[1991–92 Gib LR 263]

YETTEFTI v. C. PAYAS (Executrix of the Estate of J. BENSADON), D. PAYAS and T. PAYAS

SUPREME COURT (Kneller, C.J.): April 9th, 1992

Landlord and Tenant—lease or licence—exclusive occupation—factors for consideration

Landlord and Tenant—foreign nationals—foreign workers' accommodation—occupant of property registered under Labour From Abroad (Accommodation) Ordinance is licensee only, even if may have had tenancy before registration

Landlord and Tenant—foreign nationals—right to hold tenancy—under Land (Titles) Order, non-British subject requires Governor's approval to hold tenancy

The respondents applied to the Court of First Instance to recover possession of premises owned by them and occupied by the appellant.

The appellant, a Moroccan national, occupied a self-contained room in a house owned by the deceased, allegedly from 1969 until 1975. The owner, who managed the property in person, respected his privacy and allowed him to have his family to stay with him from time to time. He then moved into a larger, more private flat in the same premises. As before, washing and lavatory facilities were communal and the cost of water was shared by the occupants. The owners were responsible for internal and external repairs. In 1982 the owners registered the flat under s.3 of the Labour from Abroad (Accommodation) Ordinance, 1971.

In January 1989 the owners gave the appellant notice to vacate the premises by the end of March, which the appellant ignored. In April they cancelled the registration of the premises, and in July commenced proceedings to recover possession, together with damages for trespass and loss of use and occupation. The managing owner died shortly afterwards. The first respondent was his executrix and the other respondents, the owners of the rest of the building. The Ordinance was repealed in August 1989. The owners submitted that under the Land (Titles) Order, the appellant, being Moroccan, could not hold any estate in land here without the Governor's approval.

The appellant counterclaimed for an order that the respondents re-register the flat under the Ordinance, as it had been illegally removed from the register, and sought relief from forfeiture.

The Court of First Instance (Pizzarello, J.) considered the provisions of the Land (Titles) Order, and held that the appellant could have acquired a tenancy during his first 15 years' residence here. The appellant had occupied his room as a tenant from 1969 until 1975, and when he had moved to the flat in 1975 the 1971 Ordinance applied to the new residence (as he was a "worker" from abroad). Consequently, he had become a mere licensee of the premises by operation of law. Since the notice to quit had expired, the appellant was ordered to give up possession and to pay arrears of mesne profits, continuing until possession was given. The counterclaim was dismissed.

On appeal, the appellant submitted that (a) since he had enjoyed exclusive and undisturbed possession of the premises occupied by him from 1975 onward, in exchange for rent, he had at all times been a tenant under the Landlord and Tenant Ordinance; (b) the enactment of the Labour from Abroad (Accommodation) Ordinance during his tenure had not altered the nature of his interest in the premises, but merely given him additional protection, of which the respondents' cancelling the registration under the Ordinance had illegally deprived him; (c) the Court of First Instance had correctly found that it was possible to hold the legal status of tenant before he had completed 15 years' residence here; and (d) accordingly, the respondents were not entitled simply to give him notice to quit.

On their cross-appeal, the respondents submitted that (a) from the date of registration of the flat under the Labour from Abroad (Accommodation) Ordinance, the relationship between themselves and the appellant had been determined by its provisions, and not by the terms of any express or implied agreement; (b) the appellant was no longer (if he ever had been) a tenant, but a licensee, to whom the Landlord and Tenant Ordinance had no application, and whose licence had been terminated by the giving of notice to quit; and (c) in any event, under the Land (Titles) Order, the appellant could not, between 1969 and 1982, have been a tenant without the approval of the Governor.

Held, dismissing the appeal and allowing the cross-appeal:

(1) The appeal would be dismissed, since the Court of First Instance had correctly found that the appellant became a mere licensee of the property once it was registered under the Ordinance in 1982. The respondents had terminated his licence in 1989 by issuing the notice to quit, and were therefore entitled to possession of the property (paras. 16–17; paras. 24–25).

