[1991–92 Gib LR 345]

MONTAGU PROPERTIES LIMITED v. MARTIN

SUPREME COURT (Alcantara, A.J.): July 2nd, 1992

Landlord and Tenant—repair, fitness and alteration—landlord's obligations—onus on landlord, not occupying tenant, to abate nuisance arising from structural deficiency or defective construction, regardless of contractual obligations—landlord properly convicted under Public Health Ordinance, s.330(6) for non-compliance with abatement notice if non-liability only defence but no appeal against notice under s.330(3)

The appellant was charged in the magistrates' court with failing to comply with an abatement notice, under s.330(6)(*b*) of the Public Health Ordinance.

The Public Health Authority issued an abatement notice to the appellant, as leaseholder of premises which were sub-let to a business tenant, notifying it that the premises' leaky roof constituted a statutory nuisance, and requiring it to carry out repairs within 30 days to abate the nuisance. The notice informed the appellant of its right to appeal against the notice within 21 days under s.330(3), but the appellant did not exercise that right.

The appellant was prosecuted for failure to comply with the notice. The Magistrate dismissed its submission of no case to answer based on the argument that the tenant rather than the appellant was responsible for abating the nuisance. His attention was not drawn to the provisions of s.330. He stated that there was a case to answer and gave reasons. He ruled that the appellant was responsible for financing and carrying out repairs required by the Public Health Authority, that the tenant's obligations under the lease did not include repairing the roof and that under the lease the roof was not part of the demised premises. The appellant called no evidence, and the Magistrate convicted.

The appellant appealed by way of case stated, seeking a ruling as to whether the Magistrate had erred in his findings.

Held, dismissing the appeal:

The Magistrate had properly convicted the appellant under s.330(6) of the Public Health Ordinance, on the ground that the nuisance remained unabated and no explanation had been given. His reasoned judgment on the issue of who should have been served with the abatement notice was unnecessary, since the appellant had not appealed against the notice under sub-s. (3)(*e*) and would, in any event, have required leave to appeal

outside the relevant time-limit. The Magistrate should have concerned himself only with the appellant's compliance or non-compliance with the notice. Accordingly, the present appeal against conviction would be dealt with as such, and not as an appeal against the Magistrate's dismissal of the no-case submission. The responsibility under the Ordinance for abating a nuisance arising from structural deficiencies or defective construction lay firmly with the owner (in this case the appellant leaseholder) rather than the occupier, regardless of the contractual terms of the tenancy, and the appellant had failed to observe this responsibility. The appeal would be dismissed (paras. 6–8; paras. 10–11).

Legislation construed:
Public Health Ordinance (1984 Edition), s.330(3)(e): The relevant terms of this paragraph are set out at para. 4.
s.330(5): The relevant terms of this sub-section are set out at para. 4.
(6): The relevant terms of this sub-section are set out at para. 4.
s.332: "Where a person aggrieved by an order, determination or other decision of the magistrates' court under this Ordinance is not by any other enactment authorized to appeal to the Supreme Court, he may appeal to such a court."

A.V. Stagnetto, Q.C. for the respondent;
A.A. Trinidad, Crown Counsel, for the respondent.

1 **ALCANTARA, A.J.:** This is an appeal by way of case stated, pursuant to s.332 of the Public Health Ordinance, in which the learned Stipendiary Magistrate seeks the opinion of the Supreme Court on the following three questions of law:

(a) Whether or not the learned Stipendiary Magistrate erred in law in finding that under the terms of the lease, Montagu Properties Ltd., as lessor, was responsible for carrying out and financing the works demanded by the Public Health Authority under the summons dated November 14th, 1990.

(b) Whether or not the learned Stipendiary Magistrate erred in law in holding that the lessee's obligations in cl. 2(6) of the lease did not include an obligation on the part of the lessee to repair the roof of the demised premises.

(c) Whether or not the learned Stipendiary Magistrate misdirected himself in holding that under the terms of the lease the roof of the demised premises was not included in the demise.

2 The questions above are those contained in the notice of appeal dated April 23rd, 1991, wherein the appellant stated as follows that it was aggrieved by the decision of the learned Stipendiary Magistrate:

"You determined on March 13th, 1991, on a submission of no case to answer, that we, as lessors, are responsible for the costs of works required to be carried out as specified in the summons dated November 14th, 1990 and the abatement notice dated May 21st, 1990."

3 Strictly speaking, this is not correct. This is an appeal against conviction, not an appeal against a finding of a case to answer. This is clear from the case stated. The facts, as disclosed by the case stated, are as follows. On May 21st, 1990 an abatement notice was issued under the Public Health Ordinance against the appellant, as leaseholder of the premises known as *Casa Antonio*, of which Bahia Caterers Ltd. is the occupier. The abatement notice is part of the record of appeal and it discloses that the Government of Gibraltar was satisfied of the existence of a statutory nuisance—the roof of the premises was defective and leaky—and required the appellant, as leaseholder, to abate the nuisance within 30 days. The abatement notice contained a clause notifying the appellant of its right to appeal against the abatement notice within 21 days, pursuant to s.330 of the Public Health Ordinance.

