

[1991–92 Gib LR 58]

**COSMOPOLITAN BAZAAR LIMITED v. STANDARD PROPERTIES LIMITED**

SUPREME COURT (Alcantara, A.J.): May 8th, 1991

*Landlord and Tenant—renewal of tenancy—business premises—commencement of tenancy—under Landlord and Tenant Ordinance, ss. 52 and 77, new tenancy begins three months after court’s disposal of application—“current tenancy” deemed to continue beyond date specified in notice of termination*

*Landlord and Tenant—rent—renewal of business tenancy—rental value of renewed tenancy to be assessed with regard to general and special factors concerning premises and rental values of comparable properties*

The plaintiff applied for the renewal of its business tenancy under the Landlord and Tenant Ordinance.

The plaintiff tenant had held the lease of business premises since 1972 and in 1981 was granted a renewal for three years at an agreed rent with an option for a further two years at a market rent, the covenants under the lease remaining substantially the same as under the original. During 1986, the fifth year of the tenancy, the landlord served notice of termination, indicating that it would oppose the grant of a new tenancy on the grounds that the plaintiff had persistently delayed in paying the rent and that it wanted the premises from which to run its own business. The tenant then applied to the court for a five-year tenancy at a market rent, having obtained an order that, *inter alia*, the rent payable under any new tenancy granted would be back-dated to the beginning of the year in which the application was made, notwithstanding that the tenancy had terminated later that year. Before the summons was heard, the landlord sold the premises to the present defendant.

At the hearing of the summons in 1991, the plaintiff submitted that (a) it was entitled to a new tenancy, since it still held a tenancy for a term of years certain by virtue of s.77 of the Landlord and Tenant Ordinance, and the landlord’s allegations in the notice to quit were unsupported by evidence; (b) under s.77, the previous tenancy was deemed to terminate three months after the court’s disposal of the present application, and consequently, under s.52, the new tenancy would commence on the expiry of that period in 1991; (c) the rent for the new tenancy should be £1,000, taking into account the location of the premises, their size and the relative proportions of their retail and non-retail areas, and the rents

charged for comparable premises in the same location.

The defendant submitted in reply that (a) the plaintiff was not entitled to a renewal of its tenancy, since at the time the tenancy terminated, it only had a periodic tenancy and not a term of years certain, as required by s.52 of the Landlord and Tenant Ordinance; (b) if the plaintiff were entitled to a new tenancy, that tenancy should commence on the day after the termination date specified in the notice of termination of the previous tenancy in 1986, since s.52 provided that a new tenancy should begin at the end of the “current tenancy,” and by ss. 2 and 45(1), the “current tenancy” was the tenancy the plaintiff held at the time it applied for renewal; (c) accordingly, a five-year tenancy granted by the court would terminate later in 1991; and (d) the rent for a new tenancy should be £1,200 per month.

**Held**, granting a new tenancy:

(1) The plaintiff was entitled to a new tenancy, since it held a tenancy for a term of years rather than a periodic tenancy. The previous tenancy had not terminated in October 1986 on the date specified in the notice of termination, since, by virtue of s.77 of the Landlord and Tenant Ordinance, the “current tenancy” which the plaintiff sought to renew would be continued until three months from the court’s disposal of the present application (para. 15).

(2) The new tenancy would be on the same terms as the original, other than an agreed exception relating to the modernization of the shop frontage, namely the terms agreed in the order for renewal in 1986. The duration would be five years, since the landlord, although objecting to any renewal, did not oppose that term if a new tenancy were ordered. Under s.52 of the Ordinance, the term of the new tenancy would commence on the termination of the “current tenancy” in 1991, not 1986, by virtue of s.77 (paras. 9–14).

(3) The rental value was to be assessed on the basis of the general and special factors affecting its value—namely the fact that the property was a medium-sized shop in the most favoured part of Main Street, and had no particular disadvantages besides an old-fashioned façade—and the rental values of comparable properties. The court would apply an arithmetical calculation to assess the relative values per square foot of floor space for three shops in the same part of Main Street with similar ratios of shop area and non-shop area there. On the basis of these, the rent under the new tenancy should be £1,100 per month for the first three years, with a rent review at the end of three years (paras. 16–26).

**Cases cited:**

- (1) *88 High Rd., Kilburn, In re*, [1959] 1 W.L.R. 279; [1959] 1 All E.R. 527, followed.
- (2) *Chanrai (J.T.) (Gibraltar) Ltd. v. Wembley Stores Ltd.*, C.A., Civ. App. No. 1 of 1987, March 23rd, 1987, unreported, not followed.

