

[1991–92 Gib LR 115]

GIBMAROC LIMITED v. PRINCE PROPERTIES LIMITED, PLAZA HOLDINGS LIMITED and VENERONI

SUPREME COURT (Kneller, C.J.): June 20th, 1991

Landlord and Tenant—rent—renewal of business tenancy—interim rent—court may fix interim rent under Landlord and Tenant Ordinance, s.76(a) if parties not agreed on terms of renewal—discretion to be exercised to promote justice between parties—interim rent commences three months after termination date specified in notice to quit

Landlord and Tenant—rent—renewal of business tenancy—interim rent—court's discretion to fix rent unrestricted—relevant factors include (i) parties' proposals, (ii) comparables identified by experts, (iii) terms of existing tenancy, (iv) values at beginning of interim period, (v) protection of tenant from full impact of new rent, (vi) interim tenancy not marketable, and (vii) rent to be normally 10% less than full market rent

The tenant of business premises applied to the court for a new tenancy of business premises under Part IV of the Landlord and Tenant Ordinance.

The tenant of two grocery shops was served with notices to quit in respect of the premises. In each case, the landlord indicated that it would not oppose an application to the court for the grant of a new tenancy under Part IV of the Landlord and Tenant Ordinance. The tenant replied with a counter-notice stating that it would not be willing to give up possession on the date specified in the landlord's notice. In each case it proposed a five-year tenancy, instead of the existing monthly tenancy, and that the other terms and conditions should remain the same, save that the rent would increase by £10. The landlord disagreed with these proposals.

The tenant applied to the court for a new tenancy and consent orders were made that the parties should file affidavits of value within one month, that measurements and comparable rents were to be agreed if possible, and that the matter would be heard on a date to be fixed. A date was later fixed for one year after the making of the consent orders.

Since the parties were unable to agree upon a rent, the landlord applied for a determination of the interim rent payable during the continuation of the tenancy under s.77 of the Landlord and Tenant Ordinance, pending the disposal of the application for a new tenancy.

The tenant's valuer valued the properties' rental value on the open market at £230 and £440 respectively; the landlord's valuer valued them at £290 and £540 respectively.

Held, making the following ruling:

(1) The court had jurisdiction to fix an interim rent for the property under s.76(a) of the Landlord and Tenant Ordinance, since the parties were unable to agree the terms and conditions of the new tenancy. The power to do so was discretionary but it would normally be exercised, since the alternative to fixing a reasonable interim rent was to leave the tenant paying the existing rent, which might be far below what was reasonable (para. 23; para. 28).

(2) The s.76 discretion was unrestricted. The court could take into account any relevant factors, including (i) the rent proposed by the tenant and the landlord; (ii) comparables based on experts' factual evidence and/or opinion; (iii) the terms (including the rent) of the existing tenancy; (iv) that the applicable values should be those existing at the start of the interim period; (v) that the tenant should be protected if possible from the full impact of the rent to be fixed for the new tenancy; (vi) that an interim tenancy was not a marketable commodity; and (vii) that it should be less than the full market rent (traditionally around 10% less). Unlike the English provision on which it was based, s.76 did not require the court to assess a reasonable rent for the premises on the open market on a yearly tenancy (para. 24; para. 27; para. 29).

(3) The corresponding English Act stated that the interim rent would be payable from a date three months from the date of the proceedings, or the date specified in the landlords' notice to quit or the tenant's request for a new tenancy, whichever was the later. Although the Ordinance was silent on the matter, it was desirable to follow the pattern of the English legislation and, accordingly, since the parties were obliged under the Ordinance to wait three months before applying for a determination of the interim rent, it would be payable from three months after the date notified for termination of the old tenancy (para. 34).

(4) The court was therefore willing to exercise its discretion to fix an interim rent. It would take into account the old rents for the two properties, the fact that the interim rent was not a marketable commodity and should be less (approximately 10% less) than the full market rent, and the fact that the previous leases were for five years, without a rent review at any point. The new leases would be standard commercial ones with no unusual outgoings or cumbersome covenants. The tenant would pay the interim rent together with all the rates, taxes and assessments. The interim rents for the two properties would be £225 and £440 respectively (paras. 31–33).

