

[1991–92 Gib LR 1]

A1 INTERNATIONAL COURIERS LIMITED v. AFTER HOURS LIMITED and A. OLIVA, C. OLIVA and M.L. OLIVA

SUPREME COURT (Alcantara, A.J.): January 11th, 1991

Landlord and Tenant—lease or licence—criteria—prima facie sub-tenancy if exclusive occupation granted by tenant for consideration, with intention to create legal relations

Landlord and Tenant—protected tenancy—corporate tenant—corporate tenant subject to Landlord and Tenant Ordinance, Part III, except may not claim protection of possession—security of tenure to be obtained by contract

Landlord and Tenant—breach of covenant—sub-letting without consent—onus on sub-tenant to show sub-letting lawful—landlord waives right to challenge unlawful sub-letting if knowingly permits sub-tenant to remain in occupation and seeks no remedy

Landlord and Tenant—breach of covenant—sub-letting without consent—no protection for pre-existing unlawful sub-tenant under Landlord and Tenant Ordinance, s.18(8), when possession granted against tenant—court may nevertheless grant relief from forfeiture under Land Law and Conveyancing Ordinance, s.6

Landlord and Tenant—breach of covenant—forfeiture—relief against forfeiture—discretion to grant relief to unlawful sub-tenant to be exercised sparingly—relevant matters include (i) whether sub-tenant may claim protected tenancy on expiry of tenancy granted by court, (ii) circumstances in which sub-tenancy created, and (iii) landlord's conditions for consenting to sub-letting

The plaintiff landlord applied for the possession of premises let to the first defendant and sub-let to the second defendants.

The plaintiff, as holder of a long lease of residential premises, let part of the premises to the first defendant company. The tenancy agreement contained a covenant not to assign or sub-let the premises without the plaintiff's written consent, and provided that any sub-lessor could be required to pay specified sums in rent as a condition of the plaintiff's

giving that consent. The first defendant's principal offered part of the premises to the Oliva family (the second defendants) as living accommodation, under a licence agreement which was signed after they had gone into occupation, when they were desperate to find accommodation. The family enjoyed exclusive occupation of their part of the premises.

The plaintiff later discovered that the first defendant had sub-let the premises. The first defendant denied that it was in breach of the covenant but offered the plaintiff more rent. The plaintiff later served a notice under s.14 of the Conveyancing and Law of Property Act 1881, requiring the first defendant to remedy its breaches of covenant in sub-letting without consent and failing to pay rent and service charges due. The second defendants, independently, applied to the Rent Tribunal for an assessment of the proper rent for the premises under Part III of the Landlord and Tenant Ordinance.

In the present proceedings, the plaintiff claimed possession from the defendants, together with arrears of rent and mesne profits, plus damages. It obtained judgment in default of defence against the first defendant but the second defendants claimed relief against forfeiture under s.6 of the Land Law and Conveyancing Ordinance.

In respect of its claim against the second defendants, the plaintiff submitted that (a) they were mere licensees of the premises; (b) the first defendant, as a limited company, could not hold a protected tenancy under Part III of the Landlord and Tenant Ordinance; (c) the sub-letting to them was unlawful because it was in breach of covenant, and therefore they were not protected by s.18(8) of that Ordinance from re-possession in the event of an order against the first defendant; (d) it had not waived its right to challenge the illegal sub-letting, since it had been unaware of the family's presence until shortly before it served the notice on the first defendant; and (e) the Olivas were not entitled to relief from forfeiture under s.6 of the Land Law and Conveyancing Ordinance, since (i) they were mere licensees and not sub-tenants within the meaning of the Landlord and Tenant Ordinance, (ii) if they were in fact tenants, this would amount to forcing protected tenants on it as landlord without its consent.

The second defendants submitted in reply that (a) since they enjoyed exclusive possession of their part of the premises, they were tenants rather than licensees; (b) the first defendant was denied protection under the Landlord and Tenant Ordinance only so far as possession as against the plaintiff was concerned, and not in respect of its relationship with them as sub-tenants; (c) the plaintiff had waived the effect of the illegal sub-letting by failing to take prompt action once it discovered their presence; (d) the fact that they might not be eligible for protection under s.18(8) of the Landlord and Tenant Ordinance because their tenancy was an illegal sub-letting did not prevent the court from granting them relief from forfeiture under s.6 of the Land Law and Conveyancing Ordinance; and (e) an order for forfeiture would reward the first defendant, which had charged them a higher rent than that to which it was entitled.