- (3) *Khubchand & Co. Ltd. v. Key City Properties Ltd.*, Supreme Ct., 1977–K–No. 128, May 1989, unreported, applied.
- (4) *Lawrence (Frederick) Ltd. v. Freeman, Hardy & Willis Ltd.*, [1959] Ch. 731; [1959] 3 All E.R. 77, considered.
- (5) *Lombard Ltd. v. Beaumont Ltd.*, Supreme Ct., 1986–V–No. 65, February 15th, 1988, unreported, applied.

**Legislation construed:**

Landlord and Tenant Ordinance (1984 Edition), s.2: The relevant terms of this section are set out at para. 15.

s.45(1): The relevant terms of this sub-section are set out at para. 11.

s.52: The relevant terms of this section are set out at para. 1.

s.77: The relevant terms of this section are set out at para. 12.

*D.J.V. Dumas* for the plaintiff;

*A.V. Stagnetto, Q.C.* for the defendant.

1 **ALCANTARA, A.J.:** This is an originating summons under the Landlord and Tenant Ordinance. The tenant of business premises at 73 Main Street is seeking a five-year lease of the said premises at market rent. In the normal course of events this should be a straightforward exercise, although not necessarily an easy one. The court should first decide on the terms of the lease, then the duration of it, and finally the rent. In this particular application the matter is overshadowed by submissions made by counsel for the landlord on the correct interpretation of s.52 of the Landlord and Tenant Ordinance. Section 52 reads:

“Where on an application under this Part the court makes an order for the grant of a new tenancy, the new tenancy shall be such tenancy as may be agreed between the landlord and the tenant, or, in default of such an agreement shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being if it is a tenancy for a term of years certain, a tenancy for a term of not less than 5 years and not more than 14 years, and shall begin on the coming to an end of the current tenancy.”

2 But first a history of the matter. The defendant landlord is a landlord by recent purchase, having bought the property on December 31st, 1987. The plaintiff tenant has been the tenant of 73 Main Street for a good number of years. By an indenture dated August 10th, 1972, the landlord’s predecessor in title granted the tenant a lease for three years, commencing on July 1st, 1972. When the lease expired neither the landlord nor the tenant did anything about it until December 27th, 1979. The tenant continued to occupy 73 Main Street and the landlord continued to collect his rent.

3 On December 29th, 1979, the landlord gave notice to the tenant terminating the tenancy on June 30th, 1980, stating that he would not

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oppose an application to the court for the grant of a new tenancy. On April 15th, 1980, the tenant issued an originating summons asking for a term of five years at a monthly rent of £275.

4 On December 8th, 1981, a consent order was made by the court that (a) the landlord would grant the tenant a lease for three years, commencing on March 1st, 1981, at a monthly rent of £400; (b) the tenant would have an option for a further term of two years at a market rent; and (c) the lease would contain the same covenants as were contained in the lease dated August 10th, 1972, other than the covenant requiring the tenant to modernize the frontage of the premises.

5 Once the above order was perfected, nothing else happened. No lease was executed or registered. The parties continued as before, except for the increase in the rent.

6 On April 10th, 1986, the landlord served another notice on the tenant terminating his tenancy on October 31st, 1986, but on this occasion the landlord stated in the notice that he would oppose the grant of a new tenancy on the grounds that (a) the tenant was guilty of persistent delay in paying his rent; and (b) the landlord wanted the premises to carry on his own business.

7 On November 4th, 1986, the tenant issued the present originating summons, seeking a five-year lease at market rent, having, the day before, obtained the following order:

“The plaintiff and the defendants by their counsel stating that they have agreed to the terms hereinafter set out and consenting to this order, IT IS ORDERED as follows:

1. Subject to paragraph 2 hereof, the plaintiff have liberty to file and serve an originating summons herein notwithstanding that the prescribed time limited for doing so has elapsed.

2. That in the event of the court holding that the tenant is entitled to a new tenancy of the premises at 73 Main Street, Gibraltar, the new market rent will have effect and be payable from January 1st, 1986 notwithstanding that the notice to quit herein expired on October 31st, 1986.

3. That the costs of the application be costs in the cause.”

8 At the hearing of the present originating summons the landlord did not adduce any evidence in support of either of the two grounds on which he stated in his notice of termination of tenancy dated April 10th, 1986 that he would oppose the grant of a new tenancy, *i.e.* persistent delay in paying rent and wanting the premises for his own business. This does not mean that the landlord agrees that a new tenancy should be granted. The

landlord is relying on submissions made by his counsel that in law, the tenant is not entitled to a new tenancy, or that if he is, the said tenancy should come to an end on October 31st, 1991. I will deal with those submissions in due course.