(2) The factors to be considered in deciding whether an occupier enjoyed a tenancy or a licence included the following: (a) whether the parties intended to create a right of exclusive occupation, with no legal interference with that possession by the grantor; (b) whether, regardless of the label attached to the arrangement, its effect was that the occupier in fact enjoyed exclusive possession for an ascertainable period in return for periodical payments; (c) whether the occupant was the only occupant realistically contemplated by the agreement and the premises were

suitable for single occupation; and (d) whether the property was a self-contained flat or a room, who occupied it, what the occupier paid for it, and the purpose for which the owner retained a key (para. 18).

(3) However, in 1989, although the appellant appeared to have had exclusive possession of the property and his privacy had been undisturbed by the owner, under the Land (Titles) Order, as a Moroccan national, the appellant could not be a freeholder or a tenant after any number of years' residence here without the Governor's approval, irrespective of the provisions of the Labour from Abroad (Accommodation) Ordinance. Accordingly, the cross-appeal would be allowed (para. 20; para. 22; para. 26).

Cases cited:

(1) *A.G. Securities* v. *Vaughan*, [1988] 3 All E.R. 1058; (1988), 132 Sol. Jo. 1638, considered.

(2) *Aidasani* v. *Ouakin*, C.A., Civ. App. No. 2 of 1984, October 26th, 1984, unreported, considered.

(3) *Family Housing Assn.* v. *Jones*, [1990] 1 W.L.R. 779; [1990] 1 All E.R 385, considered.

(4) *Street* v. *Mountford*, [1985] A.C. 809; [1985] 2 All E.R. 289, considered.

(5) *Wyatt* v. *Matout*, C.A., Civ. App. No. 6 of 1980, March 3rd, 1981, unreported, applied.

Legislation construed:

Labour from Abroad (Accommodation) Ordinance (1984 Edition), s.2:

> "'worker' means a worker as defined in section 18 of the Employment Ordinance other than—
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> (i) a Gibraltarian; or
>
> (ii) a person who is employed either in the service of Her Majesty or in the service of the Government of Gibraltar and who was recruited to such service outside Gibraltar."

Land (Titles) Order (1984 Edition), s.2: The relevant terms of this section are set out at para. 13.

s.3(1): The relevant terms of this sub-section are set out at para. 13.

s.4: "No such deeds shall be registered or have any legal operation or effect unless the same shall have been previously approved by the Governor . . .

> Provided nevertheless that no such approbation or registration of any grant, demise, lease, or conveyance of any lands for any time not exceeding the term of three years shall be necessary except in the case of a person not being a British subject."

s.6(1): The relevant terms of this sub-section are set out at para. 19.

C.A. Gomez for the appellant occupier;
A. Serfaty for the respondent owners.

1 **KNELLER, C.J.:** Larbi Yettefti ("the occupier") appeals against the decision dated December 3rd, 1990 of the judge of the Court of First Instance (Pizzarello, J.), who held that the occupier was a licensee of the premises at 47(6) New Passage, Gibraltar ("the flat") and not a tenant protected by the provisions of Part III of the Landlord and Tenant Ordinance. His grounds are: First, that finding was inconsistent with his finding that the occupier had been in exclusive and unimpaired possession of the flat at all material times, and secondly, it was against the weight of the evidence.

2 Catherine Payas (the executrix of the will of John Bensadon, deceased), Ian Michael Payas, Darrell Andrew Payas and Tyrone Anthony Payas ("the owners") contend that the learned judge's decision ought to be affirmed on the grounds set out in his judgment and on an additional one, namely, that the occupier was not entitled to hold an interest in land, by virtue of the Land (Titles) Order ("the Order"), and therefore, irrespective of the Labour from Abroad (Accommodation) Ordinance ("the Ordinance"), he could only be a licensee of the flat.

