[1991–92 Gib LR 44]

GARDINER'S ROAD DEVELOPMENTS LIMITED v. E. HOWARD and B. HOWARD

SUPREME COURT (Alcantara, A.J.): April 26th, 1991

Landlord and Tenant—repairs, fitness and alterations—landlord's consent—"improvements" requiring landlord's consent to be judged from tenant's viewpoint—if reasons given for refusal, tenant claiming benefit of Land Law and Conveyancing Ordinance, s.5(2) to show unreasonable—if no reasons given, onus on landlord to show reasonably refused

Landlord and Tenant—breach of covenant—injunction to enforce covenant—usual "balance of convenience" test applies to suit for injunction to restrain unauthorized building works—refusal favoured if works almost complete and damages adequate remedy

The plaintiff tenant sought an injunction to restrain the defendants as sub-tenants from carrying out unauthorized building works on leased premises.

The defendants occupied residential premises as the assignees of a sub-lease of premises leased by the plaintiff. The plaintiff offered the defendants the unexpired residue of the head-lease, drawing their attention to covenants in the sub-lease not to make alterations or additions or erect new buildings on the premises without the lessor's consent and to obtain the lessor's consent to any plans or specifications for alterations. It stated that it was not its policy to give the consent needed under the covenants. Some years later, the plaintiff again offered the residue of the head-lease to the defendants, but did not mention the covenants.

The defendants obtained planning permission to increase the size of the premises by adding two further rooms and started the building works. They did not seek the plaintiff's consent to the alterations, and when the existence of the restrictive covenants was pointed out to them, they apologized and sought the necessary consent, but did not stop the building works, despite the plaintiff's insistence that they should cease. They drew attention to s.5(2) of the Land Law and Conveyancing Ordinance, which required that consent should not be unreasonably withheld. The plaintiff applied for mandatory and prohibitory injunctions in respect of the works, but did not pursue the mandatory injunctive relief.

It submitted that it was entitled to an injunction to restrain the building works, since (a) the building works were not "improvements" to the

property; (b) the defendants had not shown that it was unreasonable to withhold consent to the building of an unsightly new structure which would damage the property and affect the amenities of those and adjoining premises leased by the plaintiff; and (c) the court had no discretion to refuse an injunction to enforce express restrictive covenants in the sub-lease, and the traditional "balance of convenience" test did not apply here.

The defendants submitted that (a) for the purposes of s.5(2) of the Ordinance, the alterations were an "improvement" to the property from their viewpoint as occupying sub-tenants; (b) the plaintiff was unreasonable in withholding its consent to the works; and (c) the traditional "balance of convenience" test did apply to the plaintiff's application for an injunction, and in this case damages would be an adequate remedy for any breach of convenant found to have occurred, since by showing itself willing to sell the head-lease to them, the plaintiff had effectively forfeited any right to withhold consent.

Held, refusing to grant an injunction:

(1) The sub-tenants had first to show that the work they had carried out constituted an "improvement" to the property from their point of view (which was arguable, on the evidence, but which would be determined at the trial), and that the withholding of consent was indeed unreasonable within the meaning of the proviso to s.5(2) (also to be resolved at trial). If no reasons had been given for the refusal, the onus would then lie with the landlord to show that it was reasonable. However, reasons had been given in this case. The plaintiff tenant had established a good arguable case for an injunction on the basis of the restrictive covenants and its reasons for refusing consent and there was a serious question to be tried (paras. 10–11; para. 14).

(2) The normal "balance of convenience" test applied to applications for injunctions to enforce restrictive covenants, unless the action could not be tried before the covenant expired or had almost expired. Here the balance of convenience lay in refusing the injunction, since damages would be an adequate remedy and given that the works were almost complete, more harm would be done by granting the injunction than refusing it. The plaintiff had twice offered to sell the residue of the head-lease to the sub-tenants for specific sums, which would nullify its right to grant or refuse consent to alterations. Damages would be quantifiable (paras. 14–15).

Cases cited:

(1) *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] A.C. 396; [1975] 1 All E.R. 504, applied.

(2) *Hampstead & Suburban Properties Ltd.* v. *Diomedous*, [1969] 1 Ch. 248; [1969] 3 All E.R. 545; 112 Sol. Jo. 656, referred to.

(3) *Lambert* v. *F.W. Woolworth & Co. Ltd. (No. 2)*, [1938] Ch. 883; [1938] 2 All E.R. 664. *dicta* of Slesser, L.J. applied.

(4) *Office Overload Ltd*. v. *Gunn*, [1977] F.S.R. 39; (1977), 120 Sol. Jo. 147, considered.

Legislation construed:
Land Law and Conveyancing Ordinance (1984 Edition), s.5(2): The relevant terms of this sub-section are set out at para. 9.

