[1991–92 Gib LR 337]

LET-LIVE SUPERMARKETS LIMITED v. NIFERART INVESTMENTS LIMITED

SUPREME COURT (Kneller, C.J.): June 29th, 1992

Landlord and Tenant—renewal of tenancy—business premises—extension of time to apply—extension if inequitable to grant landlord possession without giving tenant opportunity to seek new tenancy—court to balance hardship to each party—no extension if court unlikely to renew, e.g. because history of non-compliance with lease, or new tenancy will only benefit insolvent tenant's creditors

The tenant sought an extension of time in which to apply for a new tenancy of the landlord's premises.

The tenant leased its business premises from the landlord under a six-year lease from 1986. The relationship between the parties deteriorated due to the tenant's breaches of the terms of the lease, and the landlord twice commenced forfeiture proceedings. The tenant failed to comply fully with a consent order requiring repairs to be done.

The landlord issued a notice to quit in April 1991 under s.44 of the Landlord and Tenant Ordinance and stated that it would oppose an application for the grant of a new tenancy under s.49(1)(*c*) of the Ordinance on the basis that the tenant was in breach of its obligations under the lease. Although the tenant issued a counter-notice under s.44(5) in June 1991, it failed to apply by summons for the grant of a new tenancy under s.43(1) within the four-month time-limit for doing so. Under s.48(3), the time expired in August 1991. The tenant served its summons in January 1992 (five months out of date) on being reminded by its solicitors.

By 1992, the tenant was placed in receivership by its bank. Its business on the premises was wound down and its other property sold. It hoped to obtain a renewal of the lease in order to assign the lease and pay off the bank and its other creditors. It applied under s.57(2) of the Ordinance for an extension of time to apply for a new tenancy.

It submitted that (a) the court had an absolute discretion as to whether to extend time, and there was no need, as tenant, for it to show reasonable cause for an extension; (b) it had notified the landlord of its intention to apply for a new tenancy, and had applied by summons as soon as it had been reminded that it had omitted to do so; (c) the landlord would suffer no prejudice by the renewal of the tenancy for which it could not be compensated by costs, since the receiver would first have to authorize an

application for renewal and the landlord would be required to approve the assignee of the lease; and (d) the tenant, on the other hand, would otherwise be unable to pay its debts, causing hardship to the business and its creditors.

The landlord submitted in reply that (a) the court should extend time for the tenant's application only if it would be inequitable for the landlord to recover possession, and not merely because the tenant would otherwise lose the chance to obtain a new tenancy; (b) it would be wrong to renew the tenancy in view of the tenant's past record of non-compliance with its obligations under the lease; (c) as landlord, it would suffer prejudice if time were extended, since the tenant could not pay the four months' rent it currently owed, and its debt to the bank was such that it would be unable to do so even on assigning a renewed tenancy; and (d) since there was little chance that the court would grant a new tenancy, it should dismiss the tenant's application.

Held, dismissing the application:

(1) The time-limits provided for in the Landlord and Tenant Ordinance were to be strictly interpreted, since the Ordinance discriminated against landlords in favour of tenants. The discretion to extend time was to be exercised judicially, taking into account the degree of hardship that each party would suffer if the application were granted or refused. An extension would not be granted as a matter of course when time-limits had simply been overlooked. However, if it were shown to be unjust or inequitable for the landlord to recover possession of the property without giving the tenant an opportunity to seek a renewal of its tenancy, an extension might be granted to permit it (paras. 3–6).

(2) In this case, the court would not grant an extension, even though the tenant's delay had been of moderate duration and caused by its solicitor's mistake. The court was unlikely to grant a new tenancy, given the poor state of relations between the parties, the tenant's financial position and its failure to comply with a past court order. Since the tenant was virtually insolvent and its actions were dictated by its main creditor, the bank, it would not be prejudiced by the refusal of an extension. As the proceeds from the sale of the lease would not meet the other debts, only the bank could benefit from the grant of a new tenancy. The landlord, on the other hand, would incur further costs in contesting a renewal application. Accordingly, the hardship to the landlord if the extension of time were granted would exceed any hardship to the tenant were it refused (paras. 17–19; para. 21).

Cases cited:

(1) *Baxendale (Robert) Ltd.* v. *Davstone (Holdings) Ltd.*, [1982] 1 W.L.R. 1385; [1982] 3 All E.R. 496, *dicta* of Waller and Ackner, L.JJ. applied.