3 The owners began an action in the Court of First Instance on July 31st, 1989 with a praecipe for a summons for recovery of land, *i.e.* the flat, and damages for trespass or compensation for its use and occupation. Their particulars of claim alleged that John Bensadon licensed the premises to the occupier for a fee of £7 a week, under the provisions of the Ordinance. The flat was registered under the Ordinance until April 23rd, 1989. Bensadon sent a letter dated January 23rd, 1989 to the occupier giving him notice, expiring on March 31st, 1989, to vacate the premises. The occupier ignored this notice. He was still in occupation of the flat.

4 The occupier's defence, dated September 26th, 1989, was a denial that Catherine Payas was the executrix of John Bensadon's will, that the premises were licensed under the Ordinance when he moved into them, that he was a licensee of them, that the rent was £7 a week for them, that he had been served with a valid notice, that the time to deliver up possession was adequate and that the Payas family was entitled to possession. He asserted in it that at all times he had been in possession of the flat as a tenant under the Landlord and Tenant Ordinance. He enjoyed exclusive possession of it and paid the owners £9 a week for this. He went on to counterclaim for an order that the owners re-register the flat under the Ordinance because it had been illegally removed from the register. He asked for relief from forfeiture if he were found liable to it.

5 The occupier amended his counterclaim on February 14th, 1990 by adding claims for damages for nuisance and trespass and for an order restraining the owners from causing him harassment and obstructing his enjoyment of the flat. The owners, he claimed, in order to cause him distress and hardship, had complained falsely to the police in January

1990 that his cousin had threatened them and their premises with violence.

6 The owners' reply of February 19th, 1990 to the amended counterclaim was that the occupier's licence to occupy the flat was terminated, so he had no standing (quaintly described as "local standing") in the registration or otherwise of 47 New Passage under the Ordinance. The proceedings were not for forfeiture, so he could not have relief from it. He had not suffered loss, distress or damage when the owners reported to the police that his cousin had telephoned them twice threatening them and their building with violence. They had acted lawfully and reasonably in doing so. The reply was accompanied by their request for particulars of (i) the date on which the occupier alleged that the flat was let to him; and (ii) the amenity of the right to quiet enjoyment of the premises.

7 The preliminary flourishes in this litigation were not over. The owners asked the occupier to admit that (a) 47 New Passage was held by Bensadon and the male Payas owners in fee simple in possession as joint tenants; (b) Bensadon had died before these proceedings began (*i.e.* before July 31st, 1989); (c) the occupier had not resided in the flat before February 3rd, 1984; (d) the flat was registered under the Ordinance on March 4th, 1982; (e) the registration was cancelled on April 23rd, 1989; and (f) Catherine Payas was the sole executrix of Bensadon's will.

8 The occupier admitted or did not deny any of those save that he had become a resident of the flat in early February 1984. The correct date, according to him, was some time around August 1969. He added that the cancellation of the registration of the flat under the Ordinance was illegal.

9 At the outset of the appeal, despite the owners' objection, the occupier was given leave to amend his reply to their notice, to admit that he occupied the flat from 1975 not 1969. This is not what the owners wanted him to admit. Leave to amend may be given even during an appeal if it clarifies the issues and causes no prejudice to the other party which cannot be compensated for by costs. These conditions were to be found in that application.

10 Details of the owners' registration of the flat under s.3 of the Ordinance as accommodation for a workman, and their licence under s.4 to keep or manage the flat, subject to such conditions as were prescribed by the Ordinance and the Labour from Abroad (Accommodation) Rules, 1972 ("the Rules"), were admitted as evidence by the parties' consent. The documents were dated April 11th, 1988 and were said to expire on March 31st, 1989. It seems to have been agreed, I think, that the registration was renewed or extended until it was cancelled on April 23rd, 1989. The weekly rent for the flat was expressed to be £7.50 a week and the maximum number of occupiers was to be only two.

11 The judge heard the witnesses and counsel for the parties, and made the following findings of fact: The occupant was a Moroccan workman who had taken up residence in a flat, which was a communal service tenement in John Bensadon's property, in August 1969. Bensadon managed his property and let out rooms in it under the Landlord and Tenant Ordinance. This was in 1969. The Ordinance, which, it should be made clear once again, is the Labour From Abroad (Accommodation) Ordinance, came into effect in 1972. The occupier moved in 1975 from the first flat that he occupied to the flat which is the subject of this appeal. 47 New Passage and the second flat, the one this appeal centres on, were registered by Bensadon under the Ordinance for the first time in 1982. He applied to have those premises and this flat removed from the register and so they were on April 23rd, 1989. He died soon afterwards.