Cases cited:

- (1) *Attias v. Marfe Ltd.*, Supreme Ct., 1987 A. No. 138, January 30th, 1989, unreported, applied.
- (2) *Bloomfield v. Ashwright Ltd.* (1984), 47 P. & C.R. 78, *dicta* of Lawton, L.J. applied.
- (3) *English Exporters (London) Ltd. v. Eldonwall Ltd.*, [1973] Ch. 415; [1973] 1 All E.R. 726, *dicta* of Megarry, J. applied.

SUPREME CT. GIBMAROC V. PRINCE PROPERTIES (Kneller, C.J.)

(4) *Follett (Charles) Ltd. v. Cabtell Invs. Ltd.*, [1987] 2 E.G. 88, considered.

Legislation construed:

Landlord and Tenant Ordinance (1984 Edition), s.76: The relevant terms of this section are set out at para. 23.

s.77: “Notwithstanding any other provisions of this Ordinance, in any case where—

- (a) a notice to terminate a tenancy has been given . . . or a request for a new tenancy has been made . . . and
- (b) an application to a court has been made . . . 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 three months and not at any other time.”

A. *Levy* for the landlords;

A. *Isola* for the tenant.

1 **KNELLER, C.J.:** The tenant (“Gibmaroc”) occupies two premises: first, No. 29 Irish Town and, secondly, No. 25 Irish Town and No. 19 Parliament Lane in Gibraltar. Its landlords, Prince Properties Ltd., Plaza Holdings Ltd. and M. Veneroni (“Prince”), sent it notices to quit and Gibmaroc replied with a counter-notice, stating that it would not be willing to give up possession of the premises on the date of termination of the tenancy and putting forward proposals for the period, rent and other terms of a new tenancy.

2 Prince has applied by summons in chambers dated March 6th, 1991, under s.76 of the Landlord and Tenant Ordinance, for an order determining the interim rent which Gibmaroc should pay Prince while the tenancy continues by virtue of s.77 of the Landlord and Tenant Ordinance; and for a direction under the Rules of the Supreme Court, O.28, r.7 that the summons should stand as a counterclaim, and that the costs of the application be paid by Gibmaroc to Prince in any event. There were two such summonses: one for each premises and each in a separate cause, but they were heard together by consent.

3 Beginning with No. 29 Irish Town, for the purpose of this interlocutory application the facts are as follows: Gibmaroc wants a new tenancy under Part IV of the Ordinance for five years from the end of the current tenancy, at a rent of £160 a month plus rates, on the usual terms and conditions in the existing tenancy except as to the rental and the term of it. This was set out in Gibmaroc’s originating summons of September

28th, 1990. Gibmaroc provided the following particulars which are required by O.97, r.6. No. 29 Irish Town is used as a shop. It was let by Prince to Gibmaroc on a monthly tenancy and the rent reserved for £150 plus all rates, taxes and assessments. Gibmaroc occupies the whole of the shop.

4 On March 29th, 1990, Prince's agent served on Gibmaroc a notice to terminate the tenancy on September 30th, 1990. He added that Prince would not oppose an application to the court for the grant of a new tenancy. And that was how it came about that on September 28th, 1990, Gibmaroc served on the agent for Prince a counter-notice of the same date saying the tenants would not be willing to give up possession of the premises on September 30th, 1990. Gibmaroc added that it was prepared to pay £160 a month, together with the rates, if it had a five-year tenancy and the same terms and conditions were included in the five-year tenancy.

5 There was also an application by Gibmaroc under s.57(2) of the Ordinance, by a summons in chambers dated September 28th, 1990, for an extension of time for serving Gibmaroc's counter-notice, but although there is some correspondence about this, there does not seem to have been any hearing of that summons or any order made upon it, or at least there is no evidence of this in the Registry file. No point has been taken about that by Prince.

6 The parties were represented before Alcantara, A.J. on December 10th, 1990, and consent orders were made that Gibmaroc should, within 14 days, file an affidavit of value, and then Prince had another 14 days to put in an affidavit in reply. Measurements of the shop were to be agreed if possible and so were comparable rents. The originating summons was to be adjourned into court on a date to be fixed by consent with the Registrar. Each party was at liberty to adduce oral evidence at the hearing. The experts for each party were to exchange their reports 15 days before trial. The forecast was that the trial would last 2 days. The costs of and occasioned by the application were to be costs in the cause. Each party was to have liberty to apply and it is under that order that Prince comes back to the court with a summons asking for an interim rent to be fixed.