Held, granting the second defendants a tenancy for one month:

(1) The Olivas had been granted, or had obtained exclusive possession of the premises they occupied, and were consequently *prima facie* tenants, notwithstanding the licence agreement (para. 13).

(2) The tenancy held by the first defendant was a protected tenancy under Part III of the Landlord and Tenant Ordinance. Its status as a limited company merely prevented it from claiming security of tenure from the plaintiff other than under contract, but did not prevent it from invoking the fair rent and other provisions of the Ordinance. As a landlord in relation to the second defendants, it was subject to the Ordinance (paras. 15–16).

(3) However, the sub-letting to the second defendants was unlawful because the consent of the plaintiff had been neither sought nor obtained. The onus lay on the second defendants to show that it was lawful. The plaintiff had not waived its right to challenge the breach of the covenant not to sub-let, as it had not become aware of the sub-letting until a few months before it served notice on the first defendant to remedy the breach. The second defendants could not therefore claim protection from eviction by the plaintiff under s.18(8) of the Landlord and Tenant Ordinance as sub-tenants whose tenancy pre-dated the proceedings against the first defendant tenant (paras. 17–21).

(4) Nevertheless, the court had a discretion under s.6 of the Land Law and Conveyancing Ordinance, to grant relief from forfeiture despite the fact that judgment had been given against the tenant, by granting the second defendants a tenancy for any term up to the duration of their original sub-tenancy. The discretion was to be exercised sparingly, as it would create an unanticipated privity of contract between the landlord and the sub-tenant. It could be exercised even if the sub-tenant did not have the protection of s.18(8) of the Landlord and Tenant Ordinance because the sub-letting was unlawful. If the sub-tenant would, at the end of a tenancy granted under s.6, be able to claim protection under Part III of the Landlord and Tenant Ordinance, that was a circumstance to be taken into account (paras. 22–28).

(5) The court would therefore grant a one-month tenancy to the second defendants even though they had known that the first defendant had no power to sub-let. They had taken the accommodation because they were desperate for suitable housing and had paid little regard to the terms of the agreement. Furthermore, the wording of the covenant in the tenancy agreement showed that the plaintiff's priority when considering whether to consent to sub-letting was financial, and the condition that a specified market rent be paid by the sub-tenants imposed a far higher rent than was authorized by law. The tenancy would be for one month (paras. 29–32).

Cases cited:

- (1) *Carter v. S.U. Carbuirettor Co. Ltd.*, [1942] 2 All E.R. 228, applied.
- (2) *Creery v. Summersell & Flowerdew & Co. Ltd.*, [1949] 1 Ch. 751; [1949] L.J.R. 1166; 93 Sol. Jo. 357, *dicta* of Harman, J. applied.

- (3) *Factors (Sundries) Ltd. v. Miller*, [1952] 2 All E.R. 630, followed.
- (4) *Henry Smith's Charity (Trustees) v. Wilson*, [1983] 1 Q.B. 316; [1983] 1 All E.R. 73, applied.
- (5) *Lee v. K. Carter Ltd.*, [1949] 1 K.B. 85; [1948] 2 All E.R. 690, referred to.
- (6) *Metropolitan Properties Co. Ltd. v. Cordery* (1979), 39 P. & C.R. 10, distinguished.
- (7) *Reidy v. Walker*, [1933] 2 K.B. 266; [1933] All E.R. Rep 182, explained.
- (8) *S.T.C. Properties Ltd. v. T. Totaldas Ltd.*, Supreme Ct., June 16th, 1989, referred to.
- (9) *Street v. Mountford*, [1985] A.C. 809; [1985] 2 All E.R. 289, applied.
- (10) *Swanson v. Forton*, [1949] Ch. 143; [1949] 1 All E.R. 135, referred to.

Legislation construed:

Conveyancing and Law of Property Act 1881 (44 & 45 Vict., c.41), s.14(1):

“A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.”

Land Law and Conveyancing Ordinance (1984 Edition), s.6: The relevant terms of this section are set out at para. 22.

Landlord and Tenant Ordinance (1984 Edition), s.18(8): The relevant terms of this sub-section are set out at para. 17.

A. V. Stagnetto, Q.C. for the plaintiff;
A. Serfaty for the Olivas.

1 **ALCANTARA, A.J.:** The central issue in this case is whether the occupiers of a protected dwelling-house are tenants or licensees.

2 The owners of premises in Castle Street granted a 99-years-and-10-days lease to a management company. In turn, the owners and the management company, as lessors, granted a term of 99 years, commencing on January 1st, 1986 to the plaintiff, a company by the name of A1 International Couriers Ltd., under certain terms.