4 I think that it would be helpful if I set out what I consider to be the relevant provisions, in so far as this case is concerned, of s.330 (Appeals against notices). Section 330(3) reads:

"(3) A person served with such a notice may appeal to the magistrates' court on any of the following grounds, which are appropriate in the circumstances of the particular case:—

. . .

(*e*) that the notice might lawfully have been served upon some person other than the appellant and that it would have been equitable for it to have been so served . . ."

Sub-section (5) reads:

"(*a*) Where the ground or one of the grounds upon which an appeal under this section is brought is the ground specified in paragraph (*e*) or paragraph (*f*) of subsection (3) the appellant shall serve a copy of his notice of appeal on each other person referred to.

. . .

(*c*) On the hearing of the appeal the court may make such order as it thinks fit with respect to the person (being either the appellant or a person upon whom a copy of the notice of appeal was served) by whom any requirement of the notice served by the Government is to be complied with and the

contribution to be made by any other such person towards the cost of complying with the requirement . . .

(*d*) In exercising its powers under this subsection the court shall have regard to the degree of benefit to be derived by the different persons concerned and all other circumstances of the case including (as between an owner and an occupier) the terms and conditions whether contractual or statutory of the tenancy."

Sub-section (6) reads:

"(6) Subject to such right of appeal and (where any such appeal is brought) to any order made by the court, if any requirement of the notice is not duly complied with—

. . .

(*b*) . . . the person in default is guilty of an offence . . ."

5 In the present case the appellant has not appealed under s.330. Neither has it abated the statutory nuisance. A summons was issued on November 14th, 1990 against the appellant for failing to comply with the abatement notice. The matter came before the learned Stipendiary Magistrate on February 26th, 1992. The Stipendiary Magistrate found that the nuisance remained unabated. At that stage counsel for the appellant made a submission of no case to answer. Counsel's argument was that the nuisance should be abated by the tenant and not by the appellant. Counsel referred the learned Stipendiary Magistrate to a number of authorities on landlord and tenant law, and invited him to interpret the lease under which the tenant (the occupier) held the premises.

6 The mind of the learned Stipendiary Magistrate was not directed to the provisions of s.330 of the Public Health Ordinance. I may add that on the hearing of the present appeal, my attention was not drawn to that particular section. In any event, the learned Stipendiary Magistrate adjourned to consider the submission of no case to answer, and gave his decision on March 13th, 1992. I agree with his decision, which was: "There is a case to answer, and that is as far as I should go." There was certainly a case to answer. There was default in compliance with an abatement notice, and no explanation had been given as yet.

7 The learned Stipendiary Magistrate then proceeded to give his reasons why he had ruled the way he did. Whilst not agreeing or disagreeing with him, I have come to the conclusion that his reasoning was unnecessary, and certainly not apposite to the issue before him. He was concerned with the compliance or non-compliance with the abatement notice. He was not concerned, in the proceedings before him, with whether the occupier instead of the appellant should have been served with the abatement notice.

8 This point could only have been brought up by means of an appeal pursuant to s.330. There was no appeal before him, and to convert a submission of no case to answer into an appeal is wrong. The time for an appeal had long passed. Only by securing an extension of time to appeal could the appellant argue that "the notice might lawfully have been served upon some person other than the appellant and that it would have been equitable for it to have been so served" (see s.330(3)(*e*) of the Public Health Ordinance).

9 Having given his ruling on March 13th, 1991, the case was then adjourned until April 23rd, 1991. The appellant did not call any evidence, but stood on the same argument put forward in relation to the submission of no case to answer. The learned Stipendiary Magistrate convicted.

10 During the hearing of the present appeal I was presented with the same arguments that had been put before the Stipendiary Magistrate. I was somewhat surprised that at no stage was I referred to *Lumley's Public Health*, which is the bible of public health authorities. I reproduce this passage from 1 *Lumley's Public Health*, 11th ed., at 307 (1937):

> "The owner, as distinguished from the occupier, is in all cases to abate a nuisance which arises from structural deficiencies or defective construction. The occupier is not liable under the Act for such defects, whatever may be his contractual responsibilities with his landlord. Such responsibilities are not affected by the Act."

11 I dismissed the appeal with costs on the date of the hearing, June 23rd, 1992. I will now answer Question (a) in this way: The learned Stipendiary Magistrate did not err in law in finding, under the Public Health Ordinance, that Montagu Properties Ltd. is responsible for carrying out and financing the works demanded by the Public Health Authority under the summons dated November 14th, 1990.

Appeal dismissed.