7 The originating summons has been set down for hearing on Tuesday, December 10th, 1991 at 10 a.m. There is an affidavit from Major Stanley Prescott, E.D., F.G. of S., F.I.A.B.C.I., F.P.C.S., the surveyor, valuer and property consultant here, in which he begins by saying that he is a Fellow of the Guild of Surveyors and has many years of experience in the valuation of premises for rental purposes subject to Part IV of the Ordinance. He has been to the shop, which is on the east side of Irish Town, and found it to be oblong in shape and to have no display window but just a large doorway. The shop is 284 sq. ft. in area.

8 He goes on to explain that rental values in Irish Town depend on the position of the shop in that street, just as they do for shops in Main Street. Those to the northern end of Irish Town command a slightly higher rental than those in the southern part, because the northern end is nearer what he calls "tourist activity." Irish Town is supposed to be a "pedestrianized area" but in fact that is not the case. This shop is in one of the parts of Irish Town which is affected by illegal parking and flow of traffic, so that access to the shop is difficult at most times of the day but particularly during the hours when people go shopping.

9 He found that valuation of the premises of the shop for rental purposes was difficult because there are few recent comparators in Irish Town. Many commercial units are haggling over their new rents at the moment. He has done his best. He has based his valuation on several comparables, namely, new leases negotiated in the last few years, shops of similar size and those next-door to this one. He assessed the rent for the shop at £9.50 per sq. ft., per annum, for a five-year lease with no rent review. Then he converted that figure into a monthly one and said £230 a month would be the right rent for Gibmaroc to pay Prince.

10 Rounding off, he set out that he had studied the provisions in the Ordinance and assumed that the lease would be a standard one without any onerous covenants or conditions, and he had relied on his knowledge and experience of the market and those rents that were being paid in mid-February 1991 for premises of a similar size in the same area. So his open market value would be £230 a month.

11 Mr. John Brian Francis filed an affidavit sworn on March 4th, 1991 on the same subject. He recites that he is a Fellow of the Royal Institute of Chartered Surveyors and the Managing Director of Brian Francis & Associates Ltd., a firm of chartered surveyors, valuers and estate agents, registered in Gibraltar. He has been a chartered surveyor for over 15 years and before that he was the Director of Crown Lands, so he is familiar with the value of property in Gibraltar over the last 12 years. His advice on the open market rental value of this shop at No. 29 Irish Town is that it is £290 a month, over a three-year term.

12 He has been to the shop and measured it. He has taken into account the provisions of the Ordinance and used his knowledge and experience of the rental values of comparable properties here in Gibraltar. He has also looked at the Rent Register kept at the Rent Assessor's office in the Crown Lands Department and has studied the rents of similar premises in the same location. He has produced a valuation report and added some more material to what has already been set out in this ruling. This valuation report is dated March 9th, 1990 and the period of the proposed lease is five years, with a rent review at the end of the third year. He is advising on the rental value of the shop from March 1990 for the next three years.

13 It is from his report that we learn that the shop is a grocery and vegetable retail one, and he agrees that it is 287 sq. ft. It is on the ground floor of a pre-war four-storey building in the northern end of Irish Town. The shop is in reasonable condition for its age. He describes the location of it as a good secondary one. He thought the premises were held on a five-year lease which expired in April 1989 and Gibmaroc was paying £1,800 a year. He assumed that there would be another five-year lease with a rent review after three years.

14 The factors which affected his valuation included the size of the shop, and the fact that its trade was below average for the locality and the entrance was through a central timber-frame door. There were no windows in which its wares could be displayed. He described the street as semi-pedestrianized and pointed out that it was well situated in the northern end of Irish Town, because there is another street which links it to Main Street. Furthermore, in recent years this part of Irish Town has increasingly attracted daily Spanish shoppers intent on patronizing a very popular wholesale retail shop in the area. He found the premises were in reasonable condition and he assumed that the proposed lease would be a standard commercial lease with no unusual outgoings or cumbersome covenants.

15 When the frontier opened five years ago, there was an unprecedented boom for shop-keepers, but lately the opening of shopping centres like the International Commercial Centre and Cornwall's Centre has punctured the boom. The consequence was that in a good location in Main Street rents would be £20 to £25 per sq. ft.; in a secondary location, £15 to £20 per sq. ft.; and in tertiary areas such as Irish Town and Engineer Lane close to Main Street they would be £12 to £15 per sq. ft.; in subsidiary areas such as City Mill Lane, £8 to £12 per sq. ft.; and in other areas such as the South District or the Upper Town, as little as £5 to £8 per sq. ft.

