[1991–92 Gib LR 222]

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

COURT OF APPEAL (Fieldsend, P., Davis and Huggins, JJ.A.): February 25th, 1992

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 appellant landlord applied to the Supreme Court for possession of premises that were sub-let to the respondents.

The appellant, as holder of a long lease of furnished residential premises, entered a tenancy agreement with A Co. in respect of the premises. The appellant had made the premises into a single property. The agreement contained a covenant not to assign or sub-let the premises without the appellant's written consent, and provided that a specified minimum sum should be paid in rent as a condition of the appellant's giving that consent.

A Co. sub-divided the flat and its principal offered part of the premises to the Oliva family (the respondents) as unfurnished living accommodation, under a licence agreement which they signed after they had gone into occupation. The agreement expressly stated that they were not granted exclusive possession of the premises, although when they queried this they were assured that they would have. It included terms to show that A Co. retained control of the property, such as an obligation on the company to keep the premises clean and supply fresh bed linen weekly. The licence fee was calculated on a daily basis.

The family had taken the premises as an alternative to unsuitable accommodation, some distance from Mr. Oliva's place of work. The family did, in fact, enjoy exclusive occupation.

The appellant discovered the sub-letting and commenced the present proceedings for possession against A Co. and the respondents, alleging the breach of several covenants by A Co. The respondents 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. A far lower rent was determined provisionally by the Tribunal, but the application was adjourned pending the court's determination of the

appellant's claim for possession, together with arrears of rent and mesne profits, plus damages. The appellant obtained judgment in default of defence against A Co. for non-payment of rent but the respondents claimed relief from forfeiture under s.6 of the Land Law and Conveyancing Ordinance.

The Supreme Court (Alcantara, J.) held that the respondents were *prima facie* tenants, notwithstanding the licence agreement, as they had exclusive possession of the premises. The tenancy was a protected tenancy under Part III of the Landlord and Tenant Ordinance and, as a landlord in relation to the respondents, A Co. was subject to the Ordinance. However, the respondents could not claim protection from eviction under s.18(8) of the Ordinance as sub-tenants whose tenancy pre-dated the proceedings against A Co., because the sub-letting was unlawful, the consent of the appellant having been neither sought nor obtained. The court nevertheless granted relief from forfeiture under s.6 by granting a tenancy for one month. The respondents had knowingly become party to a sham licence agreement, but had taken the accommodation out of desperation without regard to the terms.

The court took into account in particular that the appellant's priority when considering whether to consent to sub-letting was financial, and that both the rent charged to A Co. and that required under the lease as a condition of giving consent were far higher than was authorized by law. This was an evasion of the terms of Part III of the Landlord and Tenant Ordinance. The proceedings in the Supreme Court are reported at 1991–92 Gib LR 1.

On appeal against the court's exercise of its discretion to grant relief from forfeiture, the appellant submitted that (a) the discretion should be exercised only in exceptional circumstances where the sub-tenant had been blameless in its conduct and had no reason to suspect the existence of a head-lease with restrictive covenants; (b) accordingly, the fact that the respondents knew the licence agreement was a sham agreement concealing the creation of a tenancy was a factor the court should have taken into account; (c) furthermore, the court should have given more weight to the prejudice that the landlord would suffer because the terms of the respondents' sub-tenancy differed from those of A Co.'s tenancy and because at the end of their sub-tenancy, the respondents would be able to claim security of tenure under the Ordinance; and (d) the appellant had done no wrong in charging A Co. a high rent, and since the covenant in the lease to the company was in fact worded so that the obligation was on the *sub-lessor* to pay the minimum rent as a condition of the appellant's consent, not the *sub-lessee*, it was immaterial to the appellant's claim for possession as against the respondents.

The respondents submitted in reply that (a) the factors to be considered when exercising the discretion to grant relief from forfeiture under s.6 of the Land Law and Conveyancing Ordinance were (i) the conduct of the sub-tenant seeking the relief, (ii) any prejudice or disadvantage to the landlord if relief were granted, and (iii) any reprehensible conduct on the

part of the landlord; (b) the Supreme Court had properly concluded that any blame on their part in signing an agreement that did not reflect the true terms of their occupation was minor, given their pressing need for accommodation and the high rent paid by them, and in any event was irrelevant because the appellant had proceeded on the basis of breach of the covenant to pay rent; (c) any prejudice suffered by the landlord as a consequence of the granting of relief from forfeiture was outweighed by the impropriety in the way it had conducted itself; and (d) the court had correctly given weight to the fact that the landlord had charged A Co. a rent well in excess of the statutory rent applicable to the premises under the Landlord and Tenant Ordinance and had required as a condition of consenting to any sub-letting that a similarly high rent be paid.

Held, dismissing the appeal:

(1) The Supreme Court had not made a clear finding on the state of the respondents' knowledge when Mrs. Oliva had signed the licence agreement as to the implications for anyone standing in the relationship of landlord to A Co. Nor had he stated what weight he attached to their knowledge. This he should have done. The evidence was that when Mrs. Oliva signed the agreement she did not know who exactly was to be deceived by it, but the fact that the sham document must have been intended to deceive someone meant that the respondents were at least negligent and did not come to the court seeking relief from forfeiture with entirely clean hands. The judge had not found that she had conspired to deceive the appellant, knowing there was a covenant against sub-letting. He had considered the respondents' pressing need for accommodation and the fact that they had gone into occupation before they signed the agreement, as matters relevant to that knowledge rather than factors for and against granting relief. But, in any event, he had not based his decision on those circumstances. Furthermore, the appellant had sought forfeiture on the basis of A Co.'s non-payment of rent, not breach of the covenant not to sub-let (paras. 12–14; paras. 36–37; para. 58; paras. 60–63; paras. 65–69).

(2) Similarly, the Supreme Court had not dealt expressly with the question of possible prejudice to the appellant from granting relief from forfeiture, but had clearly taken into account that by doing so it would be conferring security of tenure on them as against the appellant. It had not indicated, however, what weight it gave to this. There would also be potential prejudice to the appellant because of the more favourable terms upon which A Co. had let to the respondents and because whereas it had let furnished premises, A Co. had sub-let them as unfurnished, and therefore a lower statutory rent was payable by the respondents than would be payable by A Co. Furthermore, the part of the premises not sub-let to the respondents would be difficult to let, and the appellant might be forced to lease the whole premises to them (paras. 15–17; para. 23; para. 43; paras. 81–82).

(3) There was no flagrant breach of the law by the appellant in charging A Co. a rent in excess of the rent recoverable under the Landlord and Tenant Ordinance. There was no clear intention to evade the Ordinance nor was this a criminal offence, and the terms of the tenancy had been agreed at arm's length. Furthermore, on a plain reading of the covenant not to sub-let, the requirement was imposed on A Co., as tenant, rather than on the respondents, to pay the minimum rent specified in the lease as a condition of the appellant's agreement to sub-letting. Therefore, whatever the respondents paid to A Co., it was A Co.'s obligation under the lease to pay that sum. The Supreme Court had misinterpreted this aspect of the lease agreement (paras. 18–20; paras. 38–42; paras. 83–85).

(4) However, the appellant's charging of an irrecoverable rent was a factor that outweighed anything that could be said against the respondents. Even if the Supreme Court had misconstrued the agreement, it had been entitled to take into account that the appellant was motivated by the desire to obtain a specified high rent in the event of an assignment or sub-letting and that that rent exceeded that recoverable under the Landlord and Tenant Ordinance. A company was protected as to rent under the Ordinance too. It was not necessary to find, on the facts, a deliberate attempt to evade the Ordinance (para. 44; paras. 86–91 (Fieldsend, P. dissenting, para. 23)).