(2) *Benatar Bros. Ltd.* v. *Plaza (Holdings) Ltd.*, Supreme Ct., Cause No. 1987–B–20, May 18th, 1987, unreported, applied.

(3) *Cohen* v. *Key City Properties Ltd.*, Supreme Ct., Cause No. 1986–C–143, October 26th, 1987, unreported, applied.
(4) *Gareze & Spartan Invs. Co. Ltd.* v. *Santos*, Supreme Ct., Cause No. 1986–A–222, March 23rd, 1988, unreported, applied.
(5) *Herro Traders Ltd.* v. *Sheraton Ltd.*, C.A., Civ. App. No. 14 of 1986, unreported, *dictum* of Spry, P. applied.
(6) *Vinet* v. *Montague Properties Ltd.*, C.A., October 25th, 1989, unreported, referred to.

Legislation construed:
Landlord and Tenant Ordinance (1984 Edition), s.43(1):

"A tenancy to which this Part applies shall not come to an end unless terminated in accordance with the provisions of this Part; and, subject to section 48, the tenant under such a tenancy may apply to the court for a new tenancy—

(*a*) if the landlord has given notice under section 44 to terminate the tenancy . . ."

s.44(1): "Subject to section 77, the landlord may terminate a tenancy to which this Part applies by a notice given to the tenant in the prescribed form specifying the date of termination."

(2): "Subject to subsection (3), a notice under this section shall not have effect unless it is given within the appropriate time specified in Schedule 5."

s.48(3): "No application under section 43(1) shall be entertained unless it is made not less than 2 nor more than 4 months after the giving of the landlord's notice under section 44 . . ."

s.57(2): The relevant terms of this sub-section are set out at para. 2.

Schedule 5, Part I, para. 1:

"Subject to Part II of this Schedule, the period during which a notice must be given under section 44(2) shall be not more than 12 months nor less than 6 months before the date of termination specified in the notice."

L.B. Triay for the applicant tenant;
L.W.G.J. Culatto for the respondent landlord.

1 **KNELLER, C.J.:** The issue in this application is whether the court should extend the time for the filing of an originating summons by Let-Live Supermarkets ("the tenant") for a new tenancy of 46 Irish Town ("the premises"). Niferart Investments Ltd. ("the landlord") would have the court refuse to do so.

2 The tenant's application for more time is by summons in Chambers dated January 6th, 1992, expressed to be brought under s.57(2) of the Landlord and Tenant Ordinance, which reads as follows: "The Court may, in its discretion, grant to a landlord or tenant an extension of time for giving any notice or making any application or request under this Part."

"This Part" is headed "Part IV—Business Premises." The long title of the Ordinance is "An Ordinance to Regulate the Relationship Between the Landlord and Tenant, and for Matters Relating Thereto."

3 The Gibraltar landlord and tenant legislation should be interpreted strictly, since it discriminates against landlords in favour of tenants, making serious inroads into the contractual rights of the former and conferring benefits over and beyond their contractual rights on the latter. "In general, I think the courts will have to adopt a less liberal attitude to these applications, because it is clear from many appeals that we have here that time limits are being all too lightly ignored." (*per* Spry, P., in *Herro Traders Ltd.* v. *Sheraton Ltd.* (5)). See also Waller, L.J. in *Robert Baxendale Ltd.* v. *Davstone (Holdings) Ltd.* (1) ([1982] 3 All E.R. at 501): "I do not see anything unfair in [a] timetable being strictly adhered to."

4 The jurisdiction under s.57(2) of the Ordinance is not fettered by such phrases as "for sufficient reason" or "for reasonable cause" but, on the contrary, it is left to the court to exercise it in a judicial manner, eschewing whim, fancy and prejudice: see *Benatar Bros. Ltd.* v. *Plaza (Holdings) Ltd.* (2). An extension will not be granted as a matter of course: see *Cohen* v. *Key City Properties Ltd.* (3).

> ". . . [T]he court can take into account the degree of hardship the tenant will suffer if the application for extension of time is refused and he loses the right to apply for a new tenancy, and, in balancing the tenant's hardship against the hardship the landlord will suffer if the application is granted, can take into account any remedy the tenant may have against his legal advisers for their failure to serve the documents in time, but the weight to be given to that remedy will depend on the particular circumstances . . ."

See the headnote in *The All England Law Reports* to *Robert Baxendale Ltd.* v. *Davstone (Holdings) Ltd.* ([1982] 3 All E.R. at 497).