16 Then Mr. Francis deals with rack rental value under the proposed lease, and sets out the provisions of Part IV of the Ordinance that describe the rent payable under a new tenancy granted by order of the court, namely, having regard to the terms of tenancy might reasonably be expected to be let on the open market by a willing lessor. He also sets out the matters that ought to be disregarded, such as the fact that the tenant or his predecessors in title have been in occupation of the shop; any goodwill attached to the shop by reason of the carrying out of any business which the tenant has; and any improvement carried out by the tenant or a predecessor in title over and above what he has to do under the lease. He also considers whether or not licensed premises add anything to the value of the shop, and so forth. His assessment of the open market value is £290 a month for the first three years of the term.

17 So much for the premises known as No. 29 Irish Town. I now turn to those which are No. 25 Irish Town and No. 19 Parliament Lane, Gibraltar. They are also used as a shop and they were let by Prince on a monthly tenancy with a monthly rent reserved at £275 plus all rates, taxes and assessments. Again, on March 29th, 1990, the agents of Prince served on Gibmaroc a notice to terminate the tenancy on September 30th, 1990, adding that Prince would not oppose an application to the court for the grant of a new tenancy. Gibmaroc replied with a counter-notice dated September 28th, 1990 saying it would not be willing to give up possession of the shop on September 30th, 1990. Instead, Gibmaroc proposed that the new tenancy should be five years from the end of the current one, at a rent of £285 a month plus rates, and that the other terms should be the same as the existing tenancy.

18 There was a summons seeking an order for more time in which Gibmaroc could serve the counter-notice and issue the originating summons asking for a new tenancy, and, again, in the second Registry file nothing seems to have happened so far as that summons was concerned. There was the same appearance before Alcantara, A.J. on Monday, December 10th, 1990 and the same consent orders are made in preparation for the hearing of this action on Tuesday, November 26th, 1991 at 10 a.m. or over two succeeding days.

19 Then there are affidavits from Major Stanley Prescott and Mr. Brian Francis and the latter slips in a lengthy valuation report for rental prices per square foot. They say that the shop is a medium-sized grocery shop with an area of 504 sq. ft. and a very narrow passageway which is used as a store, having an area of 43 sq. ft. There are no other shops on the other side of Parliament Lane and Irish Town. The store provides little space and at the end of it there is a hand basin for people to wash in. The consequence is that not much use is made of the passageway as a store because if much use were made of it access to the hand basin would be impossible. Major Prescott assesses the rent for the shop at £10.20 per sq. ft., per year, and for the store, £3 per sq. ft., per year, supposing that Gibmaroc would get a five-year lease without a rent review. When he converts these figures into monthly figures he would value the shop and store together at a rental of £440.

20 Mr. Brian Francis, in his report, declares that he has been instructed to provide his opinion on the assumption that the new lease would be a five-year one with a rent review at the end of the third year, so he deals with what Gibmaroc should pay Prince over the next three years from March 8th, 1990. He found the premises to be in reasonable condition, considering their age, and says they are in a good secondary location. He agrees with the measurements given by Major Prescott. He understood that Gibmaroc had a three-year lease which ended in April 1989 and was paying a current rent of £3,300 a year.

21 He took into account the area and described it as of an average size for a shop of that nature in the locality. He noticed that it had frontages to Parliament Lane and Irish Town, a timber-framed entrance door and two display windows; one on either side of the door leading into Parliament Lane. There is a timber-framed door which leads into Irish Town. He remarked on the influx of daily shoppers from Spain and the fact that there is a very popular wholesale retail shop very nearby. He had been told that the lease would be the usual standard commercial one with no unusual outgoings or cumbersome covenants. Then he went into the market conditions for primary, secondary and tertiary locations just as he had done for the other premises. His opinion was that the open market value would be £540 a month for the first three years of the five-year term.

22 And that is a distillation of the material relating to the originating summons of Gibmaroc for each of its shops, asking the court to fix the terms of the new lease under the relevant provisions of the Ordinance.