(5) Since the Supreme Court had not fully or correctly considered the proper factors, the court would consider the matter afresh. The discretion to grant relief from forfeiture was to be exercised sparingly. Taking into account all the above matters, the court would dismiss the appeal, but would set aside the order of the Supreme Court in the respondents' favour because the parties had stated that if relief were granted the new tenancy should be of the whole premises. Accordingly, the court would remit the case to the Supreme Court to reconsider the terms of the tenancy in the light of that. The parties were at liberty to negotiate the terms to be put to the court, and if they could not agree on the statutory rent, the Rent Tribunal should determine it (paras. 42–46; paras. 86–92; paras. 93–95 (Fieldsend, P. dissenting, paras. 21–25)).

Cases cited:

(1) *Carter* v. *S.U. Carburettor Co. Ltd.*, [1942] 2 All E.R. 228, referred to.

(2) *Creery* v. *Summersell & Flowerdew & Co. Ltd.*, [1949] 1 Ch. 751; [1949] L.J.R. 1116; 93 Sol. Jo. 357, applied.

(3) *Factors (Sundries) Ltd.* v. *Miller*, [1952] 2 All E.R. 630, considered.

(4) *Hurd* v. *Whaley*, [1918] 1 K.B. 448; [1918–19] All E.R. Rep. 812, applied.

(5) *Imray* v. *Oakshette*, [1897] 2 Q.B. 218; distinguished.

(6) *Lee* v. *K. Carter Ltd.*, [1949] 1 K.B. 85; [1948] 2 All E.R. 690, referred to.

(7) *Swanson* v. *Forton*, [1949] Ch. 143; [1949] 1 All E.R. 135, referred to.

Legislation construed:

Land Law and Conveyancing Ordinance (1984 Edition), s.6: The relevant terms of this section are set out at para. 7.

Landlord and Tenant Ordinance (1984 Edition), s.18(8):

> "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 ejectment 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."

A.V. Stagnetto, Q.C. for the appellant;
A. Serfaty for the respondents.

1 **FIELDSEND, P.:** The appellant landlord holds the property in question in this appeal under a head-lease for 99 years from January 1986, for which it paid £29,500. Originally known as Flats 1 & 2, 2 Castle Street, each comprising three rooms and a kitchen, it was let to the appellant on various conditions including one that each flat could be used only as a private dwelling-house for one family, or as an office for professional practice. There was a prohibition against sub-letting a part only of either flat. The appellant also agreed to pay a maintenance charge fixed later at £20 a month. The appellant converted the premises into one flat of four rooms with a kitchen and a bathroom.

2 The flat so converted the appellant then let to a company, After Hours Ltd., as a furnished property for nine years from November 1st, 1988. Under the terms of this lease the company was obliged to provide all necessary furniture and fittings to the value of £8,000 which were to become the property of the appellant. The company could not assign or sub-let without written consent. The rent was fixed at £425 for the first three years, £490 for the second three, and £560 for the last three. The company seems to have accepted a liability to pay £20 a month for the maintenance charge, and it undertook to do certain interior and external decoration during the lease. There was the usual forfeiture clause for breach of the company's covenants. The company made certain structural alterations, finally dividing the premises into a flat of three rooms with a kitchen and a bathroom, and a separate unit of two rooms.

3 In December 1988, Mr. Gohr, the principal shareholder in the company, offered the flat of three rooms with kitchen and bathroom (apparently unfurnished) to Mr. & Mrs. Oliva (now the respondents) at a rental of £120 a week, a rent well in excess of what the company was

paying for the whole premises. The Olivas accepted and on December 2nd Mrs. Oliva paid a deposit of £480 and was given a receipt in the following terms:

> "Received from Mr. and Mrs. Oliva the sum of £480 as a deposit for a licence to occupy Flats 1/2, 2 Castle Steps. The licence agreement is to be prepared within the next few 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."

It was signed by Mr. Gohr for his company and by Mrs. Oliva.

4 The Olivas went into occupation on December 12th and the anticipated licence agreement, dated December 12th, 1988, was signed by the parties. This document recites that the licensor is the tenant of the premises and that he is unwilling to grant the licensees exclusive possession of them. It then sets out strange terms designed to show that the licensor was keeping tight control of the property. He undertook to supply a change of bed linen at least once a week and to be responsible for keeping the premises clean. The licence was to run from December 12th, 1988 and the licensees were to pay £17.15 per day for the licence (*i.e.* £120.05 a week).

5 This licence agreement was clearly a sham and recognized by Mrs. Oliva as such, for when she queried some of its terms, and in particular whether she and her family had the right to exclusive occupation, she was assured by Mr. Gohr that they had that right. The trial judge found that the Olivas had been granted exclusive possession of the property and that they occupied as tenants. This was not challenged on appeal; indeed it had all along been the appellant's contention that After Hours Ltd. had breached its agreement of lease by sub-letting to the Olivas without authority.

6 Proceedings by the appellant were started against After Hours Ltd., alleging a number of breaches of its undertakings including non-payment of rent for April and May 1989 and sub-letting without consent, and claiming forfeiture of the lease, and opposing the Olivas' claiming possession. In the event After Hours Ltd. did not contest the action against it. The Olivas claimed in defence that they were protected in their possession under the Landlord and Tenant Ordinance and counter-claimed in the alternative for relief under s.6 of the Land Law and Conveyancing Ordinance. The trial judge granted this alternative relief, granting Mr. Oliva "a tenancy for one month of the premises he now holds," but ordered him to pay the costs. It is against the first part of this order that the appellant now appeals.

7 The only issue in the appeal is whether the learned trial judge correctly exercised his discretion under s.6 of the Ordinance. The section provides that in circumstances such as these—

> "the court may . . . 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 upon such conditions as the court in the circumstances of each case shall think fit, 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."

8 It is common cause that, applying the Court of Appeal decision in *Factors (Sundries) Ltd.* v. *Miller* (3), there is no conflict between s.6 of the Land Law and Conveyancing Ordinance and the Landlord and Tenant Ordinance, and that although the sub-tenant was not protected under s.18(8) of the latter Ordinance he could properly claim under the former Ordinance.

9 Mr. Stagnetto relied primarily on *Imray* v. *Oakshette* (5), and in particular on the passage where Lopes, L.J. said of the relief under the equivalent English provision ([1897] 2 Q.B. at 225):

> "It is a relief which ought to be given with caution and sparingly. It is exceptional. It could not be given to the lessee. It materially effects the interests of lessor and lessee. Before asking for it the underlessee ought to be in a position to prove that he is blameless and exercised all those precautions which a reasonably cautious and careful person would use."

In that case the under-lessee was acquiring a lease of 21 years (less 12 days), with a covenant in it not to assign without consent, and was about to spend £500 on the property. This it was held ought to have put him on his enquiry, particularly because of the implication that the lease he was acquiring was likely to be the subject of a head-lease, and the court refused relief.

10 Mr. Stagnetto also argued that the fact that at the expiration of the respondents' lease they would be able to claim the protection of the Landlord and Tenant Ordinance in regard to continued possession was a factor which should weigh heavily against the exercise of discretion in the respondents' favour. This, he said, flowed from the principle that had long been accepted that it was not unreasonable for a landlord to withhold his consent to an assignment or sub-letting where that would let in an assignee or sub-tenant with the rights of a statutory tenant which the sub-lessor did not have: see *Swanson* v. *Forton* (7) and *Lee* v. *K. Carter Ltd*. (6).

11 On the question of the exercise of the discretion under s.6, Mr. Serfaty referred to *Hurd* v. *Whaley* (4) ([1918] 1 K.B. at 451) and *Creery* v. *Summersell & Flowerdew & Co. Ltd.* (2) ([1949] 1 Ch. at 764–767). There, a somewhat less restrictive approach to that applied in *Imray* v.

Oakshette (5) was thought to be appropriate. The general factors to be considered are whether (i) there was any serious blameworthiness or negligence on the part of the person seeking relief, (ii) there would be any real prejudice or disadvantage to the landlord, and (iii) there was any reprehensible conduct on the part of the landlord. Then, taking all these factors into account, there must be a balance in favour of the person seeking relief to show it is equitable that he should get it.