12 Only the occupier could give evidence of the agreement he had with Bensadon about his occupation of the first room or flat and of the one in this appeal. He swore that he occupied it by himself, he had his own key to it and paid £2.50 a week for it. Bensadon respected his privacy and allowed him to have his family from Morocco to stay with him from time to time. Bensadon was responsible for the external and internal repairs but never did any. He also provided the rubbish bin. Water was piped into the shared part of the tenement but not into the occupier's room or his flat, and the cost of doing this was shared by all those who used the water from the tap. The occupier put in the light in the passageway leading to his flat. The flat was larger and more private than the one that he occupied from 1969 to 1975, and he shared a lavatory with only one other person.

13 The owners submitted that the occupier from Morocco (i) had no right to title to an estate in land, (ii) could not hold land without the consent of the Governor, and (iii) had no such consent. They base these propositions on the provisions of the Order. The learned judge analysed them in this way. ". . .'[D]eeds' include "all instruments in writing other than wills and testamentary writings . . ." and "'lands' include messuages, tenements, hereditaments of any tenure . . . [or any] estate, right, title, or interest therein" (s.2). The Order required such documents to "be registered in the Supreme Court" (s.3(1)). Under s.4, "a grant, demise, lease, or conveyance" exceeding a term of three years to a British subject or a citizen of the European Community had to have the approval of the Governor before it could be registered. A grant, demise, lease, or conveyance of *any* term to others could not be registered without the approval of the Governor. By s.6, an alien, namely, someone who was not a British subject or a citizen of the European Community, could not inherit land in Gibraltar unless he had been a resident in Gibraltar for 15 years or more. If he had been resident here for less than 15 years he could take by descent or inherit if he had the Governor's approval. The judge

held that while the alien was resident in Gibraltar he could be a tenant during his first 15 years in Gibraltar.

14 The learned judge held that the occupier was a tenant of Bensadon's room or flat for the period 1969–1975 because that is what was implied by the evidence which the occupier gave and which was not controverted by any other evidence. When the occupier moved in 1975, the learned judge continued, the Ordinance took effect and without exceptional circumstances, a "worker," as defined in s.2 of that Ordinance, could not be anyone's tenant even if he had been one before and merely moved from one flat to another in his landlord's property. He then applied the principle set out by the Court of Appeal for Gibraltar (Forbes, P., Hogan and Unsworth, JJ.A.) in *Wyatt* v. *Matout* (5), and found that the occupier was not the owners' lodger or their tenant but, instead, their licensee whose notice to quit had expired on March 31st, 1989. The flat had ceased to be registered under the Ordinance on April 23rd, 1989. The Ordinance was repealed on August 10th, 1989 and its replacement could not protect him on April 1st, 1989.

15 The consequential orders of the Court of First Instance were that the owners should recover possession of the flat against the occupier. The occupier was to give them possession by January 31st, 1991. The occupier paid into court £112 for arrears of mesne profits for the period ending July 21st, 1989. The owners were to recover from the occupier the further sum of £497 for the period July 22nd, 1989 to November 30th, 1990 and further mesne profits at the rate of £7 a week until possession. They were to have the costs of the action which were to be taxed. The occupier's counterclaim was dismissed with costs.