23 The jurisdiction for fixing an interim rent stems from s.76 of the Landlord and Tenant Ordinance, which reads thus:

“Where the landlord and tenant of any premises to which Part IV applies are unable to agree on the terms and conditions of a new tenancy within 3 months after the date of the termination of the current tenancy, the Supreme Court may—

- (a) on an interlocutory application to it by either party, make any interim order as to the payment of rent; and
- (b) in granting a new tenancy, order that the rent payable under it shall be payable and recoverable from such date prior to the order, but not preceding the date of termination of the former lease, as the court may specify.”

The procedures are provided for in O.97, r.9A of the Rules of the Supreme Court.

24 There is one relevant Gibraltar decision on the interpretation of s.76 of the Ordinance in *Attias v. Marfe Ltd.* (1), dated January 30th, 1989. There, I wrote:

“*English Exporters (London) Ltd. v. Eldonwall Ltd.* is the authority on how rent and interim rent are fixed under s.24A of the English Landlord and Tenant Act 1954. Megarry, J. held that the power of the court to determine an interim rent was discretionary, and in normal cases it should be determined at an amount nearer to the market rent than to the existing rent. It would be the rent that it was reasonable for the tenant to pay. This would involve determining the rent at which, at the beginning of the interim, the

SUPREME CT. GIBMAROC V. PRINCE PROPERTIES (Kneller, C.J.)

holding ought reasonably to be expected to be let on the open market by a willing lessor on a hypothetical yearly tenancy, but the court must also have regard to the rent under the existing tenancy.

Section 24A of the Landlord and Tenant Act specifies that the power is discretionary. It also sets out that to fix it the court must have regard to the rent payable under the terms of the tenancy, but must otherwise deal with it as if it were a new tenancy from year to year.

Section 76 of the Landlord and Tenant Ordinance also makes the power of the Supreme Court to make an interim order as to the payment of rent discretionary and not obligatory. It does not narrow the discretion by requiring the court to take into account the rent under the existing tenancy or what the premises ought reasonably to be expected to be let at on the open market as a tenancy with a yearly tenancy. It also states that the court may make any interim order.

Megarry, J. in *English Exporters (London) Ltd. v. Eldonwall Ltd.* took into account these factors, among others:

- (a) the rent proposed by the tenant and the landlord;
- (b) comparables based on experts' (i) factual evidence, (ii) opinion;
- (c) the terms including the rent of the existing tenancy;
- (d) the values to be applied should be those existing when the interim period begins to run;
- (e) a 'cushion' should if possible be provided for the tenant against the full impact of the rent to be fixed for the new tenancy (see the submissions in *Regis Property Co. Ltd. v. Lewis & Peat Ltd.*, [1970] Ch. 695);
- (f) recall that an interim tenancy is not a marketable commodity;
- (g) it should be less than the full market rent.

Megarry, J. was dealing with s.24A of the Landlord and Tenant Act 1954, which lays down what has to be done in determining an interim rent, whereas s.76(a) of the Landlord and Tenant Ordinance does not do so, so I have excluded one of his principles which was in s.24A of the Act, namely, to fix the market rent for a new tenancy, from year to year, of the whole of the property comprised in the tenancy if it were granted to the tenant by order of the court, and then temper it by reference to the existing rent."

25 Mr. Isola has cited in this application *Charles Follett Ltd. v. Cabtell Invs. Ltd.* (4). The history of the English legislation on the payment of an interim rent was set out in the judgment of Nourse, L.J. in that case, and what he said was this ([1987] 2 E.G. at 89):

“The 1954 Act, as originally enacted, did not give the court power to order the payment of an interim rent. In other words, the old rent continued automatically during such time as the tenancy was continued under section 24 of the Act. In 1969 a new power was added by an amendment made by section 3(1) of the Law of Property Act of that year. It is contained in section 24A of the Act, which is in these terms:

‘(1) The landlord of a tenancy to which this Part of this Act applies may

- (a) if he has given notice under section 25 of this Act to terminate the tenancy; or
- (b) if the tenant has made a request for a new tenancy in accordance with section 26 of this Act;

apply to the court to determine a rent which it would be reasonable for the tenant to pay while the tenancy continues by virtue of section 24 of this Act, and the court may determine a rent accordingly.

(2) A rent determined in proceedings under this section shall be deemed to be the rent payable under the tenancy from the date on which the proceedings were commenced or the date specified in the landlord’s notice or the tenant’s request, whichever is the later.