Blameworthiness of the Olivas

12 The relevant date for determining any blameworthiness or negligence on the part of the Olivas must be the date on which Mrs. Oliva signed the licence agreement. That this was after they had entered into occupation is irrelevant, for the receipt for the deposit clearly said it was subject to the agreement being mutually satisfactory. The agreement was signed some time after December 12th. At that stage, Mrs. Oliva knew from the licence itself that the licensor was a company, and that it was itself a tenant and not the owner of the premises. She also appreciated that the agreement was a sham, for she had queried the matter of exclusive possession and the provision of bed linen. She had been told by Gohr that certain terms in the agreement were there to cover him—against what, she said she did not ask, and was not told. She said she did not have any idea whom Gohr was trying to deceive, but, appreciating that it was a sham, she must have realized that it was to deceive someone, especially as she was told by Gohr "you have to sign things you do not agree."

13 The learned judge did not find expressly that the Olivas knew that the company had power to sub-let. He did say, however, that they were "not in exactly the same position as the tenant in *Factors (Sundries) Ltd.* v. *Miller* (2), who was unaware that the previous tenant had no power to sub-let." This may mean that the Olivas did realize that the company had no power to sub-let to them but, when read in the light of what follows, it may mean that they were desperate for accommodation and this provides an excuse for their conduct. It may mean that as lay people they did not appreciate the significance of the deception and did not realize that the deception was related to any lack of power to sub-let.

14 But the Olivas lent themselves to the creation of a sham document which must have been intended to deceive someone. This certainly does not leave them entirely blameless, and at least gives rise to the inference that they entered into the arrangement negligently. Unfortunately, the learned judge has not dealt with what weight, if any, he attached to this conduct of the Olivas or how, if at all, it affected the exercise of his discretion. This, I feel he should have done, as, on the authorities, it could be an important factor.

Prejudice to the appellant

15 Equally, the learned judge has not dealt expressly with the question of possible prejudice to the appellant from the exercise of his discretion in favour of the respondents. There clearly would be possible, if not actual, prejudice to the appellant in imposing the Olivas upon it. The appellant let furnished premises, the Olivas obtained unfurnished premises. The basis of assessing a statutory rent under s.11 and Schedule 1 is different for furnished property (see para. 3 of the Schedule which allows the addition of one-eighth of the value of furniture supplied to the rent determined under para. 1). The inclusion of a part of one of the separate flats in the premises occupied by the Olivas is a contravention of a requirement of the head-lease. No provision for internal and external decoration of the premises, such as was in the company's lease, was made for the Olivas. No requirement that the Olivas pay any part of the maintenance charge was included in their terms.

16 But most important of all is the fact that, whereas the company did not have security of tenure under the Landlord and Tenant Ordinance (see *Carter* v. *S.U. Carburettor Co. Ltd.* (1)), the Olivas, if allowed to stay, will have the full protection of Part III. The learned judge appreciated this last point, but not apparently any of the others. He does not indicate how he weighed it in the balance. The facts are different from those in *Factors (Sundries) Ltd.* v. *Miller* (3), where the forfeiting sub-lessor himself had protection against eviction under the Rent Acts. The company here, of course, had no protection.

17 These are all important points where the appellant has paid £29,500 for a long lease and incurred expenditure in converting the two flats let to it into one larger unit. The effect of letting in the Olivas is to divide the premises into one flat and a pair of separate rooms without facilities. It is no answer to say that this could be overcome by granting the Olivas a lease of the whole. That might be a last desperate expedient, but one asks why it should be forced on the appellant.

Impropriety of the appellant

18 Mr. Serfaty argued below and on appeal that the appellant had acted in flagrant breach of the law in stipulating for a rent in excess of the "recoverable rent" under the Landlord and Tenant Ordinance, first from the company and secondly from the Olivas by the provisions of cl. 5(k). Mr. Stagnetto rightly conceded that the rent charged to the company exceeded the standard rent prescribed in Schedule 1. It seems that the standard rent for the Olivas' flat let unfurnished was just over £20 a month. But it does not seem to have been appreciated that the standard rent recoverable by the company had to take into account an allowance for furniture: see Schedule 1, para. 3.

19 The agreement with the company was apparently one negotiated at arm's length between equal contracting parties. The company could at any stage have gone to the Rent Tribunal for determination of its rent. There is no flagrant breach of the law, nor is there any evasion of the Ordinance by stipulating for what is an irrecoverable rent. It is not a criminal offence, as it is under s.32 to require an exorbitant rent. Secondly, the trial judge found that cl. 5(b) entitled the appellant to impose a condition on the sub-tenant that the rent payable by him should be the "market rent." This clause entitled the appellant, in agreeing to any assignment or sub-letting, "to require the assignee or sub-lessor to pay the market rental of the premises, which shall in no case be less than the rental provided in the agreement." In this he was in error. The clause refers to the sub-lessor, not to the sub-lessee or sub-tenant, and there has been no application to rectify the wording. The clause may not be elegantly drafted, but as it stands it does make grammatical and logical sense.

20 There was no justification to take this into account as between the appellant and the respondents. It was of relevance only between appellant and the company. Nor should it have been characterized as tantamount to an evasion of the Ordinance. Mr. Serfaty contended only at the conclusion of Mr. Stagnetto's reply that the appellant's concern was mainly for rental, as evidenced by the fact that the pleadings relied specifically for forfeiture only on the failure to pay rent. The other breaches were, however, clearly set out and great weight cannot be placed on this. I do not think it can be said, as was said in *Factors (Sundries) Ltd.* v. *Miller* (3) ([1952] 2 All E.R. at 632), that it was a reasonable inference that if the appellant had got its rent it would not have bothered about the breach of covenant in regard to sub-letting without consent. The present facts are more akin to those in *Lee* v. *K. Carter Ltd.* (6).

Exercise of discretion

21 It is on the facts set out above that the discretion under s.6 should have been exercised. In my view, these were not fully or correctly considered by the learned trial judge. Accordingly it is now for this court to assess the matter afresh and to exercise its own discretion. The relevant factors for and against each party have to be balanced.

22 All that there is positively in the respondents' favour is their apparently urgent, if not desperate, need for accommodation. It would undoubtedly be a hardship for them to have to leave the flat with their children, as housing is very difficult to obtain in Gibraltar. On the other hand, they acted very hastily and were parties to an admittedly sham agreement obviously designed to deceive someone. This, in itself, should have put them on their guard that all was not right with their arrangement with the company.

23 The appellant has undoubtedly sought in its agreement with the company to get as much rent as it could over and above the "recoverable rent." But this has been done openly and in an agreement with an equal contracting party. There has been nothing secretive or underhand in his conduct. The appellant would certainly be prejudiced by the exercise of discretion in the respondents' favour. The whole basis of its original letting to the company would be destroyed. It would have a natural person with security of tenure as a tenant instead of a company without it. It would have a tenant of unfurnished, not furnished, premises. It would be left with two rooms that would be difficult to let, or it would have forced on it a lease of the whole to someone who had wanted only a part. It would have tenants who had not undertaken any obligations for redecoration or payment of the maintenance charge.

24 As was said in *Creery* v. *Summersell & Flowerdew & Co. Ltd.* (2) ([1949] 1 Ch. at 767), the jurisdiction under this legislation is to be exercised sparingly because it thrusts upon a landlord a person whom he has never accepted as a tenant and creates *in invitum* a privity of contract between them. It is clearly a serious matter for a landlord when the person so thrust upon him would have greater rights and lesser liabilities than the forfeiting lessor through whom he managed to get into occupation.

25 In my view, this is not a case where it can be said that, balancing all the relevant considerations the court should exercise its discretion in favour of the respondents whose main case rests on personal hardship. I would allow the appeal and set aside the order of the court below in favour of the respondents.