5 One of the objects of Part IV of the Ordinance is to prevent an action being brought by a landlord to recover possession of the premises when, in the opinion of the legislature and the court, it is unjust and inequitable for him to recover possession at all or to recover it precipitately: see *Gareze & Spartan Invs. Co. Ltd.* v. *Santos* (4).

6 In *Robert Baxendale Ltd.* v. *Davstone (Holdings) Ltd.*, Ackner, L.J. said (*ibid.*, at 504):

> "It is not enough to show that the legal advisers overlooked the time limits, or misunderstood the rules as to service and that unless time is extended, the tenant will lose his right to a new lease with the sort of hardship which would normally result. Such a case would have

no unusual feature about it. It would be a common form situation where the rules of court are overlooked or not properly considered."

7 Here, in this case, the landlord has leased the premises to the tenant for the past 18 years. The last lease was dated September 30th, 1986 and was for the term of six years from April 1st, 1986, so it expired on March 31st, 1992. The landlord issued a notice to quit dated April 3rd, 1991, pursuant to s.44 of the Ordinance, stating that it would oppose an application by the tenant for the grant of a new tenancy on the ground that the tenant was in substantial breach of its obligations under its current lease and/or for other reasons connected with the tenant's use and/or management of the holding. This notice to quit was served on the tenant on April 5th, 1991, three days after the landlord was entitled to do so under Schedule 5 to the Ordinance. Had it been served three days before the time to do so had expired, the lease would have expired at the end of February 1992 and this summons would have been in time. As it was, this application for more time was made after a delay of five months.

8 The tenant issued a counter-notice dated June 3rd, 1991, informing the landlord that it would not be willing to give up possession of the premises on March 31st, 1992 and that it would apply to this court in due course for the grant of a new tenancy. It should have done so by originating summons, which should have been served on the landlord within the four-month period after it had been served with the notice to quit (see s.48(3)). Thus, the originating summons should have been served by August 5th, 1991. It failed to do that in time.

9 The landlord's previous solicitor reminded the tenant's solicitor on January 6th, 1992 that the tenant had not applied for a new tenancy, and so, on that very day, it applied by summons in chambers for the time in which to issue and serve the originating summons to be extended. This was, as I have said, five months after that time had expired. The originating summons had been settled by the tenant's solicitor by June 3rd, 1991 when the counter-notice was issued, but it was left in the solicitor's file to await the end of the statutory two-month period before issuing and serving it. The omission to file it in time was inadvertent and not the result of any intention to prejudice or to defeat the interest of the tenant.

10 Recently the relationship between this tenant and landlord has been bitter. The landlord began forfeiture proceedings in 1989 because the tenant carried out unauthorized works. The action was compromised on August 25th, 1989 on terms set out in an order of this court. The tenant paid the landlord £15,000, its rent was doubled and it had to carry out repair works which were said to be minor. The tenant has not done part of them because its surveyor said work on the beams was unnecessary. The landlord filed another action against the tenant for forfeiture of the lease

because the tenant had not paid the rates. The tenant was locked in battle with the officials of the Rates Department over the amount it should pay, and meanwhile refused to pay what was demanded. When the amount was agreed the tenant paid the rates and the landlord discontinued that action.

11 The tenant's solicitor was involved in all that between April and September 1991. He thought that with the rates troubles out of the way there would be no opposition from the landlord to the tenant's application for a new lease.

12 The tenant's financial affairs are now in a parlous state. The Banque d'Indosuez registered a debenture against the tenant on December 21st, 1976 by way of a floating charge to secure the tenant's borrowing, which, by May 11th, 1992, amounted to £80,000. The bank crystallized the floating charge over the tenant's assets on April 1st, 1992 and appointed a receiver. It has not gone into liquidation. The receiver is selling or has sold the tenant's other premises at 15 Engineer's Lane and a substantial part of its stock. He continues to run down its supermarket business from the premises, which is now its only asset.

13 The tenant is trying to find a purchaser for its interest in the lease of the premises and goodwill in the business for a premium, with which it will discharge its £80,000 debt to the bank and £40,000 worth of other debts owed to its other creditors. A purchaser has been found but the landlord will not grant the tenant a new tenancy. If this application is rejected the tenant cannot have its day in court, argue its case for a new tenancy, sign the lease, sell it, realize the premium and pay off its debts.