3 The plaintiff in turn, now as landlord, entered into a tenancy agreement with another company called After Hours Ltd., the first defendant, for a term of nine years, in respect of certain parts of the

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premises. The agreement was executed on October 31st, 1988, and was in respect of what is described as “all that furnished property known as Flats 1 and 2, 2 Castle Street.” Under cl. 5(k) of the said agreement, the tenant, After Hours Ltd., undertook—

“not to assign under-let or part with the possession of the premises or any part thereof without the written consent of the landlord, such consent not to be unreasonably withheld in the case of a respectable and responsible tenant, provided always that the landlord shall be entitled as a condition of giving such consent to require the assignee or sub-lessor to pay the market rental of the premises (which shall in no case be less than the amounts set out in cl. 4 above).”

The market rent in cl. 4 was set at £425 per month for the first three years, £490 per month for the next three years and £560 for the last three years.

4 The Oliva family came from England in 1986. The family consists of Mr. Oliva, a Gibraltarian, Mrs. Oliva, an English lady, and three small girls. Mr. Oliva was able to find work immediately but was not able to find accommodation in Gibraltar. They decided to live in La Linea. This proved to be more than inconvenient. I accept Mr. Oliva’s assessment that commuting was hell. His wife got a job in Gibraltar six months later and the children started school in Gibraltar. They stuck it out for about 18 months. Then Mr. Oliva saw an advertisement in the *Gibraltar Chronicle* that there was a flat for rent at Sunnyside House. He phoned the telephone number in the advertisement and was told that the accommodation was no longer available, but that there was some other accommodation for renting at 2 Castle Street. He went to that address and spoke to Mr. Gohr, who was the *alter ego* of After Hours Ltd.

5 The accommodation at 2 Castle Street consisted of three small rooms, a kitchen and bathroom. It was being refurbished and would be ready soon. The rent was £120 a week, payable monthly in advance, plus £480 deposit. Mr. Oliva did not think twice about it. He decided to take it and then phoned his wife. She was astounded because it would put a severe strain on their budget.

6 Then Mrs. Oliva took over. She inspected the flat and later paid a deposit of £480, and got the following receipt:

“12.12.88

Received from Mr. & Mrs. Oliva the sum of £480 as a deposit for a licence to occupy Flat 1/2, 2 Castle Steps.

The licence agreement is to be prepared within the next 10 days (cost of said agreement to be borne in equal parts by both parties), and this deposit shall be subject to reaching a mutually satisfactory agreement.

[signed] D. Gohr

[another signature]

D. Gohr, Director, After Hours Ltd., Suite 1, 123 Main Street,
Gibraltar.”

7 The licence agreement, which bears the date December 12th, 1988, came to be signed by Mrs. Oliva some days later, after the Oliva family had gone into occupation. The licence agreement is said to have been prepared by a lawyer. Clause 11 is a gem. It reads: “The licensee agrees that he or his wife will use the kitchen solely for the purpose of providing meals for the said three children.” On a literal construction, this means that Mr. and Mrs. Oliva could not prepare meals for themselves; they had to content themselves with take-aways!

8 Mr. and Mrs. Oliva paid their licence fees or rent regularly, and the evidence before me discloses that they had exclusive possession of the flat.

9 On February 16th, 1989 the plaintiff wrote to Mr. Gohr accusing him of sub-letting without its written consent. Mr. Gohr wrote back to the plaintiff’s solicitors, stating that he was “not sub-letting as defined in para. 5(k) of the tenancy agreement,” and offering to pay “an extra £20 per month to your clients in view of the increased number of users of the property.”

10 There the matter rested until June 1989, when two things happened almost at the same time.

(a) The plaintiff decided that the first defendant had committed breaches of covenants in respect, *inter alia*, of non-payment of rent and service charges for the months of April and May 1989, and of sub-letting without written consent, and served a notice under s.14 of the Conveyancing and Law of Property Act 1881.

(b) Mr. Oliva independently and not aware of what was happening, applied to the Rent Tribunal for the determination of the rent of the flat he was occupying in accordance to Part III of the Landlord and Tenant Ordinance.

11 The net result of the above-mentioned events was that the first defendant did not remedy the breaches of covenant and the Rent Tribunal did not reach a final determination of the rent payable although the provisional assessment was £20.35 per month. By a letter dated November 8th, 1989, the Chairman of the Rent Tribunal informed the parties, including the plaintiffs, that the matter was adjourned until the present action is concluded.