26 **HUGGINS, J.A.:** On this appeal the appellant challenges only the grant of relief against forfeiture to the respondent sub-tenants under s.6 of the Land Law and Conveyancing Ordinance. By an agreement in writing dated October 31st, 1988, the appellant let two flats to a corporation for a term of nine years from November 1st, 1988. It is now common ground that they were let as one separate dwelling-house and that Part III of the Landlord and Tenant Ordinance applied to it. It was expressed to be a letting of furnished premises, although the corporation was to provide the furniture to a value of £8,000. It is immaterial that the price of the furniture may arguably have been a premium. The rent was agreed at £425 per month for the first three years, with specified increases for each period of three years thereafter. There was provision for an interest-free loan by the corporation to the respondent of £8,000, which was to be repaid by deductions from the rent, but, again, this is not material to the action.

27 It seems to be common ground that the rent agreed was irrecoverable. The basic statutory rent under s.11 cannot have been greatly in

excess of the rent provisionally assessed by the Tribunal in respect of the appellants' premises. To that would have to be added, for the first eight years of the tenancy, one-eighth of the value of the furniture as on the date it was provided (para. 3 of Schedule 1), but the statutory rent would still be nothing approaching the contractual rent.

28 It is not now disputed that in December 1988 the corporation sub-let the whole of the two flats, with the exception of two rooms, to the respondents, without seeking the written (or, indeed, any) consent of the appellant, as a separate dwelling-house. The rent of these premises was to be £120 per week. Some time after the respondents went into possession they signed an agreement in writing, drawn up by the corporation's solicitors, in the form of a licence to occupy "that part of the [two flats] allocated from time to time by the licensor, as he sees fit," at a fee of £17.50 per day. The second respondent knew that this agreement was a sham (although she said she did not know whom it was intended to deceive), but they were desperate for accommodation in Gibraltar and were not particular what they signed. They had believed that they were to have exclusive possession of the two flats less the two rooms, and that was what they had in fact been given.

29 On February 16th, 1989 the appellant accused the corporation of sub-letting without its written consent, but such sub-letting was denied and nothing further happened until June 1989. By that time the appellant was alleging sundry breaches of covenant by the corporation and it served notice thereof under s.14 of the Conveyancing and Law of Property Act 1881. However, without any knowledge of these complaints the respondents applied to the Rent Tribunal for determination of the rent they should be paying in accordance with Part III of the Landlord and Tenant Ordinance 1983. The Tribunal made a provisional determination that £20.35 was the proper rent, but, having been informed of the present action, made no formal decision pending the conclusion of the action.

30 The action had been brought by the appellant against the corporation and the respondents for, *inter alia*, forfeiture and possession. The statement of claim alleged breaches of the corporation's covenant to pay rent, the covenant not to sub-let without written consent and other covenants with which we need not be concerned. Then there was pleaded a proviso for forfeiture for non-payment of rent but not for the other alleged breaches of covenant, although the proviso in the agreement was not so limited. Subsequently the solicitors for the appellant filed a certificate that the claim did not relate to a dwelling-house the tenancy of which was protected under the Landlord and Tenant Ordinance.

31 The corporation did not defend the action, and judgment was entered against it in default. The respondents did not admit the alleged breaches of covenant by the corporation, and pleaded that both the rent which had

been charged for the corporation's premises and the rent which had been charged for their premises were "unlawful." They claimed the protection of the Landlord and Tenant Ordinance.

32 Having held that the respondents were sub-tenants and not licensees, the trial judge next decided that the corporation had been protected by the rent restriction provisions of the Ordinance, although not by the provisions conferring the status of irremovability. He did not go on to consider what (if any) was the consequence of this decision. Instead, he passed to the issue whether the letting by the corporation to the respondents was lawful and whether, therefore, they could claim protection under s.18(8) of the Landlord and Tenant Ordinance. He found that the manifest breach of the covenant against sub-letting had not been waived, so that such protection was not available. Nevertheless, he held that the respondents could properly claim relief against forfeiture under s.6 of the Land Law and Conveyancing Ordinance.

33 As I indicated at the outset, the appellant has on this appeal raised no issue other than the adequacy of the grounds for granting relief against forfeiture. Moreover, the respondents have not sought to rely upon any grounds other than those relied upon by the judge, which they might well have done. The learned judge's reasons are set out in three paragraphs at the end of his judgment (1991–92 Gib LR 1, at paras. 29–31):

> "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.
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> 30 In this case the Olivas, as tenants, are not in exactly the same position as the tenant in *Factors (Sundries) Ltd.* v. *Miller* . . . 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 and

above what the law authorizes it to demand. This is tantamount to an evasion of Part III of the Landlord and Tenant Ordinance."

34 The first of those paragraphs is unexceptionable in itself, but the judge would hardly have said this if he had not thought that there had been a material evasion. He had just stated that counsel for the respondents had argued that the behaviour of "the first defendant" (the corporation) was a flagrant breach of the law in demanding more rent than "the landlord" was entitled to under the law. It is not clear whom he meant by "the landlord," but the appellant ought not to be blamed for any misbehaviour of "the first defendant." In fact, it appears from the notes of proceedings that the judge mis-stated counsel's argument, which is recorded as follows: "Behaviour of lessor. In flagrant breach of the law. Clean hands on both sides."

35 The sides to this dispute were the appellant and the respondents, not the corporation and the respondents. It would therefore seem that it was the behaviour of the appellant (the lessor to the corporation) to which counsel had referred. As I understood it, although counsel did not contend that the appellant had disentitled itself altogether by basing its claim on non-payment of an exorbitant rent, he was saying that that basis was a factor in the respondents' favour when it came to considering the grant of relief. It seems to have been that "flagrant breach" which the judge regarded as an "evasion." Ground 3 in the memorandum of appeal contends that the judge made the agreement between the appellants and the corporation "the basis" for granting relief. I am satisfied that he did not do so, but I think that he was justified in taking it into account as a factor to be weighed in the balance. In my view, it was not fatal to this approach that the judge described the agreement as an "evasion." He was clearly referring to the charging of an irrecoverable rent. The appellants could properly avoid the creation of a statutory tenancy by insisting on "a company let," but even a company could not properly be charged a rent in excess of that prescribed in the Ordinance.

36 It is a factor unfavourable to the respondents that they executed an agreement which they knew to be a sham, and it seems to be this which the judge considers in the second paragraph of the passage cited, though I have had difficulty in deducing precisely what he intended by that paragraph. In the first sentence he draws a distinction between the respondents and the tenant in *Factors (Sundries) Ltd*. v. *Miller* (3), "who was aware that the previous tenant [presumably the *mesne* landlord] had no power to sublet." One might infer from that that the respondents did know that the corporation had no power to sub-let, but if the paragraph is read as a whole an interpretation less damaging to the respondents is possible, namely that they were not entirely blameless, as was the tenant in *Factors (Sundries) Ltd.* v. *Miller*, but that they did not appreciate that

the corporation was breaching its covenant. At first, I thought this a rather strained interpretation, but it avoids the conclusion that the judge took into consideration as separate factors several matters mentioned in the paragraph which were obviously not material.

37 Against the fact that Mrs. Oliva read and signed "the licence," the judge sets the facts that the Olivas acquired the accommodation in the open market, that they were desperate for accommodation, and that they went into occupation before signing the agreement. Was he there weighing not factors for and against granting relief, but the evidence as to their knowledge that the corporation had no power to sub-let? He did not make any clear finding on the issue of knowledge. Grounds 1 and 5 in the memorandum of appeal alleged that the judge disregarded, or gave insufficient weight to, the evidence of Mrs. Oliva that she knew the licence agreement was a sham. He did not disregard it. Equally he did not "base" his decision on the facts that the respondents had acquired the accommodation in the open market and that they wanted accommodation at any price and under any conditions, as alleged in Ground 2. At worst, he may have given insufficient weight to the respondents' conspiring with the corporation to deceive. However, I was not persuaded that the judge did find that there was a conspiracy to deceive the appellant. The evidence of Mrs. Oliva was that she knew the written agreement was a sham but that she did not know who was to be deceived, and I did not think one was compelled to the conclusion that she must have known it was intended to deceive the appellant because there was no power to sub-let. Her part in the conspiracy was, therefore, less damaging than if she had had full knowledge. Moreover, it did not relate to the covenant to pay rent, for breach of which the forfeiture was claimed alone.

