

[1991–92 Gib LR 317]

**TAYLOR WOODROW OF GIBRALTAR LIMITED v.
NIGHTFIRE LIMITED and SITHANANTHAN
ARUMAGAM**

SUPREME COURT (Alcantara, A.J.): May 19th, 1992

Landlord and Tenant—breach of covenant—forfeiture—relief against forfeiture—relief usually granted on payment of arrears of rent and landlord's costs, and other breaches disregarded—relief refused exceptionally if tenant's behaviour such that payment of arrears would not compensate landlord for being denied possession

The plaintiff applied for an order of possession in respect of premises leased to the first defendant.

The first defendant occupied the plaintiff's premises under a 27-year lease containing a covenant permitting it to convert the premises into a restaurant. The costs of the conversion process were approximately £250,000. Just before the opening of the restaurant, the premises flooded, and the tenant took the view that the landlord was responsible, that the premises were unfit for occupation, and ceased paying the rent due.

The landlord commenced proceedings claiming possession and arrears of rent, and obtained summary judgment for the arrears of rent to date. The court (Alcantara, A.J.) gave leave to defend in respect of the claim for *mesne* profits, and declined to grant possession. On appeal, the Court of Appeal granted possession (execution of which was stayed pending the outcome of the present application) and gave leave to defend in respect of four months' rent. The tenant paid the arrears ordered, but not promptly, and the following month's rent was paid late. Subsequent payments were irregular and unpunctual, and further arrears accrued prior to the tenant's application for relief from forfeiture.

Held, granting conditional relief from forfeiture:

(1) The court would usually exercise its equitable discretion to grant a tenant relief from forfeiture of his lease upon payment of arrears of rent outstanding and any costs the landlord had incurred. Other breaches of covenant or causes of complaint would then be disregarded. In exceptional circumstances, however, the tenant's conduct—*e.g.* misuse of the premises, inability to pay arrears of rent, or persistent default in paying rent, with the prospect of further default in future—might disqualify him from relief, since the payment of arrears would not then compensate the landlord for being denied possession (paras. 3–6; para. 12).

(2) There were no exceptional circumstances in this case to justify withholding equitable relief from forfeiture, provided that all arrears of rent were paid. Two relevant factors in the tenant's favour were that the landlord had not pursued the issue of payment of the four months' rent in respect of which the Court of Appeal had given leave to defend, and that the tenant had expended £250,000 in converting the premises in expectation of enjoying tenure for the remaining 24 years of the lease. Accordingly, relief from forfeiture would be ordered upon payment within 10 days of all arrears (para. 13).

Cases cited:

(1) *Barton, Thompson & Co. Ltd. v. Stapling Machines Co.*, [1966] Ch. 499; [1966] 2 All E.R. 222, applied.

(2) *Gill v. Lewis*, [1956] 2 Q.B. 1; [1956] 1 All E.R. 844, applied.

D.J.V. Dumas for the plaintiff;

C. Finch for the defendants.

1 **ALCANTARA, A.J.:** This is an application for relief against forfeiture arising out of an order of the Gibraltar Court of Appeal dated March 21st, 1991, wherein it granted the plaintiff possession of premises at Unit G5, Cornwall's Court, Cornwall's Parade, Gibraltar, but ordered that—

“execution of the order for possession herein be and is hereby stayed pending the final disposal proceedings for relief against forfeiture if certain proceedings are instituted by the first respondent within 21 days from the date of this order.”

2 The first respondent is one of the defendants in this application, which was made within the time-limits imposed by the Court of Appeal, but which was not heard and disposed of until May 4th, 1992. I have now to give my reasons for the order I made granting relief.

3 The law as to relief from forfeiture appears to be reasonably clear and straightforward. 27 *Halsbury's Laws of England*, 4th ed., para. 442, at 346 has this to say:

“ . . . [T]he tenant is entitled to be relieved against forfeiture on payment of the rent and any expenses to which the landlord has been put. Save in exceptional circumstances, therefore, relief will be granted on payment of the rent in arrear, and, moreover, save in exceptional circumstances, the court will grant relief on payment of arrears of rent and costs and will disregard other breaches of covenant.”

4 The above passage is made clearer by the leading case of *Gill v. Lewis* (2), where Jenkins, L.J. dealt with the matter thus ([1956] 1 All E.R. at 852):

“In my view, as the conclusion of the whole matter, the function of the court in exercising this equitable jurisdiction is, save in exceptional circumstances, to grant relief when all that is due for rent and costs has been paid, and (in general) to disregard any other causes of complaint that the landlord may have against the tenant. The question is whether, provided all is paid up, the landlord will not have been fully compensated; and the view taken by the court is that if he gets the whole of his rent and costs, then he has got all he is entitled to so far as rent is concerned, and extraneous matters of breach of covenant are, generally speaking, irrelevant. There may, however, be very exceptional cases in which the conduct of the tenants has been such as in effect to disqualify them from coming to the court and claiming any relief or assistance whatever.”