L.E.C. Baglietto for the plaintiffs;
F.X. Triay and *S.P. Triay* for the defendants.

1 **ALCANTARA, A.J.:** This is an application by the plaintiff for an interlocutory prohibitory and mandatory injunction, which, at the hearing, the plaintiffs limited to its prohibitory aspect only, seeking to restrain—

> "the defendants and each of them, their servants, agents or others acting on their behalf from carrying out any construction and related works at the premises known as Villa 14/2A(1), Gardiner's Road, Gibraltar ('the premises') pursuant to and/or by reference to the defendants' plans, dated May 1990, prepared for them by S. Mart Building Design Consultants, and/or the building permit issued pursuant to the said plans and to the defendants' application for planning permission, save with the consent of the plaintiffs until judgment or further order."

2 The matter arises in this manner. The plaintiff acquired a site in Gardiner's Road in 1976 from the Government of Gibraltar, for a term of 150 years. The plaintiffs developed the said site and built a number of villas with open terraces and gardens on the land. In 1979 the plaintiff granted an under-lease in respect of Villa No. 14 to Bridgetown Ltd. for 99 years. The consideration was £52,000 and a yearly rent of £25. The under-lease contained the two following covenants by the under-lessee, which are relevant to the present proceedings:

> "(d) not to make any alterations or additions to the premises or erect any new buildings thereon without the previous written consent of the lessor nor to cut, maim or injure any of the walls or timbers thereof except for the purpose of carrying out needful repairs, nor to permit any of the aforesaid things to be done . . ."

and

> "(o) the lessee shall not make any alteration in the premises without the previous consent in writing of the lessor or superior landlord to the plans and specifications thereof, and shall make such alterations only in accordance with such plans and specifications as so approved to the satisfaction of the lessor and the superior landlord of their respective agents."

3 On December 2nd, 1980, Bridgetown Ltd. assigned the under-lease in respect of part of Villa No. 14 (Bridgetown Ltd. retained the third floor of the villa) to the defendants in consideration of £73,800, subject to the paying of the reserve rent of £25 per annum to the plaintiff. It is significant that in July 1981, the then solicitors of the plaintiff (Messrs. Vasquez & Vasquez) wrote to the defendants offering the unexpired residue of the head-lease, 51 years, for the sum of £5,000, drawing the defendants' attention to covenants (d) and (o), and ending by stating: "We have been further advised that at present it is the practice of our client company not to grant the consents required under cl. 3(d) and (o) of the said sub-lease." (The sub-lease referred to above is the under-lease.)

4 Another offer was made by the plaintiffs to the defendants to buy the residue, on January 17th, 1989, in a letter written by the plaintiffs' estate agent. In the said letter the asking price was £6,000, and no mention was made of the policy of not granting consent. The defendants found, as their children were growing up, that the accommodation at Villa 14/2A(1) was too small for them, and decided to increase the same by adding two rooms in their terrace and re-providing the terrace on top of those two rooms. This was last year. They obtained planning permission under the Town Planning Ordinance, and engaged a contractor. Work commenced early in 1991.

5 What the defendants did not do was to obtain permission from the plaintiffs in accordance with cl. 3(d) and (o) of the under-lease. The explanation given by the defendants for this *faux pas* is that this was an error, as they had entirely forgotten about the existence of the restrictive covenants and the letter they had received from Messrs. Vasquez & Vasquez in 1981. This is difficult to accept, but it is what the defendants have deposed to.

6 The defendants, when their attention was called to their altering the villa without having obtained the necessary consent, apologized and sought the required consent, but did not stop the works. If there was repentance on the part of the defendants it was not apparently obvious, taking into account that the plaintiffs had, in their letter to the defendants drawing their attention to the lack of consent, stated that "all works must cease immediately pending your making the necessary application to our principals as aforesaid for their consideration."

7 In a further letter dated March 20th, 1991, the plaintiffs stated in relation to the alteration proposed by the defendants that they (the plaintiffs) would "examine and consider the plans you have sent in an attempt to resolve the matter amicably." This was, however, conditional on the defendants' stopping the works.

8 The defendants were not willing to stop the works and, in a letter bearing the date March 22nd, 1991, their solicitors wrote to the plaintiffs' solicitors saying, *inter alia*:

"We trust that in dealing with this matter, your clients have not overlooked the provisions of s.5(2) of the Land Law and Conveyancing Ordinance in a manner that would result in an unnecessary and costly interference with the stoppage of works of alteration which your clients are bound in law to permit."

9 I think that it would be appropriate at this stage to set out what s.5(2) of the Land Law and Conveyancing Ordinance is all about. It reads:

"In all leases whether made before or after the 26th day of September, 1895, containing a covenant, condition or agreement against the making of improvements without licence or consent, such covenant, condition or agreement, shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld; but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed."

