter. And, furthermore, that it has let the noxious and offensive dust, grit, and ashes escape from the incinerator onto the Bakeries' premises.

7 They have claimed special damages amounting to £131,380.12; general damages; and an injunction to restrain the Government of Gibraltar from permitting the work of the incinerator to be carried on in such a manner that is a nuisance or causes injury to the Bakeries, their business as bakers and their servants who work in the Bakeries; they also ask for costs.

8 The Government of Gibraltar pleaded that the work of the incinerator is an operation incidental to the obligation to collect refuse imposed upon the Government under the Public Health Ordinance. It denies that the Bakeries have suffered any loss which is attributable to the actions of the Government when working this incinerator. The Government also pleads contributory negligence on the part of the Bakeries and their agents or servants, alleging that they failed to repair or replace broken or damaged window panes; that they stored food products in the loading bay of their premises when the doors were open; and that they failed to take any or any proper precautions to prevent their food products from becoming contaminated or otherwise damaged. Finally they plead that this sub-clause in the leases precludes any claim against the Government for any loss or damage of any nature caused by this fire. The Government's contention is that the incinerator is nothing but a large fire which burns the refuse collected from the people, houses and streets of Gibraltar.

9 The background to all this includes these matters. Crown properties 1469, 1471 and 1472 were transferred by the Ministry of Defence to the Colonial Government, as it was then called, on September 16th, 1957. The first relevant document relating to one of these plots is an agreement for a tenancy at will made on October 6th, 1961 for 18 months from September 1st, 1961 between the Governor and Commander-in-Chief of the City and Garrison of Gibraltar for and on behalf of Her Majesty the Queen and Edward Falquero & Sons Ltd., a company incorporated under the Companies Ordinance.

10 The company, as the tenant, was to have licence and authority to enter upon the land at the North Front described in the First Schedule to the agreement for the purpose of executing works in accordance with various stipulations contained in the agreement. It was to be tenant-at-will of that piece of land, which was to be leased to it until a lease was granted in accordance with the regulations. One of the conditions was that the tenant agreed not to claim compensation from the Crown or any officer or

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person in the service or employment of the Imperial Government or the Government of Gibraltar in respect of any damage to the new building or any part of it or in respect of any loss of life, injury or damage to persons or chattels in it arising from or in any way attributable to various acts or occurrences which were then set out.

11 These included blasting, excavating, tunnelling, boring or mining by or upon the orders or instructions of either or both those governments; flood, landslide or fall of water or stones howsoever caused; the firing of any gun or the flying of any aircraft owned by either of the said governments or fire or explosions in or originating or arising in any property or vessel occupied or owned by the Admiralty. This was so whether it was the result of accident, or by reason of any negligence or other acts of either of the said governments or of any officer or other person employed in the service of or any agent of either of the said governments.

12 Another condition was that the tenant would indemnify and keep indemnified the Crown and any officer of the Imperial or Colonial Government in respect of any claim which might be made against the Crown or any such officer or arising out of any such loss of life, injury alleged to have been caused by or through any such matter, act, event or contingency. The tenant was to take out a policy of insurance with a reputable company in a sufficient sum to the satisfaction of the landlord against such loss, injury or damage and to maintain the policy of insurance during the term granted. The agreement stated that when the works had been completely finished to the satisfaction of the landlord at the end of the 18 months or any extended period that should be allowed or fixed by the landlord then the tenants were to have leases which would include covenants set out in the Second Schedule.

13 I turn aside here to take judicial notice of the fact that H.M.S. *Bedenham*, an ammunition ship, exploded in the harbour of Gibraltar on April 27th, 1951, and I believe that I am right in saying that window panes and parts of buildings were damaged by the blast. It may be, therefore, that that is why in October 1961 the agreement for the tenancy at will between the landlord and the company made provision for a fire or explosion arising in the property or vessel occupied or owned by the Admiralty.

14 Be that as it may, Crown Plot 1471 was the subject of a deed of lease made on March 14th, 1967 between the Governor for and on behalf of Her Majesty the Queen, the landlord, and Allied Bakeries Ltd. The consideration was the expense incurred by the Bakeries in erecting a building on that plot, observance of the covenants in the lease and the rent reserved under it. The demise was to date from July 1st, 1966, and it was for a term

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of 50 years with a rent of £59 per year for 21 years and thereafter a rack rent.