5 An example of disqualification suggested by the learned Lord Justice is where the tenant is using the premises as a disorderly house. Mr. Dumas, for the plaintiff, has brought to my attention the case of *Barton, Thompson & Co. Ltd. v. Stapling Machines Co.* (1) as another example of disqualification, where the tenant was not in a position to pay the arrears of rent within the time specified.

6 I think that another example of disqualification might well be where a tenant has a long history of having been persistently bad in the payment of rent and there is the expectation that even if granted relief he will continue to be persistently bad. I think that this course of conduct by a tenant can amount to exceptional circumstances, in some cases.

7 Now, as for the facts which have given rise to this application for relief, by a deed of under-lease dated September 18th, 1989, the first defendant was granted a lease of premises, to be used solely as a restaurant, at Unit G5 Cornwall's Court, for a term of 27 years from August 1st, 1989. The premises were what has been described as “shell” premises. The first defendant had a covenant in the under-lease to convert the said premises into a high-class restaurant at his own expense. I am told that the conversion cost was in the neighbourhood of £250,000.

8 When the defendant was getting ready to open his restaurant, the premises were flooded and became unfit for the purpose for which they had been leased. There were allegations and counter-allegations as to which of the two parties had been negligent and responsible for the flooding. The first defendant took the view that they were under no duty to pay rent during the period that the premises were unfit to be used as a restaurant.

9 The plaintiff issued a writ on July 13th, 1990 against both defendants, claiming possession and arrears of rent, together with *mesne* profits. A defence and counterclaim was served on the plaintiff on August 7th,

1990, followed by a reply on August 31st, 1990. On October 20th, 1990, the plaintiff issued a summons for summary judgment on the grounds that the defendants had no defence. The matter eventually came before me in Chambers and on December 18th, 1990 I made, *inter alia*, the following order:

“1. Judgment in respect of rent due from May 4th, 1990 to December 31st, 1990, at the rate of £21,024 per annum, plus maintenance rent.

2. Leave to defend in respect of the residue claimed by the plaintiff.

3. No order as to the plaintiff’s claim for possession.”

10 The above order was appealed against by both parties. The Court of Appeal, apart from granting possession to the plaintiff, gave the defendants unconditional leave to defend in respect of the unpaid rent of a slightly shorter period of four months. The order of the Court of Appeal is dated March 21st, 1991.

11 Following my order of December 18th, 1990, the defendant paid the arrears of rent ordered, but not until January 8th, 1991. As the rent in respect of these premises is payable in advance, the defendant failed to pay the rent for January 1991 promptly. This rent was not paid until late February 1991. Since the order of the Court of Appeal payments in respect of rent or arrears of rent have been made by the defendant, but never regularly or punctually. The last payment in respect of rent has been on January 24th, which took care of all the rent due for the year 1991 (apart from the rent in respect of which leave to defend has been granted). Since January 24th, 1992 no money in respect of rent has been paid by the defendant to the plaintiff up to the present hearing. Rent is now due in respect of January, February, March, April and May 1992.

12 In those circumstances is it proper to grant relief from forfeiture as prayed? Or is this a case of exceptional circumstances, where the tenant has disqualified himself by a long history of being a persistently bad tenant in respect of the payment of rent, leading to the conclusion that he will continue to be persistently bad? Relief from forfeiture is an equitable remedy and therefore the court has a judicial discretion to do what is right and proper, taking into account all relevant factors, but being guided by *Gill v. Lewis* (2). The general rule is that relief from forfeiture should be granted on payment by a tenant of all the arrears of rent, if there are no exceptional circumstances.

13 There are two factors which I think I should take into account on behalf of the tenant. The first is that he has been granted leave to defend in respect of four months’ rent from December 1st, 1990 to March 31st,

SUPREME CT.

TARACHAND V. SERUYA

1991 and the plaintiff has not taken any further steps concerning this part of its case. Secondly, the tenant has spent £250,000 in converting the “shell” premises into a high-class restaurant, and the lease the tenant holds has still over 24 years to run. Weighing one thing with the other, I think that fairness and justice demand, and I order, that relief from forfeiture should be granted on the following terms: “Payment of arrears of rent amounting to £10,572, plus costs, on or before noon, May 29th, 1992. Otherwise, the stay is discharged.”

Order accordingly.