38 In stating, in the third paragraph of the passage cited above, that the appellant could, upon granting consent to an under-letting, "impose a condition that the sub-tenant should pay" the so-called market rent, the judge misread cl. 5(k) of the agreement, which read as follows:

> "Not to assign, underlet 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)."

Mr. Serfaty had urged that the word "sub-lessor" in that clause must be a typing error for "sub-lessee" and that, if it were otherwise intended, the draftsman would have used the word "tenant." I did not think we were entitled to assume that the agreement was incorrectly engrossed,

especially when one considered that the effect of ss. 14 and 24 of the Landlord and Tenant Ordinance could be to increase the rent payable by a tenant who sub-let.

39 It would seem that the draftsman was under the impression that a corporation was protected neither as to tenure nor as to rent, for it was clear that the rent provided for exceeded the statutory tent. It therefore made sense to provide that, upon a sub-letting, the sub-lessor should pay the market rent if it exceeded the contractual rent. The sub-lessee would pay his rent to the sub-lessor and not to the appellant, whether or not it was the market rent, so upon Mr. Serfaty's argument the appellant would have gained no benefit from the provisions of cl. 5(k).

40 In spite of this misreading of the agreement, was there any force in the point which the judge was making, when one remembered that even a corporation could justifiably claim the protection of the Landlord and Tenant Ordinance in relation to the rent? Clause 5(k) could only have been enforced if neither the contractual nor the market rent exceeded the statutory rent or the rent fixed by the tribunal. As the draftsman seemed to have overlooked the protection afforded to the corporation as to rent, it might be that there was no intention to evade the provisions of the Ordinance, although that was a possible effect of the clause.

41 Although by saying that it was "one further factor" in favour of the respondents, the judge appeared to have thought that the point added something to the argument that the appellant was seeking to charge an irrecoverable rent, in my view, it did not. If charging the contractual rent was "a flagrant breach of the law," *a fortiori* the charging of a higher (market) rent would be "tantamount to an evasion of Part III of the Landlord and Tenant Ordinance." Moreover, I did not think the clause did necessarily show "that what the plaintiffs were really interested in when considering to grant or refuse their consent to an assignment or sub-letting was a high rent," and there was clear evidence that that was not the appellant's main concern.

42 Whether or not, therefore, I was right in my interpretation of the second paragraph cited from the judgment, I came to the conclusion that the judge did err in regarding cl. 5(k) as an additional factor, and that the correct course was for us not to consider whether the judge failed to give due weight to the material factors (as alleged in Ground 6 in the memorandum of appeal) but to substitute our own exercise of the discretion.

43 I accepted the law to be as stated by the judge. I bore in mind (i) that the jurisdiction to grant relief was one which should be exercised sparingly and only where the merits of the case justified relief; (ii) that in the present case the granting of relief might soon saddle the appellant

with a statutory tenant for an indefinite period—though it was true that the appellant had itself granted a tenancy which would have entitled the corporation to retain possession until October 31st, 1997 at a restricted rent, provided that the corporation observed the covenants set out in cl. 5(b) to (m) in the agreement of October 31st, 1988; and (iii) that the respondents did not come to the court with entirely clean hands.

44 Nevertheless, in all the circumstances it seemed to me that the appellant's charging of an irrecoverable rent, although I would not myself have described it as "a flagrant breach of the law," outweighed anything that could be said against the respondents, and that we should exercise the discretion in their favour. On that ground I would dismiss the appeal in so far as the judgment below granted relief from forfeiture.

45 However, the judge vested in the respondents a term of one month in the premises let to them and made no mention of the fact that the parties had indicated their wish that, if relief were granted, the new tenancy should be of the whole property let to the first defendant. I would therefore set aside the order as to the terms of the new tenancy and remit the case to the trial judge to reconsider the terms in the light of that agreement.

46 The parties should be able to agree what is the statutory rent, but I think that in the event that they are unable to agree, the rent should be fixed by the Rent Tribunal upon an application by the appellant. The respondents should probably undertake to observe the tenant's covenants set out in cl. 5(b) to (i), (j) and (1) of the corporation's tenancy agreement.

47 **DAVIS, J.A.:** This is an appeal against the decision of Alcantara, A.J., granting the respondents relief from forfeiture of property comprised in an under-lease under s. 6 of the Land Law and Conveyancing Ordinance.

48 The appellant company (the plaintiff in the original action) was granted, on December 31st, 1985, for the sum of £29,500, a 99-year lease (the head-lease) of premises known as Flats 1 and 2, 2 Castle Street, Gibraltar. By an agreement dated October 31st, 1988 the appellant sub-let (purportedly as furnished premises) to a company called After Hours Ltd. (the first defendant in the original action) for a period of nine years from November 1st, 1988.

49 Clause 5(k) of the agreement made between the appellant and After Hours Ltd. provides as follows:

"5. The tenant agrees with the landlord—

. . .

(k) 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 clause 4 above)."

50 Clause 4 of the agreement provided for a rent of £425 a month for the first three years, rising to £560 a month for the last three years of the lease. Clause 7(a) comprised the usual proviso for re-entry in the event, *inter alia*, of non-payment of rent or breach of any of the tenant's covenants. By an agreement dated December 12th, 1988 between After Hours Ltd. and Andrew Oliva of the respondents (the second defendants in the original action), After Hours Ltd. purported to give to Andrew Oliva a licence to use all but two rooms in the premises, comprising Flats 1 and 2, 2 Castle Street.

51 By a writ dated August 9th, 1989, the appellant instituted proceedings against After Hours Ltd. and the respondents, claiming possession of the premises for, *inter alia*, non-payment of rent by After Hours Ltd. and breach of the covenant in cl. 5(k) of the sub-lease against sub-letting without the appellant's consent. In para. 21 of the statement of claim the appellant claimed that the respondents were wrongfully in possession of that part of Flats 1 and 2, 2 Castle Street, occupied by them. In para. 10 of the statement of claim the appellant specifically pleaded the proviso for forfeiture for non-payment of rent comprised in cl. 7(a) of its sub-lease to After Hours Ltd. It did not invoke the proviso for forfeiture, however, as it might have done, in respect of the breach of cl. 5(k) as to sub-letting without consent by After Hours Ltd.

52 The appellants obtained judgment in default for possession of Flats 1 and 2, 2 Castle Street, against After Hours Ltd. The action continued against the respondents. They claimed the protection of the Landlord and Tenant Ordinance and, in the event of its being found that the premises occupied by them were liable to forfeiture, they sought relief from forfeiture under s.6 of the Land Law and Conveyancing Ordinance.

53 Alcantara, A.J., after setting out the facts, came to the following findings:

(a) The agreement entered into between After Hours Ltd. and Mr. Andrew Oliva of the respondents, though called a licence, was a tenancy. (This was not disputed.)

(b) This tenancy was protected under Part III of the Landlord and Tenant Ordinance. This was conceded at the outset of this appeal by Mr. Stagnetto, Q.C., who appeared for the appellant; although the point had been argued strenuously at the trial before Alcantara, A.J. on the ground

that a company (in this case, After Hours Ltd.) could not be a protected tenant under Part III of the Ordinance and that accordingly the sub-tenants of a tenant company sub-letting without the consent of the company's landlord could not claim protection under Part III of the Ordinance. It was conceded at the trial and on appeal that Part III of the Ordinance applied to Flats 1 and 2, 2 Castle Street. Mr. Stagnetto also conceded that After Hours Ltd. could have applied to the Rent Tribunal under Part III of the Ordinance for determination of the statutory rent payable for the premises let to it by the appellant and that the rent prescribed in cl. 4 of the lease to After Hours Ltd. was in excess of that prescribed under the Ordinance for a furnished letting of such premises.