16 So much for the pleadings, the course of the trial and the findings of the learned judge. I now turn to the relevant law so far as this appeal is concerned. On March 3rd, 1981 the Court of Appeal for Gibraltar in *Wyatt* v. *Matout* (5) held:

> "1. The intention of the parties is expressed in the legal effect of the terms agreed between them. The concern of the court is not the performance of the agreement but its terms. A lack of any supervision over, interest in or interference with the use of the premises, or the performance of the agreement is not the concern of the court, but its terms are.
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> 2. The legislature, by the Ordinance and the Rules, intervened and imposed certain provisions upon owners and occupiers, and account must be taken of them. When that is done little room is left for any inference of an intention to grant a licence.
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> 3. Whatever the relationship between the owners or the occupiers was when the occupier was in the first or second room, from the date

of the application of the Ordinance and the Rules to the flat their relative positions would be determined by the provisions of the Ordinance and the Rules, even though they were imposed by legislation and not agreed by the owners and the occupiers.

4. A foreign workman in occupation of premises registered under the Ordinance and Rules is not a tenant and cannot rely on any protection contained in the Landlord and Tenant (Miscellaneous Provisions) Ordinance (Cap. 83) or the Landlord and Tenant Ordinance which superseded it."

17 On October 26th, 1984 a differently constituted Court of Appeal in *Aidasani* v. *Ouakin* (2) held that *Wyatt* v. *Matout* did not apply when "(a) the worker occupying the registered premises under the Ordinance is also the manager of it (*per* Spry, P.); and (b) the Ordinance was not in operation when the worker entered into occupation (*per* Blair-Kerr, J.A.)." The third member of the court (Briggs, J.A.) concurred without more. This, in my most respectful view, is unfortunate because in *Wyatt* v. *Matout*, Hogan, J.A., who gave the leading and only reasoned judgment, said:

"Even assuming that at the time of the respondent's first occupation the Ordinance was not in force, once it was in operation the terms to which I have referred became part of the terms on which the respondent occupied the rooms and, whatever the position at an earlier stage, from that point onwards the relative positions of the parties would be determined by those provisions, even though they were imposed by legislation rather than voluntarily agreed to by each side."

Spry, P., in my reading of his judgment, implied that that was not correct when the occupier worker was a tenant and also the manager of the registered premises, because then the owner had no right to reserve his exclusive possession. Blair-Kerr, J.A. implied, I think, that Hogan, J.A.'s *dicta* were correct if the Ordinance was in operation when the workman went into occupation. It may be, of course, that Briggs, J.A. agreed with what fell from Spry, P. and Blair-Kerr, J.A.

18 United Kingdom decisions that deal with the issue of whether an occupant is a lodger, licensee, tenant or protected tenant yield these guidelines:

(a) If it was the genuine intention of the parties that a right of exclusive occupation was granted to an occupier but it did not amount to exclusive possession and create a tenancy, it did not necessarily create a licence, because the consequences in law of the agreement, once concluded, can only be determined by its effect. If the agreement satisfied all the requirements of a tenancy, then that agreement produced a tenancy, and

the parties could not alter the effect of the agreement by insisting that they only created a licence. The right to non-interference must be *de jure* and *de facto* non-interference will not do (see *Street* v. *Mountford* (4) ([1985] A.C. at 819, *per* Lord Templeman)).

(b) If the true legal effect of the arrangement entered into is that the occupier of residential property has exclusive possession of the property for an ascertainable period in return for periodical money payments, a tenancy is created, whatever label the parties may have chosen to attach to it (see *A.G. Securities* v. *Vaughan* (1) ([1988] 3 All E.R. at 1070–1071, *per* Lord Oliver)).

(c) If the circumstances show that the occupant is the only occupier realistically contemplated, and the premises are suitable for single occupation such an occupier normally has exclusive possession (*ibid*.).

(d) The factors on which the answer should be based include (i) Is it a self-contained flat or just a room? (ii) Who occupied it? (iii) What did the occupier pay for his right to occupy it? (iv) Did the owner retain a key for it just so that he could enter it to inspect the state of repair or also to provide attendance and services? (see *Family Housing Assn*. v. *Jones* (3) ([1990] 1 All E.R. at 390–393, *per* Balcombe, L.J.)).