12 The plaintiff issued a writ with a statement of claim against the first and second defendants claiming possession of the flat, arrears of rent and

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mesne profits, together with damages. Both sets of defendants acknowledged service. The second defendants (the Olivas) served a defence. The first defendant did not. The plaintiff entered judgment against the first defendant in default of defence, and obtained an order for possession and judgment for rent and mesne profits. The action by the plaintiff against the second defendants continued.

13 There are a number of issues I have to decide. The first is whether Mr. Oliva was a tenant or a licensee. On the authority of *Street v. Mountford* (9), I have no hesitation in coming to the conclusion that Mr. Oliva was granted or obtained exclusive possession of the flat at Castle Street, notwithstanding the licence agreement.

14 The second issue is whether the tenancy that After Hours Ltd. (the first defendant) had from the plaintiffs was a protected tenancy. Mr. Stagnetto, for the plaintiff, relies on *Reidy v. Walker* (7), the headnote to which in the *Law Reports* reads ([1933] 2 K.B. at 266) “that a limited company could not be a tenant to whom the Rent Restriction Acts applied, and, therefore, the defendant company was not entitled to the protection of those Acts.” “Protection of those Acts,” translated into Gibraltar law, means the protection afforded by Part III of the Landlord and Tenant Ordinance.

15 Mr. Serfaty for the second defendants, on the other hand, has referred me to Megarry, 1 *The Rent Acts*, 11th ed., at 156 (1988), for what he says is the true position of company lets:

“A limited company cannot claim the protection of the Acts as to possession . . .

This exclusion is confined to questions of possession as against the corporation as tenant. As landlords, they are subject to the Acts, and even as tenants the Acts protect them as to rent . . . Corporations are thus perhaps better regarded not as being excepted from the Acts, but as being subject to them . . . In short, a corporation which is tenant of a dwelling-house within the Acts can invoke the fair rent system, but must obtain by contract any desired security of tenure.”

Support for the above quotation can be found in *Carter v. S.U. Carburettor Co. Ltd.* (1).

16 I hold that the statement in *Megarry* is the correct statement of the law of Gibraltar. There is a concession on record by the plaintiff that Part III of the Landlord and Tenant Ordinance applies to this particular flat.

17 The next issue is whether the letting by the first defendant to Mr. Oliva was lawful or unlawful. If lawful, the Olivas would be fully protected by s.18(8) of the Landlord and Tenant Ordinance, which provides:

“Where a dwellinghouse or any part of a dwellinghouse to which this Part applies has been lawfully sub-let by the tenant to a sub-tenant before proceedings for recovery of possession or ejection are commenced against the tenant, no order or judgment on those proceedings against the tenant shall affect any right of the sub-tenant to retain possession under this section or in any other way operate against the sub-tenant.”

18 There is no doubt that the consent of the superior landlord (the plaintiff) was never obtained, or even asked for. *Prima facie*, the sub-letting to the Olivas was unlawful. Consequently, the second defendants cannot claim protection under this particular sub-section. Mr. Serfaty, however, argues that the sub-letting became subsequently lawful because there was a waiver by the plaintiff, in that it was aware that persons were living in the flat and did nothing about it.

19 In support of this contention counsel relies on *Metropolitan Properties Co. Ltd. v. Cordery* (6). In that case, the original tenant purported to grant a sub-tenancy of a flat to the defendant, in breach of covenant. The defendant lived quite openly in the flat for over three years in full view of the landlord’s porters, without challenge by them. It was held that the landlord was deemed to have waived the breach of covenant in allowing that situation and that the defendant became protected by the Rent Acts. Bridge, L.J. is reported as saying (39 P. & C.R. at 18):

“Once the landlords had notice, as notionally they had in the circumstances of this case, of a breach of the covenant in question, it was for them to inquire as to the nature of the breach. Of course, if they had been misled, a different situation would have arisen.”

20 The facts in the case before me are different. The plaintiff did not become aware that there were persons living in the flat until a few months before June 1989, when it took action by serving a notice pursuant to s.14 of the Conveyancing and Law of Property Act 1881. Furthermore, it inquired and was misled by the first defendant as to the status of the Olivas as occupiers.

21 I would not be justified, on the facts, in finding that there has been a waiver. This is particularly so, taking into account that the onus of proof is on the second defendants to show that there is a lawful tenancy: see *Trustees of Henry Smith’s Charity v. Wilson* (4).