(c) Thirdly, Alcantara, A.J. found that the sub-letting by After Hours Ltd. to Mr. Andrew Oliva was unlawful and that there had been no waiver of that illegality by the appellant. Nevertheless the learned judge, in exercise of the discretion conferred on him by s.6 of the Land Law and Conveyancing Ordinance, granted relief from forfeiture in favour of the respondents. It was conceded by counsel for both parties that the only point for this court's decision was whether the learned judge had correctly exercised his discretion to grant relief.

54 Mr. Stagnetto relied on the case of *Imray* v. *Oakshette* (5). That was an appeal against the refusal of an application for relief against forfeiture under s.4 of the Conveyancing Act 1892 (which is in the same terms as s.6 of the Gibraltar Land Law and Conveyancing Ordinance). The forfeiture had arisen as a result of a breach by the original lessee, Miss Oakshette, of a covenant not to assign or under-let without the consent of the lessors. One of the four defendants in the action had purchased an under-lease under a contract which did not give him a right to call for Mrs. Oakshette's title. He had spent £500 on the house he had so acquired. Nevertheless, it was held that he had been guilty of negligence in entering into a contract that precluded him from investigating the title properly and that relief against forfeiture ought not to be granted to him. It was held in this case that while relief from forfeiture could not be granted to a lessee who was in breach of a covenant against assigning or under-letting the land leased in view of the terms of s.14(6) of the Conveyancing and Law of Property Act 1881, such relief could be granted to the lessee's under-lessee in view of s.4 of the Conveyancing Act 1892. Lopes, L.J. ([1897] 2 Q.B. at 225) said:

> "It is a relief which ought to be given with caution and sparingly. It is exceptional. It could not be given to the lessee. It materially affects the interests of lessor and lessee. Before asking for it the underlessee ought to be in a position to prove that he is blameless and exercised all those precautions which a reasonably cautious and careful person would use."

55 Mr. Serfaty, however, drew our attention to the case of *Hurd* v. *Whaley* (4). This was a case of breach by both the lessee and the underlessee of a covenant to repair in their respective leases which contained the usual proviso for re-entry upon breach of any of the covenants. On the plaintiffs' claim for possession, the lessee claimed relief against forfeiture under s.14(2) of the Conveyancing and Law of Property Act 1881 and the underlessee claimed relief under s.4 of the Conveyancing Act 1892. Counsel for the plaintiffs argued that as the underlessee had committed a breach of the covenant for repair as between himself and the lessee he was precluded from relief by reason of the Court of Appeal's decision in *Imray* v. *Oakshette*, and in particular the passage from the judgment of Lopes, L.J. set out above.

56 McCardie, J. held that the *dictum* of Lopes, L.J. had no relevance to the action with which he was dealing in that it related only to a case where the under-lessee was applying for relief after a forfeiture of the original lease had occurred as a result of a breach of the covenants or conditions mentioned expressly in 14(6) of the Conveyancing and Law of Property Act 1881 which include those "against the assigning, underletting, parting with possession or disposing of the land leased." In such a case, McCardie, J. pointed out ([1918] 1 K.B. at 450), by virtue of s.4 of the Conveyancing Act 1892, the sub-lessee can obtain relief even though the breach of covenant committed by the lessee precludes the latter from seeking the assistance of the court. The Court of Appeal in *Imray* v. *Oakshette* (5) had held, however, that for the sub-lessee to obtain relief he must show that he himself is free from blame, but McCardie, J. held (*ibid.*, at 450–451) that "the words of Lopes, L.J. have no application to a case where the original lessee has incurred a forfeiture in respect of which the Court can grant relief, e.g., by breach of a covenant to repair." Accordingly, he held that both the lessee and the sub-lessee were entitled to relief from forfeiture.

57 In so far as a sub-lessee is concerned, McCardie, J. concluded as follows (*ibid.* at 451):

> "I myself entertain the view that s.4 [of the Conveyancing Act 1892] should be construed with a generous desire to save an underlessee from the grave loss which may fall upon him unless the section be liberally construed. The notion of personal negligence founded on the artificial doctrine of constructive notice seems to me to be in conflict with the object of the Act of 1892 and scope of s.4 and to be opposed to the well-established equity leaning against the enforcement of forfeiture."

58 In the present case, where the appellant claimed forfeiture for non-payment of rent (para. 10 of the statement of claim), *Imray* v. *Oakshette* did not apply. After Hours Ltd., had it defended the action, could have

claimed relief from forfeiture, and the respondents could and did claim relief under s.6 of the Land Law and Conveyancing Ordinance. On the authority of *Hurd* v. *Whaley*, any negligence on the part of the respondents in failing to ascertain whether any consent was necessary to the letting to them of a flat at 2 Castle Street by After Hours Ltd. is immaterial.

59 In Ground 1 of its memorandum of appeal, the appellant claims that the learned judge erred in disregarding the evidence of Mrs. Oliva that she knew that the licence agreement was a sham, and in Ground 5, the appellant claims that the learned judge granted relief to the respondents although the respondents had knowingly entered into an agreement which was a sham and which was calculated to deceive the appellant.

60 Had there been evidence to show that the respondents conspired with Mr. Gohr (the director of After Hours Ltd., who dealt directly with the respondents) to deceive the appellant as to their occupation of part of Flats 1 and 2, 2 Castle Street, then, it appears to me, there would have been grounds for refusing the relief sought by the respondents. Had the learned judge considered there was any such evidence, I have little doubt he would have said so clearly. He did not.

61 It is quite clear, on the evidence before the learned judge, that Mr. Gohr did intend and did mislead the appellant. This is shown by his letter dated February 28th, 1989 to Messrs. Stagnetto & Co. in reply to their letter of February 16th in which Messrs. Stagnetto & Co. said they had information that After Hours Ltd. was sub-letting part of the premises leased to it without the consent of its landlord. With his reply, Mr. Gohr enclosed a copy of the so-called licence agreement made with Mr. Oliva "as proof that my company is not sub-letting as defined in paragraph 5(k)." It also seems likely that Mr. Gohr was trying to deceive the respondents themselves into a belief that they had a mere licence to use the flat, in an attempt to prevent them from applying, or at least make it more difficult for them to apply, to the Rent Tribunal for the determination of the statutory rent for the flat and the consequent reduction in the payment to After Hours Ltd.

62 It is clear from the evidence of Mrs. Oliva as recorded in the judge's notes that Mrs. Oliva realized that the licence agreement was a sham. She said so in evidence. It is clear from her evidence that she realized from what Mr. Gohr said to her that the agreement was intended to cover him in some way. She said that she read the agreement. She did not query the fact that it appeared from the recitals to the agreement that After Hours Ltd. ("the licensor") was a tenant of Flats 1 and 2, 2 Castle Street; she realized that the agreement was a sham. She said, however, that she had no idea who Mr. Gohr was trying to deceive and had no indication that any third party would be affected by the agreement.

63 It would appear from her evidence as recorded that what Mrs. Oliva was mainly concerned about in relation to the agreement was the purported withholding of exclusive possession, the provision requiring the flat to be used only by the respondents and the curious provisions of cll. 8, 10 and 11 of the agreement. It was, however, for the learned judge, who heard the evidence, to assess her credibility. Had he come to the view that Mrs. Oliva knew or was aware that the agreement made with After Hours Ltd. was designed to deceive After Hours's landlord he would, it seems to me, have made this clear in his judgment.

64 Alcantara, A.J. was referred to the case of *Factors (Sundries) Ltd.* v. *Miller* (3). The facts of that case were somewhat similar to those of the present case. In that case the landlords let a flat to a tenant with a covenant not to under-let without the landlord's consent. In breach of the covenant the tenant sub-let the premises on a monthly tenancy. The tenant failed to pay his rent to the landlords and on calling at the flat the landlord's representative found the sub-tenant in possession. The sub-tenant was unaware of the covenant against under-letting and thought that the tenant was an estate agent with power to under-let. He had paid rent regularly to the tenant.