9 I shall now revert to the classical pattern in deciding these cases. There has been little discussion or argument about the terms of the tenancy. It appears that if a new tenancy were to be granted, the terms should be the same as the terms of the lease dated August 10th, 1972, other than cl. 1(9) relating to the modernization of the frontage—in fact, the terms agreed to in the consent order of November 3rd, 1986. I find as a fact that those are the reasonable terms in the circumstances.

10 The next thing to decide is the duration of the new tenancy. This has not been agreed between the parties. The tenant is asking for a five-year lease. The landlord, apart from the issue of whether the tenant is entitled to a new tenancy at all, is not adverse to a lease for five years, provided that the date of commencement of the said lease is November 1st, 1986.

11 In support of this latter contention, counsel for the defendant invites the court to give to the phrase: “and shall begin on the coming to an end of the current tenancy,” in s.52 of the Landlord and Tenant Ordinance, a logical interpretation, and consequently the correct interpretation. His argument is that the words “current tenancy” should have the same meaning in whichever section they occur in the Ordinance. He relies on the Gibraltar Court of Appeal decision in *J.T. Chanrai (Gibraltar) Ltd. v. Wembley Stores Ltd.* (2). The court followed the decision in *Frederick Lawrence Ltd. v. Freeman, Hardy & Willis Ltd.* (4), and held that the definition of current tenancy found in s.45(1) applied also to s.49(2) of the Landlord and Tenant Ordinance. Section 45(1) reads as follows:

“A tenant’s request for a new tenancy may be made where the tenancy under which he holds for the time being (hereinafter referred to as ‘the current tenancy’) is a tenancy granted for a term of years certain exceeding one year, whether or not continued by section 43, or granted for a term of years certain and thereafter from year to year.”

Not the easiest of definitions. Counsel for the defendant submits that the above definition should be applied to s.52. Logic demands that it should so be, and consequently that the new tenancy must begin at the termination of the current tenancy, *i.e.* the termination date on the notice of April 10th, 1986.

12 In arguing this, Mr. Stagnetto, for the defendant, has an uphill task, though not necessarily an impossible one. He has to convince me that the case of *Lombard Ltd. v. Beaumont Ltd.* (5) was wrongly decided. In that case (Mr. Stagnetto also appearing for the landlord), I decided that the

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commencement date of a new tenancy is not the end of the current tenancy but three months from the disposal by the court of an application for a new tenancy. I held this to be the case because of s.77 of the Landlord and Tenant Ordinance. Section 77, in so far as it is relevant to the present proceedings, reads:

“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 3 months and not at any other time.”

The effect of this is that the current tenancy continues until three months after the final disposal of the application by the court and that is the date of commencement of the new tenancy.

13 If the *Lombard* case were the only hurdle to surmount, the gradient of the uphill task would not be very steep, but the *Lombard* case was decided following the English decision in *In re 88 High Rd., Kilburn* (1), where it was held on the basis of equivalent English legislation that—

“the grant of a new tenancy which would begin at the end of the current tenancy by virtue of s. 33 of the Act of 1954 was governed by s. 64(1) of the Act and accordingly the new lease would not commence until the expiration of a period of three months after the termination of all proceedings relating to the application, notwithstanding any injustice which might result to the landlords by the continuation of the rent payable under the old lease.”

See *Frederick Lawrence Ltd. v. Freeman, Hardy & Willis Ltd.* (4) ([1959] 3 All E.R. at 87), in which *In re 88 High Rd., Kilburn* was considered and approved by the English Court of Appeal.

14 Mr. Stagnetto fails on this part of his submission. I hold that the *Lombard* case (5) is still good law.

15 I think I should refer to s.2 of the Landlord and Tenant Ordinance, and quote the relevant part:

“(1) In this Ordinance, unless the context otherwise requires—

...

‘current tenancy’ has the meaning assigned to it by section 45(1)  
...

Logic need not be offended if identical words have a different meaning in different sections of a statute or Ordinance, if the context so requires. This is an example of it. In support of counsel’s first submission that the tenant was not entitled to any relief at all, the argument is that when the current tenancy came to an end on October 31st, 1986, the tenant only had a periodic tenancy and therefore he could not claim that he had a term of years. I do not think that this point has any merit. The current tenancy did not come to an end on the termination date because it was saved by s.77. There was an interim continuation of the tenancy pending the present determination by the court.