(3) In determining a rent under this section the court shall have regard to the rent payable under the terms of the tenancy, but otherwise subsections (1) and (a) of section 34 of this Act shall apply to the determination as they would apply to the determination of a rent under that section if a new tenancy from year to year of the whole of the property comprised in the tenancy were granted to the tenant by order of the court.’

Section 34(1) effectively provides that the rent payable under a tenancy granted by order of the court shall in default of agreement be such as may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent) the holding might reasonably be expected to be let in the open market by a willing lessor, certain standard matters being disregarded.”

26 Then the learned Lord Justice went on to set out four effects of the provisions in the Landlord and Tenant Act so far as interim rent was concerned. Here they are in his words (*ibid.*, at 89):

“First, the question whether an interim rent should be determined is one for the discretion of the court. Second, if one is determined, there is no discretion as to the period during which it is payable. In the present case it will run from July 7 1983 (being the date specified for the commencement of the new tenancy in the plaintiff’s request under section 26) until December 2 1986, being the date on which it actually commenced.

Third, in fixing the interim rent, a start must be made with the section 34 market rental value under a tenancy from year to year on the date when it starts to run, and *some* regard must then be had to the old rent.

Fourth, if an interim rent is determined, it can be determined only in the amount so fixed. In other words, in respect of the interim period, the court can make one or other of two orders: either that the old rent shall continue or that it shall be replaced by a new one fixed in accordance with the provisions of section 24A. It cannot order that some other rent shall be payable.”

27 Further on in his judgment, Nourse, L.J. observed (*ibid.*, at 90):

“. . . [T]he having of a regard to the old rent is mandatory. It then becomes a matter for the judge’s discretion to decide what, if any, consequences that regard ought to have on the interim market rent.

In some cases, as in *Halberstam v Tandalco Corporation NV*, the judge may deem it appropriate that the consequences shall be nil. In others, as in *English Exporters (London) Ltd v Eldonwall Ltd*, *Janes (Gowns) Ltd v Harlow Development Corporation* and *Ratners (Jewellers) Ltd v Lemnoll Ltd*, he may deem it appropriate that there should be a small reduction of something up to 10% or thereabouts.

. . . What was the intention of Parliament in requiring regard to be had to the old rent? While sympathising with the pleas for clarification which have been made by Megarry J. and others, I think the circumstances in which section 24A came into existence provide a reliable answer to this question. By 1969 it had been demonstrated that a tenant, in times of inflation, could readily spin out the steps described by the 1954 Act and the rules of court, so as unfairly to prolong the continuation of the old rent under section 24. The defeat of such practices was the primary legislative purpose of section 24A. At the same time it was recognised that, while inflation benefits the tenant during the currency of a lease at an uninflated

rent, it exposes him to an inordinate shock if its consequences are visited on him in full directly the lease has determined. The legislative purpose of the requirement that regard should be had to the old rent was, where appropriate, to cushion the tenant against that shock.

. . . [I]t is not impossible to conceive of circumstances in which it might well be thought that that object could be achieved only by applying a reduction which was far from marginal, and certainly significant . . . Each case must depend on its own facts. That, I think, is the inescapable result of Parliament having given no guidance as to the consequences which are to flow from the mandatory regard to the old rent.”

28 The learned Lord Justice underlined the fact that the discretion in the matter of fixing the interim rent belonged to the judge who was asked to deal with the application. He included two quotations from other cases on the point of whether or not the court ought in the case before it to determine an interim rent. The first was in *English Exporters (London) Ltd. v. Eldonwall Ltd.* (3), where Megarry, J. said ([1973] Ch. at 434):

“In those circumstances, it seems to me that the court ought in this case to determine an interim rent. The choice lies between leaving the tenants to pay their existing rent, which is admittedly far below the value of what they are getting, and requiring them to pay a rent which, by statutory definition, is the rent ‘which it would be reasonable’ for the tenants to pay. In the absence of considerations pointing to any different conclusion, why should the court prefer the inadequate to the reasonable? Without laying down any formal rule that the onus lies on the tenant to show why the discretion should not be exercised, I would say that in most normal cases the court’s discretion under section 24A ought to be exercised, in that to do so will usually promote justice.”