22 I now come to what I consider the most important and difficult aspect of this case, which is the final issue. Whether relief from forfeiture should be granted to the second defendants under s.6 of the Land Law and Conveyancing Ordinance, which provides:

“Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso or

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stipulation in a lease, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term or any less term the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property . . . but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease."

23 The leading case in this field of the Rent Acts is *Factors (Sundries) Ltd. v. Miller* (3). In that case, a tenant in breach of a covenant not to sub-let without the landlord's consent, sub-let the premises to a sub-tenant. The sub-tenant thought that the tenant had power to sub-let, and paid rent regularly to the tenant. In an action by the landlord for possession against the sub-tenant, the county court held that the sub-tenant was not a sub-tenant within the Rent Acts, and therefore not entitled to protection under the Acts, but made an order under s.146(4) of the Law of Property Act 1925 (relief from forfeiture). According to the headnote to the case in *The All England Law Reports*, it was held by the Court of Appeal ([1952] 2 All E.R. at 630) that—

“there was no conflict between s. 146(4) of the Act of 1925 and the Rent Acts, and, although the sub-tenant was not protected under s. 15(3) of the Act of 1920, he was entitled to seek relief under s. 146(4), the fact that, at the expiration of a lease granted to him under s. 146(4) he could claim the protection of the Rent Acts being a relevant circumstance for the court to consider in deciding whether to grant relief.”

24 The above case, translated into our local legislation, means that there is no conflict between s.6 of the Land Law and Conveyancing Ordinance and s.18(8) of the Landlord and Tenant Ordinance, and I so hold.

25 Mr. Stagnetto, with reference to how this power should be exercised, has quoted from the judgment of Harman, J. in *Creery v. Summersell & Flowerdew & Co. Ltd.* (2), where the learned judge said ([1949] 1 Ch. at 767): “Nevertheless, I think this remains a jurisdiction to be exercised sparingly because it thrusts upon the landlord a person whom he has never accepted as tenant and creates *in invitum* a privity of contract between them.”

26 Notwithstanding the above *dicta*, the learned judge in that case would have granted relief had the under-lessee not insisted on an alteration of a clause in the head-lease. Relief was refused.

27 I agree that the jurisdiction must be used sparingly and only in a proper case. Mr. Stagnetto ended his address to me by saying that if relief

were to be granted the effect would be that the court would be forcing a tenant having the protection of Part III of the Landlord and Tenant Ordinance, on the plaintiff. Counsel drew my attention to a line of authorities to the effect that the refusal of a landlord to consent to the assignment of a lease in order to prevent a statutory tenancy arising at the termination of a contractual tenancy was not unreasonable: see *Swanson v. Forton* (10); *Lee v. K. Carter Ltd.* (5); and *S.T.C. Properties Ltd. v. T. Totaldas Ltd.* (8).

28 Mr. Serfaty, on the other hand, ended his final address by putting forward the proposition that by not granting relief the court would be giving a premium for illegality. The behaviour of the first defendant, he says, was a flagrant breach of the law in demanding more rent than that to which the landlord was entitled under the law.

29 I think I can state the legal position in this manner: Whereas it is permissible to *avoid* the constraints of Part III of the Landlord and Tenant Ordinance, it is wrong to *evade* the restrictions and the court will frown on such evasion, and condemn it.

30 In this case the Olivas, as tenants, are not in exactly the same position as the tenant in *Factors (Sundries) Ltd. v. Miller* (3), who was unaware that the previous tenant had no power to sub-let. Mrs. Oliva read and signed the licence. On the other hand, they acquired the accommodation in the open market. The flat was being made ready for renting and in fact the Olivas went into occupation before signing the so-called licence agreement. They wanted accommodation at any price and under any conditions. They were desperate.

31 There is one further factor in favour of the court's exercising the jurisdiction under s.6 of the Land Law and Conveyancing Ordinance in favour of the second defendants, and that is cl. 5(k) of the tenancy agreement between the plaintiff and the first defendant. The wording of that clause leads one to the conclusion that what the plaintiff was really interested in when considering whether to grant or refuse its consent to an assignment or sub-letting was a high rent. It could impose a condition that the sub-tenants should pay what it calls the market rent, which, on the evidence before me, is far above what the law authorizes it to demand. This is tantamount to an evasion of Part III of the Landlord and Tenant Ordinance.

32 In the circumstances, I am prepared to grant relief to the second defendants on the following terms: "Mr. Oliva shall be granted a tenancy for one month of the premises he now holds, but he should pay the costs of the present action."

Order accordingly.