16 Now we come to the rental. The leading case on this subject is *Khubchand & Co. Ltd. v. Key City Properties Ltd.* (3), in which the then Chief Justice laid down the principles which should be applied, and which have been followed since then. This is what he said:

“The proper course is for the court to assess the general factors, the special factors, the actual rents, taking into account the dates when they were agreed or assessed, of comparable properties and the opinions of professional witnesses and then arrive at its own conclusion.”

17 Applying the above to the present application, I will deal first with the general factors. There is no dispute that 73 Main Street at the present moment in time is on the most favoured part of Main Street, and that it is a medium-sized shop with a reasonable sized store.

18 Secondly, the special factors: nothing special; it is not a corner shop; it does not suffer from not having a pavement or being too exposed to the sun in summer; it is as normal a shop as you can get, although its frontage is said to be old-fashioned.

19 Thirdly, the parties have each produced a list of comparables. Except for one particular premises the lists do not coincide. The exception is Bramworth Ltd., at 23 Main Street, with a rental of £1,400 per month, fixed in September 1990. The total area of this shop is 813 sq. ft., composed of 672 sq. ft. of the shop proper and 140 sq. ft. of the non-shop area. The rental works out at £20.66 per square foot, per annum.

20 There is another shop in the same area which is not in the plaintiff’s list, but which Mr. Schembri, the expert witness for the plaintiff, when asked by the court which particular premises in either of the lists of comparables was more comparable than any of the others, said he would select as probably the most comparable, namely “Stagnetto of 56 Main Street.” Stagnetto of 56 Main Street is almost opposite 73 Main Street. It has an area of almost 768 sq. ft. and on the list of comparables I was

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given the overall rent to be £21.90 per square foot, per annum. When Mr. Mark Hassan, an expert for the defendant, came to give evidence, he told me that the monthly rent was £1,400 and that the shop proper was 611 sq. ft.

21 Stagnetto of 56 Main Street, together with Hammonds (next door to the former), were Mr. Hassan's choices as the most comparable. Hammonds of 54 Main Street commands a rent of £1,350. It has a total area of 709 sq. ft., of which 613 are the shop proper and 96 the non-shop area.

22 The rents in all these premises have been fixed recently. I shall use all three as comparables. In both the plaintiff's and defendant's lists of comparables there are some premises which are clearly not comparables and are therefore of no assistance to me. I will name some by way of example. Crown Chemist of 211/213 Main Street is too far away from the area of Main Street with which we are concerned. S.M. Serruya Ltd. of 187/189 Main Street is a corner shop. The same applies to Mahtani of 158 Main Street. Similarly, the International Commercial Centre units are not a good guide in this case.

23 The premises at 73 Main Street have a total area of 626 sq. ft., the shop proper being 535 sq. ft., and the non-shop area, 91 sq. ft. The proportion of non-shopping area is not greatly dissimilar in the three comparables and 73 Main Street.

73 Main Street	91 to 626 (about 1/6)
Stagnetto, 56 Main Street	157 to 768 (about 1/5)
Hammonds, 54 Main Street	96 to 613 (about 1/6)
Bramworth, 23 Main Street	140 to 813 (about 1/6)

24 I have taken into account the opinion of the experts, all duly qualified and experienced. Mr. Schembri, for the plaintiff, says that the proper rent for 73 Main Street should be £1,000 per month. For the defendant, Mr. Brian Francis comes to the conclusion that it should be £1,200 per month, and Mr. Hassan is nearer to Mr. Francis and says it should be £1,190 per month.

25 Taking into account all the relevant factors, including the opinion of experts and the comparables, I have come to my own conclusion, which I am going to test by a simple mathematical exercise, making use of the comparables selected.

*Stagnetto*: if for 768 sq. ft. the rent is £1,400, for 626 sq. ft. it is £1,141.

*Hammonds*: if for 709 sq. ft. the rent is £1,350, for 626 sq. ft. it is £1,191.

*Bramworth*: if for 813 sq. ft. the rent is £1,400, for 626 sq. ft. it is £1,077.



Taking everything into account, including a very slight disadvantage of this particular shop having an old-fashioned frontage, and the fact that the evidence adduced shows that rents have stabilized, I have come to the conclusion that the proper rent for 73 Main Street is £1,100 per month, for the first three years.

26 The defendant is to have a five-year lease with a rent review at the end of the first three years. The rent for the first three years is fixed at the rate of £13,200 per annum.

*Order accordingly.*