BARCLAYS BANK PLC v. C. SILVA, L. SILVA and SILVA Jr.

SUPREME COURT (Harwood, A.J.): November 30th, 1993

Civil Procedure—judgments and orders—summary judgment—order for possession of land obtainable under O.14 procedure if defence dependent on point of law—O.14A more suitable procedure

Landlord and Tenant—lease or licence—service tenancy—hotel manager occupying rooms during employment in return for services is mere licensee or service occupier unless contrary intention shown—tenancy requires exclusive possession for term certain in consideration of rent, and mutual intention to create interest in land

The plaintiff applied for an order for possession of premises occupied by the defendants.

The plaintiff bank leased a building to the first defendant's employer for use as an hotel. The first defendant, the hotel manager, lived with his family in rooms in the hotel free of charge, in exchange for being "on call" outside normal working hours, and was paid less in recognition of this. It was not a condition of his employment that he live on the premises but merely a matter of convenience. The first defendant's employment was terminated when the hotel went out of business but he and his family remained in occupation. The company's liquidators restored possession of the building to the bank, and the bank applied under O.14 of the Rules of the Supreme Court for an order for repossession.

It submitted that (a) it was entitled to summary judgment, since the defendants had no defence to its claim; (b) the first defendant and his employer had clearly intended that his occupancy was to be a personal privilege, conferring no interest in the property, since (i) there was no agreement in writing, (ii) he was free to live elsewhere if he chose, (iii) no rent was payable, and (iv) it was absurd that a hotel would have contemplated otherwise; and (c) accordingly, he was at best a service occupier or otherwise a licensee of the premises, to whom the protection of the Landlord and Tenant Ordinance did not apply.

The defendants submitted that (a) since there were discrepancies between the accounts of the parties, O.14 was not an appropriate means of determining their respective rights; (b) their occupation was not dependent on the continuation of the first defendant's employment, since (i) they enjoyed exclusive possession of the rooms, and (ii) he had rendered services in lieu of payment of rent; and (c) accordingly, the first defendant was a service tenant and protected by Part III of the Landlord and Tenant Ordinance.

Held, giving judgment for the plaintiff:

(1) The O.14 procedure could properly be invoked to determine whether a tenancy had been created, although O.14A provided a more appropriate means of disposing of the case. The issue was a purely legal one which, if decided in favour of the plaintiff, precluded the existence of a defence. The difference between the facts pleaded by the parties did not amount to a significant dispute of fact (page 251, lines 9–20).

(2) An order for possession would be made, since having regard to the circumstances in which the first defendant entered into possession, he was a licensee, or at best a service occupier, but not a tenant. The protection given by the Landlord and Tenant Ordinance in relation to dwelling-houses therefore did not apply. His status was to be determined by ascertaining the parties' intentions in the light of the circumstances of occupation. A tenancy would arise only if there had been a grant of exclusive possession for a term certain, in consideration of a premium or periodical payments, and with the mutual intention of creating a proprietary interest in the property. Although he had been given exclusive possession, it was not for any fixed period, and even if his services had constituted payment of rent in kind, no intention had been shown that he should acquire a tenancy. He and his family had no right to remain in occupation after the end of his contract of service (page 251, lines 41–45; page 252, line 29 – page 253, line 30).

Cases cited:

(1) *Crane* v. *Morris*, [1965] 1 W.L.R. 1104; [1965] 3 All E.R. 77, distinguished.

(2) *Errington* v. *Errington*, [1952] 1 K.B. 290; [1952] 1 All E.R. 149, *dicta* of Denning, L.J. applied.

(3) *Hughes* v. *Overseers of Parish of Chatham* (1843), 5 Man. & G. 54; 134 E.R. 479; Pig. & R. 35; *Hughes* v. *Chatham Overseers, Burton's case*, [1843–60] All E.R. Rep. 470, distinguished.

(4) *Murray, Bull & Co. Ltd.* v. *Murray*, [1953] 1 Q.B. 211; [1952] 2 All E.R. 1079.

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

Legislation construed:

Landlord and Tenant Ordinance (1984 Edition), Long Title: The relevant terms of this title are set out at page 253, lines 13–14.

Rules of the Supreme Court, O.14, r.2(1):

> "An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim … is based and stating that in the deponent's belief there is no defence to that claim…"

r.3(1): "Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court

with respect to the claim … to which the application relates that there is an issue or question in dispute which ought to be tried … the Court may give such judgment for the plaintiff against that defendant on that claim … as may be just having regard to the nature of the remedy or relief claimed."

O.14A, r.1(1): "The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that—

(*a*) such question is suitable for determination without a full trial of the action, and

(*b*) such determination will finally determine (subject to any possible appeal) the entire cause or matter or any claim or issue therein."

J.E. Triay, Q.C. and *M.W. Isola* for the plaintiff;
C.A. Gomez for the defendants.

HARWOOD, A.J.: In these proceedings the plaintiff bank seeks summary judgment under O.14 for possession of the premises occupied by the defendants. The summons is supported by an affidavit sworn by Douglas Reyes, who is the senior operations manager of the bank, and two affidavits of Julius James Mifsud, a director of Associated Properties Ltd. ("the company"). It is opposed on the basis of affidavits sworn by Carlos Silva and by William David Jones.