19 And the law cited in support of the cross-appeal was found in the Order. Counsel for the owners relied on its s.6(1) which is in these terms:

> "If any person not being a British subject would, had he been a British subject, have been seized [sic] or entitled by descent or inheritance or by virtue of any will or codicil, of, or to any lands situate in Gibraltar, or to any money charged thereupon, then if such person shall have been so resident and domiciled in Gibraltar for fifteen years next preceding the time when such right, title or interest would have accrued to, or become vested in him, or if any such person shall have been so resident and domiciled in Gibraltar for any time less than such period of fifteen years, and the Governor shall by his licence duly signed by the Deputy Governor (which licence the Governor is hereby authorised in his discretion to grant) empower such person to hold and enjoy the same, such person shall be competent to hold and enjoy such lands or such money charged thereupon as fully and effectually as if such person had been a British subject."

Section 2 of the Order provides that "'lands' include messuages, tenements and hereditaments of any tenure, and to any part, share, estate, right, title or interest therein."

20 So, the facts in this appeal are that the occupier is a Moroccan and not a British subject and he is not a national of any member state of the

European Community. He is an alien and by the time of the decision of the learned judge he had lived in Gibraltar for 21 years. By an oral agreement in August 1969, he was let into possession of one room with a kitchenette and shared an outside lavatory with several others in 47 New Passage, which was a communal service tenement owned by Bensadon. The rent was then only £2.50 a week. He had his own key to it and so did Bensadon. The occupier's possession was exclusive. Bensadon did not object to members of his family from Morocco visiting from time to time.

21 Then the Ordinance (the Labour from Abroad (Accommodation) Ordinance) came into force on April 1st, 1972. This was to ensure, among other things, that workmen from Morocco were treated properly and that they were given reasonable facilities and not made to live in squalid conditions.

22 In 1975 the owners in this appeal gave the occupier the opportunity to move up one floor to what I have called "the flat," which was larger and he would have to share the outside lavatory with only one other occupier, and all this he accepted. He paid the higher rent of £7 for all this. The owners painted the flat but did not repair it, but whether it ever needed repair was not clear. I should be surprised if it did not need to be repaired. He shared with the occupiers of other flats the cost of having water piped into the patio for their common use. He paid for the electric light that was put into the approach corridor to the flat. Again, he had the key to his accommodation and he was permitted to bring other members of his family from Morocco to stay with him for different periods of time. He had another man sharing the flat from time to time. He was not a lodger and his privacy was not disturbed for something like 16 years.

23 The freehold of this flat with other flats in 47 New Passage was vested in Bensadon and the male owners in this appeal in fee simple as joint tenants in possession. Bensadon registered the flat in 1982 as accommodation for workmen under the Ordinance. This may have been as a consequence of the Court of Appeal's decision in *Wyatt* v. *Matout* (5). Bensadon, not the occupier, was the keeper and manager of it.

24 Bensadon gave the occupier notice on January 23rd, 1989 to vacate the flat by the end of March 1989, and the occupier ignored this. He is said to have brought in two more men to share this flat. Bensadon then had the registration of the flat cancelled on April 23rd, 1989. He died later in the same year. Catherine Payas became the sole executrix of his will. She joined with the remaining male owners of 47 New Passage to recover possession of the flat.

25 On my analysis of the facts and the law which binds this court, I find that the occupier of Flat 6 in 47 New Passage, Gibraltar became a licensee of it from when it was registered under the Ordinance on March

4th, 1982. Bensadon gave him a valid notice to quit by March 31st, 1989. He remained in possession unlawfully. That is not inconsistent with the learned judge's finding that the occupier was formerly not a lodger but a tenant. His finding was not against the weight of the evidence. His decision will be affirmed.

26 In my judgment, at the end of March 1989, after however many years sojourn in Gibraltar and irrespective of the provisions of the Ordinance, he could not be a freeholder or a tenant without the approval of the Governor, but only a licensee. The cross-appeal will be allowed.

27 The order will be that the appeal is dismissed with costs and the cross-appeal is allowed with costs. Each party will have liberty to apply to the court to settle consequential orders. The occupier is to deliver up possession within six weeks from the date hereof.

Appeal dismissed; cross-appeal allowed.