65 Alcantara, A.J. found (1991–92 Gib LR 1, at para. 30) that the respondents were "not in exactly the same position as the tenant in *Factors (Sundries) Ltd.* v. *Miller*, who was unaware that the previous tenant had no power to sub-let. Mrs. Oliva read and signed the licence." It appears from this statement that the learned judge was referring to the fact that Mrs. Oliva must have known, from having read the agreement, that After Hours Ltd. was the tenant of Flats 1 and 2, 2 Castle Street, unlike the sub-tenant in *Factors (Sundries) Ltd.* v. *Miller*.

66 It is not clear from this passage whether the learned judge was suggesting that Mrs. Oliva should therefore have been put on her guard, had she had any experience of leases, that the tenant's lease was likely to contain a covenant against sub-letting without the landlord's consent. It appears from the judge's notes that Mrs. Oliva was tested in cross-examination as to whether she had any such experience. She said that she had not.

67 It appears that the learned judge then went on to balance the fact that Mrs. Oliva, unlike the sub-tenant in *Factors (Sundries) Ltd.* v. *Miller*, knew that her landlord was a tenant, against the respondents' having acquired their flat in the open market; that the flat was clearly being got ready for letting; and that the respondents were allowed to enter into occupation of the flat before they signed any agreement. From this it would appear that the learned judge was indicating that there was nothing to arouse the respondents' suspicions that they were not entering into a perfectly normal tenancy of the flat from someone who had authority to

let it to them. But the learned judge then goes on to say (*ibid.*): "They wanted accommodation at any price and under any conditions. They were desperate."

68 It is by no means entirely clear what the learned judge was implying by this statement. It occurred to me at one stage that he might be indicating that because the respondents were desperate not only were they prepared to obtain accommodation at any price and under any conditions, but that they were also prepared to overlook any flaws in their landlord's right to grant them a tenancy. I rejected this view, however, in view of the opening words of the succeeding paragraph in the judgment: "There is one further factor in favour of the court exercising the jurisdiction of s.6 . . . in favour of the second defendants." It seems clear from this, in my view, that the learned judge, after weighing up the facts in the earlier paragraph of his judgment, had come to a finding in favour of the respondents, and that the two final sentences of that paragraph were simply a summary of the evidence of Mr. and Mrs. Oliva as to their pressing wish to obtain accommodation for themselves and their family in Gibraltar.

69 Be that as it may, there is nothing here amounting to a finding or even an inference of Mrs. Oliva's being a party to any deception of the appellant. There is perhaps an inference of negligence on her part, but as I have said earlier, any such negligence, on the authority of *Hurd* v. *Whaley* (4), is immaterial.

70 In so far, therefore, as Grounds 1 and 5 of this appeal are concerned, it cannot, in my view, be said (a) that the learned judge disregarded Mrs. Oliva's admission in evidence that she knew that the licence agreement was a sham; or (b) that there was evidence to show that the respondents had entered into an agreement knowing that it was a sham in order to deceive the appellant. It cannot be said, in my view, that in coming to his decision to grant relief the learned judge failed to consider material relevant to the exercise of his discretion, and accordingly, I find no merit in these two grounds of appeal.

71 In so far as Ground 2 is concerned—that the learned judge erred in basing his decision to grant relief on the fact that the respondents had acquired the accommodation in the open market at any price and under any conditions—I consider that these were valid points which the learned judge was fully entitled to take into consideration in coming to his decision. I find no merit in this ground of appeal.

72 In Ground 6 the appellant claims that the learned judge, in considering whether to grant relief, failed to give due weight to the fact that by granting relief the respondents could claim the protection of the Landlord and Tenant Ordinance.

73 In *Factors (Sundries) Ltd.* v. *Miller* (3) the flat the subject of the action for possession was one to which the Rent Restriction Acts applied, as, in this case, Part III of the Landlord and Tenant Ordinance applies to the flat occupied by the respondents. It was held there that the protection given by the Rent Restriction Acts to a sub-tenant applying for relief against forfeiture, in the event of the court exercising its discretion in his favour and granting him a tenancy, was a relevant circumstance for the court to consider in deciding whether or not to grant relief. As Hodson, L.J. pointed out ([1952] 2 All E.R. at 634), the landlord was "going to be saddled with a statutory tenant under the Rent Acts for an indefinite period." So, in the present case, it was a circumstance for the learned judge to consider in deciding whether to grant relief, that in the event of his exercising his discretion in the respondents' favour and granting them a *tenancy* of the flat they occupied, they would, on the expiration of that tenancy by operation of time or notice to quit, be entitled to the protection of Part III of the Landlord and Tenant Ordinance.

74 Reference was made both in the court below and in this court to the case of *Creery* v. *Summersell & Flowerdew & Co. Ltd.* (2). This again was a case of a sub-tenancy entered into without the consent of the tenant's landlord in which the sub-tenants sought relief against forfeiture of the premises occupied by them. It was held, *inter alia* ([1949] 1 Ch. at 767, *per* Harman, J.), that the jurisdiction to grant relief should be sparingly exercised "because it thrusts upon a landlord a person whom he has never accepted as a tenant and creates *in invitum* a privity of contract between them." It is clear from his judgment that the learned judge had in mind the words of Harman, J. and that for the reason given by Harman, J. relief in a case such as this should be given sparingly.

75 In letting Flats 1 and 2, 2 Castle Street, to a corporation, the appellant wished to ensure that the tenant in occupation of the flats had only the security of tenure provided by its lease. In the case of the appellant's lease to After Hours Ltd., this provided for a term of nine years from November 1st, 1988 to October 31st, 1997. In both the court below and in this court Mr. Stagnetto has argued that it would be very prejudicial for the appellant, which had paid £29,500 for its lease of Flats 1 and 2, 2 Castle Street, to have to accept the respondents as protected tenants under Part III of the Landlord and Tenant Ordinance, for an indefinite period, extending possibly beyond 1997, during which time they would be paying only the statutory rent. He referred us to the cases of *Lee* v. *K. Carter Ltd.* (6) and *Swanson* v. *Forton* (7). In both these cases the court held that the refusal of the landlord's consent to an assignment of the tenant's lease, which would give rise to a statutory tenancy under the Rent Acts on the expiration of the contractual tenancy, was not unreasonable.

76 Mr. Stagnetto conceded, however, that the rent provided for in cl. 4 of After Hours Ltd.'s lease was in excess of that allowed for premises to which Part III of the Landlord and Tenant Ordinance applied. He also conceded that had After Hours Ltd. applied to the Rent Tribunal to determine the statutory rent applicable in respect of Flats 1 and 2, 2 Castle Street, the statutory rent would have been considerably less than that provided for in cl. 4 of the lease, and that the appellant would have been obliged to accept a considerable reduction in rent for the remainder of the term of the lease.

77 It is clear from the appellant's statement of claim in the original action, paras. 4 and 7, that one of the matters that concerned the appellant was that After Hours Ltd. had sub-let only a part of Flats 1 and 2 to the respondents. This was a breach of covenant as set out in Schedule 5, para. 10 in the appellant's head-lease, to which the proviso for re-entry in cl. 5 of that lease applied. In the appellant's defence to the respondents' counterclaim in the original action, the appellant states, in para. 6, that—

> "if . . . the second defendants are entitled to relief from forfeiture, then the plaintiff will require the second defendants to become lessees of the whole of the premises in accordance with para. 10 of the Fifth Schedule of the head-lease which prohibits the plaintiff from granting a lease of part only of the premises."

78 It appears from the judge's notes that Mr. Oliva in evidence said that after proceedings had been instituted by the appellant against After Hours Ltd. and the respondents he had a discussion about the case with Miss Evans, a solicitor with Messrs. Stagnetto & Co. Ltd., when she came to take an inventory of the furniture in Flats 1 and 2, 2 Castle Street. Mr. Oliva is recorded as saying that Miss Evans told him that he could avoid further proceedings were he to take on After Hours Ltd.'s lease. Miss Evans in evidence remembered discussing with Mr. Oliva, in February 1990, the pending proceedings, but she said she could not remember having suggested that Mr. Oliva should take over After Hours Ltd.'s sub-lease.