15 In this, the first of the three leases, the covenants which the Bakeries had to observe included the following. The Bakeries were not to keep or permit or suffer to be kept on their premises any materials of a dangerous, combustible or explosive nature, and were not to carry on or permit or suffer to be carried on upon their premises any trade of a noxious offensive nature. No-one suggested that the baking ovens or their materials were dangerous, combustible or explosive: cl. 2(viii). They were to insure and keep insured the premises at all times throughout the term in the joint names of the landlord and tenants against loss or damage by fire by taking out a policy in some insurance office in Gibraltar to the full value of the premises, and were to make payments necessary for that purpose and so forth: cl. 2(xi). Then follows the sub-clause which has already been set out earlier in this ruling. This time, and for the first time, in sub-clause 2(xii)(iv) the fire or explosion is that which is in or originates or arises in any property, pipe or vessel occupied or owned by the Ministry of Defence. It is no longer confined to property or a vessel occupied or owned by the Admiralty.

16 The Governor and Commander-in-Chief of the City and Garrison of Gibraltar set his hand to the lease and caused the Public Seal of the City of Gibraltar to be affixed to it. The next lease concerns Crown Plot 1469. It was made on February 28th, 1969. The parties are the Governor (for and on behalf of the Queen as landlord) and Edward Falquero & Sons Ltd., a local company. The consideration for this is the expenses incurred by the company in erecting buildings on land demised and the covenants it undertakes to observe and the rent it is to pay. What is demised? It is Crown property 1469, and the recently-erected buildings on it. They are demised from March 1st, 1963 for a term of 21 years to be extended to 50 from March 1st, 1963 if the lease is assigned to Allied Bakeries. The rent to be paid is £65 per year.

17 It includes the same covenants to be observed by the tenant in its cl. 2, namely, not to keep or permit or suffer to be kept on the demised premises any materials of any dangerous, combustible or explosive nature and not to carry on or permit or suffer to be carried on upon the demised premises any trade of a noxious or offensive nature; to insure and keep insured the premises at all times in the joint names of the landlord and tenant against loss or damage by fire; and not to claim compensation against the Crown or any officer or person in the service or employment of the Government of the United Kingdom and Northern Ireland or the Government of Gibraltar as before. The Governor and Commander-in-Chief of the City and Garrison set his hand to it and caused the Public Seal of the City to be impressed on it.

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18 The third and last lease concerns Crown Property 1472, and was made on March 21st, 1973. The parties to this are the same, and so is the consideration. The property and the buildings recently erected on it are demised from April 20th, 1969 for a term of 50 years at £130 per year for 21 years and thereafter at the best yearly rent. The covenants are exactly the same. The Governor is described as the Governor and Commander-in-Chief of the City only. He set his hand to it and caused the Public Seal of the City to be affixed to it.

19 That brings the story up to March 21st, 1973. Then, by correspondence between August 4th and September 4th, 1975 between the Regional Estate Surveyor of the Public Services Agency and the Administrative Secretary of the Gibraltar Government, the old Combined Service Working Area of 1.148 acres which was surplus to defence requirements was transferred free of consideration from June 1st, 1975 by the Ministry of Defence to the Government of Gibraltar. There are certain reservations and conditions in that correspondence. This area is where the incinerator was erected some time in 1973 according to counsel for the plaintiff so, presumably, the Ministry of Defence had agreed to this.

20 The reservations in the transfer include the Ministry of Defence water main, electricity and telephone cables, sewers and all other services that may be found, discovered or unearthed within the area transferred, together with rights of access for workmen or vehicles for inspection, maintenance and renewal or repair of them. Extreme care was to be exercised when any works were executed in the vicinity of the Royal Signals cables, indicated in a drawing attached to the correspondence.

21 The Ministry of Defence had a right in perpetuity to develop or make such other use of adjoining or neighbouring land in which it had an interest, and the Ministry of Defence in its discretion might determine, that interest notwithstanding, that the access of use of light and air enjoyed from and over the adjoining or neighbouring land might be obstructed, diminished or destroyed. Any buildings constructed and occupied within the old Combined Services Working Area or Colonial Military Land had to have all the steel metal reinforcement and materials used in this construction bolted together when cleaned, efficiently earthed by cable or copper strips to an earth table or rod with a resistance of 1 ohm or less, and were to be tested once a year. Floor-mounted machinery was to be earthed effectively. The transfer meant that the Government of Gibraltar assumed full responsibility for the site transferred and the condition in which it was on the date of the transfer, and the Government of Gibraltar was to relieve and indemnify the Ministry of Defence in respect of all claims and matters arising at the date of, subsequent to, and as a consequence of the transfer which, as I have said, was to date from June 1st, 1975.