14 The tenant is owned by a branch of the Budhrani family, which has been successful in business in Gibraltar for nearly 20 years. According to this family, the business has been the only source of income for Mr. and Mrs. Tahilram Essardas Budhrani, who are elderly and have returned to India in order to carry out their last pilgrimage; Mr. Mohan Budhrani, who is unable to earn his own living; and Mr. Prem Budhrani, who is its present managing director. Some of them have incurred considerable debts in order to keep the business going. The bank may seek to enforce their personal guarantees. They have decided to leave Gibraltar but they want to do so with their heads held high because they have met all their obligations. They have nothing to go to in India.

15 The tenant points out that to grant an application will not prejudice the landlord to any extent that cannot be compensated for by payment of its costs. Ultimately, it will not be the Budhranis who are its tenants but some person or entity to whom the tenant has assigned the new lease of the premises with the landlord's consent in writing. The landlord would receive the rent it desired or something near it. No irreparable hardship

would be caused to the landlord. On the other hand, to refuse the application would cause the tenant company, its directors, shareholders and creditors, including the bank, to suffer extreme hardship.

16 If the time for applying by originating summons were extended, the receiver would have to decide whether the tenant should apply, and if he authorized the tenant to do so the tenant would have to pay the arrears (if any) of rent and rates and comply with all its obligations, or it would not succeed in getting a new lease. If the tenant went on to succeed in obtaining a renewal of the lease the landlord could agree to its assignment if the purchaser impressed it and then receive the rent it demanded or one that was near it, assuming its demand was a reasonable one.

17 It is true that the delay in applying for leave to file an originating summons for a renewal of the lease is about the same as in the Gibraltar authorities cited. The reason for the delay is also the same, namely, the applicant's solicitors' mistake, and that has been deplored but condoned by the Supreme Court in those cases. But in those, or nearly all of them, the landlord was prepared to renew the lease because the tenant was acceptable to the landlord. Those tenants always paid the rent and complied with their obligations and always would. The landlord opposed the application of the tenant for extra time in which to apply for a renewal because it gave it extra bargaining power, *e.g.* the tenant would have to pay the new (probably higher) rent retrospectively. Here, the relationship between the tenant and the landlord could only be worse if the parties resorted to open, armed conflict. The application is nominally by the tenant, but the bank is probably its main-spring and the Ordinance was not designed to protect banks.

18 The tenant is virtually insolvent and so the failure of this application will not prejudice it or cause it irreparable hardship. It will not be looking for new premises if it has to leave 46 Irish Town. The assignment of the lease to a purchaser will only benefit the bank because the price will probably be insufficient to meet the demands of the tenant's other creditors, directors and shareholders. The tenant has no right to a renewal of its lease under the lease, or at common law, or under the Ordinance, now that the time has passed.

19 Allowing this application would be to give the tenant an "outside chance" of succeeding in having it renewed, which will create uncertainty for the landlord and cause serious hardship to it. The tenant now owes the landlord four months' rent at £1,150 a month, which is a total of over £4,600. The tenant has no money to pay it now and if and when it assigns the renewal lease, the premium will presumably be scooped up by the receiver for the bank, which is unsure it can recover its £50,000 loan under the debenture or £80,000 balance. The tenant is not even trading from the premises.

20 The landlord served the notice to quit three days after the earliest date it could in order to have the tenant's originating summons heard early this year before the end of the tenancy. The object was to save the landlord from having to put up with this tenant a moment longer than was necessary. As it is, the landlord issued a writ for possession because it was trying to exercise its common law right. No weight should be attached to that fact: see *Vinet* v. *Montague Properties Ltd*. (6). The landlord asks if it is expected to incur even more costs in the further litigation involved in giving the tenant more time in which to file its originating summons. It is sceptical of the Budhranis' allegations that they have no assets elsewhere. Their writing paper sets out an enterprise called Roop with an address in La Linea and an individual, R.T. Essardas, in Bombay.

21 Obediently interpreting this Ordinance strictly, and adopting a less liberal attitude to time-limits for such applications, in the exercise of the discretion vested in the court, I dismiss the application with costs. The tenant has not shown on the balance of probabilities that it should be granted. The hardship to the landlord would be greater if it were allowed than it will be to the tenant if it is refused. The tenant's financial position and the history of its troubled relationship with the landlord, together with its failure fully to observe the terms of an earlier order of this court, in my judgment, justify the exercise of the discretion in this way. The landlord should not be made to endure another period of uncertainty and expense before recovering possession of its property, letting it at a market rent and making a profit.

Application dismissed.