10 A tenant who seeks to rely on s.5(2) of the Land Law and Conveyancing Ordinance must satisfy two requirements: First, that the alterations he has carried out constitute an "improvement," and secondly, that the landlord has been unreasonable in withholding his consent. 1 *Woodfall's Law of Landlord & Tenant,* 28th ed., para. 1–1265, at 523 (1978) has this to say about "improvements":

"An alteration or addition to demised premises is an 'improvement' within the meaning of the subsection when such alteration or addition is an improvement to the demised premises from the point of view of the tenant."

On the question of whether consent has been unreasonably withheld, I think I need only refer to the headnote in *The All England Law Reports* to *Lambert* v. *F.W. Woolworth & Co. Ltd. (No. 2)* (3), where it was held ([1938] 2 All E.R. at 664):

"(v) (*per* Slesser, L.J.): the onus of proving that the withholding by a landlord of his consent is unreasonable is upon the tenant. If, however, the landlord merely refuses, but gives no reason for so doing, the onus is upon him to show that his action was reasonable."

11 In the present proceedings it would appear, *prima facie*, that there has been an "improvement," although this is really a matter for trial. The landlords (the plaintiffs) have, however, given their reasons for withholding their consent. These are to be found in their solicitors' letter dated April 4th, 1991, the relevant part of which states: "Our clients do not consent to the new structure being built, *inter alia*, because it is unsightly, damages the original premises and affects the amenities of the same and of the adjoining properties of which our clients are the head-lessors." Whether the reasons given by the plaintiffs are valid is a matter which will be ventilated at the trial of the action, and not a matter which I should decide in the present interlocutory proceedings.

12 Mr. Baglietto, counsel for the plaintiffs, submits that the balance of convenience test in *American Cyanamid Co.* v. *Ethicon Ltd.* (1) does not really apply to this case because of the restrictive covenants. He prays in aid *Office Overload Ltd.* v. *Gunn* (4); and *Hampstead & Suburban Properties Ltd.* v. *Diomedous* (2) for the proposition to be found in *Snell's Principles of Equity*, 28th ed., at 631 (1982), that "although the court has, in general, a discretion whether to grant or withhold an injunction, it has no option but to grant an injunction to restrain the breach of a negative covenant." Counsel has also drawn my attention to a passage in 27[1] *Halsbury's Laws of England*, 4th ed. (Reissue), para. 380, at 358: "An express covenant against making alterations or erecting new buildings is often found in leases: and a breach of any such covenant may be restrained by injunction." The learned editors of *Halsbury's Laws*, in a note (*ibid.*), go on to say that where there is such an express covenant the court will not apparently have any discretion to refuse an injunction.

13 In answer to the above contentions, counsel for the defendants has argued that the *Office Overload* case (4) was concerned with a restrictive covenant in restraint of trade and that the *Hampstead & Suburban Properties* case (2) is distinguishable on its facts, dealing as it does with an absolute covenant not to create a nuisance. Counsel ended by drawing my attention to 1 *The Supreme Court Practice 1991*, para. 29/1/4, at 499, which states: "The normal rule in *American Cyanamid Co. v. Ethicon Ltd.* applies to restrictive covenant cases, unless the action cannot be tried before the covenant expires or has nearly done so."

14 I have come to the conclusion that the rule stated above is the correct statement of the law in Gibraltar. Applying the principles in the *American Cyanamid* case without re-stating them in full again, I have to decide whether, in the exercise of my discretion I should grant or refuse the injunction sought.

(a) First, has the plaintiff established that it has a good arguable claim to the right it seeks to protect? The answer is Yes. The plaintiff has a

restrictive covenant and it has given its reasons for not giving its consent to the alterations which the defendants have carried out. It is up to the defendants to show that the plaintiff has been or is unreasonable.

(b) Secondly, has the plaintiff shown that there is a serious question to be tried? The answer is Yes.

(c) Thirdly, where does the balance of convenience lie? In considering this, an important factor is whether damages would be a sufficient remedy. Are damages a sufficient remedy in this case? The answer is again Yes. The plaintiffs have been willing in the past to nullify their right not to consent to any alteration of the villa by selling the residue of their 150 years to the defendants for a sum of money, varying from £5,000 to £6,000. This is not a case where damages would not be sufficient because they are either difficult to assess, irreparable or outside the scope of pecuniary compensation.

15 I have come to the conclusion that more damage would be done by granting the injunction than by refusing it. The construction of the two rooms is practically complete, short of having the outside painted and embellished. The injunction is refused. The defendants are to have the reserved costs.

Application dismissed.