Second, in *Bloomfield v. Ashwright Ltd.* (2), Lawton, L.J. (with whom Dillon, L.J. agreed) said of a submission which had there been made by the landlord’s counsel (47 P. & C.R. at 84):

“His submission was, and no doubt it was well founded, that the judge has a discretion to order an interim rent. There may be circumstances when it would be unjust to make a tenant pay an interim rent. I find it myself difficult to imagine such circumstances but no doubt others with a more fertile imagination than I have can do so.”

Fox, L.J. and Sir Denys Buckley agreed and did not add anything.

29 Again, there is much in *Charles Follett Ltd. v. Cabtell Invs. Ltd.* (4) which, with great respect, is good law and should be applied in Gibraltar,

SUPREME CT. GIBMAROC V. PRINCE PROPERTIES (Kneller, C.J.)

since the Ordinance is, in some respects, modelled on the relevant Act in England. It must be noted that in the Ordinance the court is not required to fix the market rent for a new tenancy from year to year of the whole of the property comprised in the tenancy as if it were granted to the tenant by order of the court. The legislature had the opportunity to include that in the Ordinance but chose not to do so. So, in my view, it is still correct to exclude it when fixing an interim rent in an application in this court.

30 Turning back now to these two applications before the court, I apply the factors which I have set out so far. Prince and Gibmaroc are unable to agree on terms and conditions of these two new tenancies, and they have had more than three months after the date of the termination of those tenancies, which was September 30th, 1990. They still disagree on the term of the leases and the rentals of each one. So, now that Prince has applied to this court to fix the interim rents, the court may make an order as to that rent, and in the circumstances of these two cases the court's discretion will be exercised because that will promote justice between Prince and Gibmaroc. Gibmaroc has not tried to show that it would be unjust to make these orders for interim rents which it ought to pay.

31 The court now takes into account these factors: (a) the old rents were £160 and £275 a month for No. 29 and No. 25 Irish Town; (b) the interim rent is not a marketable commodity; (c) it should be less than the full market rent; (d) there should be usually a 10% reduction on the likely full market rent; (e) the previous leases were for five years without a rent review at any point; (f) the new leases would again be standard commercial ones with no unusual outgoings or cumbersome covenants; (g) Gibmaroc will pay the interim rent together with all the rates, taxes and assessments; and (h) Gibmaroc's Major Prescott's proposals are lower than those of Prince's Mr. Francis.

| Rent (£) | | Term |
|--------------------|--------------------|--|
| No. 29 | No. 25 | |
| Gibmaroc (160) 230 | Gibmaroc (285) 440 | Five years with no review |
| Prince 290 | Prince 540 | Five years with review after first three years |

32 This court cannot prophecy with complete accuracy, but it finds it probable that after the hearing the result will be:

| Rent (£) | | Term |
|----------|--------|--|
| No. 29 | No. 25 | |
| 250 | 490 | Five years with review after first three years |

That being so, those forecasts should, in the circumstances of each case, be “cushioned” by a reduction of 10% in favour of Gibmaroc against the shock of the new terms of each lease, and those reductions will be £25 for No. 29 Irish Town and £49 for No. 25 Irish Town.

33 Accordingly, exercising the discretion vested in this court, I hold that the old rent shall not continue in the interim period but that a new one shall be fixed at the monthly rate of £225 for No. 29 and (rounded down) £440 for No. 25.

34 And from what date are those interim rents payable? The Ordinance gives no guidelines; the Act does. They are payable from the date of the proceedings or the date specified in the landlords’ notice or in the tenant’s request, whichever is the latest. In Gibraltar the landlord or tenant cannot apply to the court to determine the interim rent as soon as the tenancy is determined but must wait for three months. Presumably this is further to protect the tenant from the shock of the terms of the new lease or to make the parties try to fix it themselves.

35 The proper date for the beginning of the payment of these interim rents is January 1st, 1991. The order will be as follows:

1. The application is granted.
2. The interim rent for No. 29 Irish Town is determined at £225 per month.
3. The interim rent for No. 25 Irish Town is determined at £440 per month.
4. Each interim rent shall be payable from January 1st, 1991.
5. By consent, the landlords’ applications to determine the interim rents shall stand as their counterclaims in tenant’s application for new tenancies for each property.
6. The costs of each summons to determine the interim rent are to be paid by the tenant in any event.

Order accordingly.