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22 So it is clear that the Bakeries came to the area before the incinerator. The Bakeries had leases with sub-clauses relating to a fire or explosion in Ministry of Defence property, pipes or vessels, and when the incinerator was erected they were precluded from suing the Government of Gibraltar for any damage caused by fire or explosion in or originating or arising in any property, pipe or vessel occupied or owned by the Ministry of Defence.

23 There is no more that can be culled from the papers and submissions in this matter insofar as the background facts to the application are concerned. I now turn to the law. No decision of a Gibraltar court was cited by counsel for either party. Miss Ramagge referred to *Turner* v. *Civil Service Supply Assn. Ltd.* (1). The defendant's servant packed the plaintiff's goods and put them on a motor lorry to be moved from London to Hailsham in the middle of 1924. On the journey, the driver stopped the motor and poured some petrol over the engine. Almost immediately, flames burst out and the motor lorry and its contents were consumed by fire. The jury found that the fire was the result of the defendant's negligence.

24 The judgment is concerned with the protection from liability by a condition that the defendants were not responsible for loss or damage caused by a fire and the liability of a common or other carrier. There are various first principles set out in the judgment which I respectfully adopt insofar as the correct approach to the preliminary issue in this case is concerned. Here they are.

25 Whether or not the Government of Gibraltar is protected by the terms of the lease is a question of law. Assuming that the incinerator has caused loss or damage to the Bakeries and that it is due to the negligence of those working it, the question is whether the Government of Gibraltar is exempt from liability. This in turn depends on whether or not it had in express and unambiguous phrases exempted itself from liability. If a man wishes to exempt himself from liability, he will say so in clear and unambiguous terms.

26 There are two questions here. First, does the word "fire" in that sub-clause cover the fire in the incinerator? Secondly, does the fact that the Government of Gibraltar owns the incinerator and not the Ministry of Defence mean that the Government of Gibraltar is not protected by that sub-clause?

27 Reading the sub-clause against the rest of the lease, and more particularly the rest of cl. 2, the word "fire" in my judgment does not cover a controlled domestic steady day- and night-burning fire and the processes connected with it, but a sudden outburst of fire or an unusual manifestation of it. It is in the context of an explosion in or originating or arising in any property, pipe or vessel.

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28 Secondly, the Ministry of Defence is clearly mentioned twice in the sub-clause of cl. 2 in contradistinction to the Government of the United Kingdom and Northern Ireland and the Government of Gibraltar. The incinerator has never been owned by the Ministry of Defence.

29 The fact is that when the incinerator was put up, had Allied Bakeries asked themselves whether or not they were precluded from suing the Government of Gibraltar for any damage caused by the incinerator to their premises, employees or their business they would have seen that the Government of Gibraltar was not protected by that clause. The latter cannot shelter behind any clause in the leases when the Bakeries sue them for any damage caused by dirt, dust and grit or fumes swirling over their buildings and seeping into them through the negligence of the Government of Gibraltar.

30 The fact that the Government of Gibraltar had the area in which they put up the incinerator transferred to them by the Ministry of Defence in 1975 should have led to the leases being re-drawn by the parties on the initiative of the Government of Gibraltar. There has been no suggestion that the covenants run with the land, or even that the plots of the incinerator and the Bakeries are contiguous. The words of the sub-clause and of the clause—and indeed of the lease—do not refer to a fire or explosion in or originating or arising in any property, pipe or vessel occupied or owned by the Government of Gibraltar, and so they are not protective.

31 Answering, then, the preliminary issue as a matter of law, I hold that the Bakeries are not precluded from making a claim against the Gibraltar Government for any loss or damage of any nature caused by the fire in the incinerator in the plot in which it lies and which is owned by the Government of Gibraltar. This being so, the respondent must pay the costs of the hearing of the application for having this set down as a preliminary issue and for the hearing itself.

Order accordingly.

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