79 There would appear to be little reason for Mr. Oliva to have concocted his evidence as to this discussion with Miss Evans who, at that time (February 1990) knew that Mr. Oliva had applied to the Rent Tribunal to have the rent of his flat determined and that such determination had been postponed until a decision had been reached in the proceedings from which this appeal arises.

80 It appears to me, therefore, that the present case is not unlike *Factors (Sundries) Ltd.* v. *Miller* (3)—to which the learned judge referred towards the end of his judgment and which he clearly had in mind in coming to his decision—in that it would appear from Miss Evans's conversation

with Mr. Oliva that the appellant's solicitors were not unduly concerned as to who their tenant was, so long as it or he paid the rent, and that the tenancy extended to the whole of Flats 1 and 2 and not merely to part of them. I think this is what the learned judge had in mind in the penultimate paragraph of his judgment.

81 In the circumstances, were the respondents to be granted relief and the appellant "to be saddled with a statutory tenant '*in invitum*'" for an indefinite period, the appellant would be suffering no less hardship—certainly up to October 31st, 1997 when After Hours Ltd.'s lease expired—than it would have done had After Hours Ltd. applied to the Rent Tribunal for the determination of the statutory rent payable for Flats 1 and 2, 2 Castle Street. To this extent, it appears to me that much of the force is taken out of Mr. Stagnetto's submissions that the appellant should not be saddled with a statutory tenant in place of a company tenant who would only have security of tenure for the term provided for in his lease (in this instance until October 31st, 1997). It is true that were the respondents to be still in occupation of the flats up to that date, their tenancy might continue for an indefinite period. On the other hand, it is possible that the respondents might decide to vacate the premises long before that date.

82 In my view, there is no merit in Ground 6. It is clear from his judgment that the learned judge gave due weight to the fact that by granting relief to the respondents he would be saddling the appellant with a statutory tenant.

83 In the penultimate paragraph of his judgment, the learned judge also deals with the matters the subject of Grounds 3 and 4 of this appeal, namely, that the learned judge erred in law (a) in considering the agreement between the appellant and After Hours Ltd. as the basis for granting relief; and (b) in finding that the appellant intended to evade the constraints of Part III of the Landlord and Tenant Ordinance when in fact it merely avoided those constraints by insisting on a company let.

84 Two paragraphs earlier in his judgment the learned judge had said (1991–92 Gib LR 1, at para. 29): ". . . Whereas it is permissible to *avoid* the constraints of Part III of the . . . Ordinance, it is wrong to *evade* the restrictions and the court will frown on such evasion and condemn it." In the penultimate paragraph of his judgment the learned judge refers to cl. 5(k) in the tenancy agreement made between the appellant and After Hours Ltd. This clause is set out at the beginning of this judgment. The learned judge had set out cl. 5(k) in full at the beginning of his judgment, but in referring to it at the end of his judgment he appears to have misconstrued it. He said (*ibid.*, at para. 31):

> "The wording of that clause leads one to the conclusion that what the plaintiff was really interested in when considering to grant or

> refuse the 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 and above what the law authorizes it to demand. This is tantamount to an evasion of Part III of the Landlord and Tenant Ordinance."

85 Under the proviso to cl. 5(k) as framed, it was on the sub-lessor, not the sub-tenant, that such a condition could be imposed. To impose such a condition on the sub-tenant would in fact be of no advantage to the appellant (the landlord), in view of the fact that the sub-tenant would be paying his rent to the appellant's tenant (After Hours Ltd.) and not to the appellant. Mr. Serfaty submitted that the word "sub-lessor" in the proviso to cl. 5(k) was an error and that the word should read "sub-lessee." I agree, however, with my brethren that we should not assume that the draftsman of this proviso has made a mistake, as the proviso makes perfectly good sense as drafted.

86 The fact that the learned judge may have misconstrued cl. 5(k) does not appear to me, however, to affect substantially the reasoning in the passage from his judgment cited above. What the learned judge was saying, as I understand him, was that—

(a) it was a factor in granting the sub-tenants (the respondents) relief that all the landlord (the appellant) was really interested in was that in the event of an assignment or under-letting it should get as high a rent as that provided for in cl. 4 of the lease to the tenant (After Hours Ltd.);

(b) such rent was greatly in excess of the statutory rent permissible for premises falling within Part III of the Landlord and Tenant Ordinance, and amounted to an evasion of the provisions of Part III.

In so saying, I understand the learned judge to be implying that a party seeking the assistance of a court of equity (in this case the appellant, as plaintiff) should come to court "with clean hands."

87 In my view, the learned judge was fully entitled to take into account the provisions of clauses 4 and 5(k) of the appellant's lease to After Hours Ltd. as factors for consideration in deciding whether or not to grant relief to the respondents. Accordingly, I find no merit in Ground 3 of this appeal.

88 Nor do I find any merit in Ground 4 of the appeal. Mr. Stagnetto conceded that the premises let by the appellant to After Hours Ltd. fell within the provisions of Part III of the Landlord and Tenant Ordinance and that the rent prescribed in cl. 4 of the lease was in excess of the statutory rent permissible for such premises under Part III. The fact that the appellant leased the premises to a company was immaterial in so far as rent was concerned. A company tenant, like any other tenant, was

protected under Part III of the Ordinance as to the rent it paid for the premises.

89 In this context I would observe, however, that while it was, in my view, a factor for consideration in weighing up the pros and cons for granting relief, that the appellant in its action against the respondents relied on the provisions of its lease to After Hours Ltd. in which the rent payable greatly exceeded that permissible under Part III of the Ordinance, and to that extent, came to the court without entirely clean hands, I would not myself go so far as to categorize this as an "evasion" of the provisions of the Landlord and Tenant Ordinance in the pejorative sense given to that word by the learned judge. Section 31 of the Ordinance provides that notwithstanding any agreement to the contrary, rent exceeding the statutory rent is irrecoverable from the tenant.

90 In this case the statutory rent applicable to Flats 1 and 2, 2 Castle Street, had not been determined. The appellant was no doubt well aware when leasing the flats to After Hours Ltd. that the rent payable under cl. 4 of the lease was likely greatly to exceed the statutory rent permissible under Part III of the Ordinance. Had After Hours Ltd. applied to the Rent Tribunal to have the statutory rent determined, the appellant would have been unable to recover the difference between the statutory rent and the rent prescribed in cl. 4 of the lease. It appears in this case that the appellant's solicitors did not consider that After Hours Ltd., as a company, was entitled, as to rent or otherwise, to the protection of Part III of the Ordinance. This was a mistaken view of the law, but it does not in my view amount to evasion of the law.

91 But even had the appellant's advisers been under no mistake as to the law but had drawn up the lease in the belief that After Hours Ltd., having agreed to the rent prescribed in cl. 4, would not apply to the Rent Tribunal to have the statutory rent determined, this, in my view, would not amount to "evasion" of the constraints of Part III of the Ordinance, which only apply, as I understand it, when application is made to the Rent Tribunal for determination of the statutory rent.

92 Nevertheless, in all the circumstances of this case, it cannot be said, in my view, that in granting relief to the respondents the learned judge misdirected himself in the exercise of the discretion conferred on him by s.6 of the Land Law and Conveyancing Ordinance so as to justify this court interfering in his decision. Accordingly, I would dismiss this appeal.

93 **FIELDSEND, P.:** In this appeal the court, though not unanimous, is of the view that the court below was right to have exercised its discretion in favour of the respondent, and to that extent the appeal should be dismissed with costs.

94 However, we note that the parties were agreed on the pleadings below that in the event of discretion being exercised in the respondent's favour, they should be required to enter into a lease of the whole of flats 1 and 2. The court below granted a lease of only the portion actually occupied by the respondents. Further, s.6 of the Land Law and Conveyancing Ordinance provides that a court exercising its discretion should determine the conditions upon which the occupant should occupy the premises. The parties may of course negotiate the terms of lease between themselves to be put before the court.

95 In the circumstances, the order of the court below is set aside and the question of the precise terms of the lease is referred back for determination.

Appeal dismissed in part; case remitted.