The proceedings were commenced by originating summons dated April 23rd, 1993, claiming possession of premises on part of the third floor of the building formerly known as the Montarik Hotel. It was subsequently ordered that the action be tried as if begun by writ and pleadings followed in the form of a statement of claim and defence.

Mr. Triay has argued the claim for possession under O.14 on the basis that there is no defence even if one accepts the facts deposed to or alleged by way of defence—being facts as opposed to statements or inferences having legal implication—because he says, quite rightly, that the issue as to whether or not any tenancy was created is unquestionably a matter of law to be decided on the facts.

The facts and the issue are as follows: The bank leased a building to the company for use as an hotel with effect from February 1st, 1965 to December 31st, 1992. The company carried on an hotel business there. Carlos Silva was appointed manager of the hotel on May 13th, 1986 and a few months later was permitted, by oral agreement, to occupy a part of the third floor as a place in which he and his family could reside. It was not a term of his contract of employment—he was not required to live there—but it suited both Carlos Silva and the company that he did so.

On or about December 23rd, 1992 the company went into liquidation and Carlos Silva ceased to perform any duties in connection with the

hotel or the company, but he and his family remained in occupation of part of the third floor without payment as before. The liquidator restored possession of the building to the bank on January 22nd, 1993. The bank now wants Mr. Silva and his family to leave. It is contended by Mr. Gomez on his behalf that he cannot be compelled to do so because he is in occupation of that part of the premises as his residence under Part III of the Landlord and Tenant Ordinance and is therefore entitled to the protection from eviction which it affords.

First, however, Mr. Gomez sought, apparently under the first limb of O.14, r.3(1), to persuade me that since there appear to be certain differences in the narratives of the opposing affidavits, O.14 proceedings are not appropriate. But I hold that those differences are not of such consequence as to render these proceedings inappropriate. The plaintiff had complied with O.14, r.2 and, in my judgment, these proceedings were appropriately commenced, even though I consider that they might better have been formulated and dealt with under O.14A if the parties' legal advisers had given due thought to this useful, though often ignored, method of disposal. Nevertheless, as a matter of case law, the modern view is that O.14 is a very convenient method of determining a pure question of law.

Secondly, Mr. Gomez has pointed out a number of factors which, he says, combine to demonstrate that a landlord and tenant relationship was created and still subsists. By oral agreement between the parties, Mr. Silva was given exclusive possession of certain rooms in the Montarik Hotel for the use of himself and his family. He was permitted to occupy those rooms, as he says in his affidavit, "free of charge by way of an incentive to remain in employment" as manager of the hotel. He took up occupation in November 1986 and put the rooms into good order. It was agreed that he should be available "on call" as duty manager should his services be required at any time and he received remuneration from his employer somewhat lower, he says, than would otherwise have been the case. Certain other rooms in the hotel were let to occupiers on a long-stay basis.

The cessation of employment and liquidation of the company do not affect the right of occupation, Mr. Gomez contends. Against that background, Carlos Silva became a service tenant (as opposed to a service occupier) rendering services in lieu of the payment of a monetary rent, whose right of occupation continued even after his employment ceased, by reason of the application of Part III of the Landlord and Tenant Ordinance.

Mr. Triay, on the other hand, submitted that there is abundant authority for the proposition that it is the intention of the parties, as determined in the light of the circumstances of the occupation of the premises, that must decide the status of the occupant. That is a proposition of law with which I entirely agree. On that basis, says Mr. Triay, Carlos Silva was at best a

service occupier or otherwise a mere licensee, to whom Part III of the Landlord and Tenant Ordinance has no application.

Denning, L.J. after a review of a number of cases in *Errington* v. *Errington* (2), said ([1952] 1 All E.R. at 155).

> "Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee."

Mr. Triay has indicated a number of features, in connection with the defendant's occupation of the premises, which he relies upon to demonstrate that no landlord and tenant relationship can have been created or intended in this case, even on the facts as averred by the plaintiff. There was never any agreement in writing. Mr. Silva was at liberty, at any time, to leave and go to live elsewhere should he have chosen to do so.

Mr. Triay also made reference to a number of cases. He pointed to the internal structural similarity of access enjoyed by the defendant in *Murray, Bull & Co. Ltd.* v. *Murray* (4) and that afforded to Mr. Silva when the premises were an hotel and he was its manager, as well as the inherent unlikelihood that the company would have even contemplated the creation of such a relationship with him. He stressed that there was never any requirement that Mr. Silva should live within the hotel (see *Crane* v. *Morris* (1)), nor any stipulation concerning rent to be payable by him. Further, Mr. Triay pointed to the absurdity of the notion that Mr. Silva could have been granted any greater interest than that of a licensee or, at best, a service occupier, having regard to the nature of the company's business as an hotelier, and the covenant under cl. 2(8) of its lease of the hotel premises from the plaintiff.

It is quite clear that a grant of exclusive possession is not of itself conclusive that a tenancy exists, though it is equally clear that Mr. Silva was given exclusive possession of his rooms. More than that is required, however—for example, "a fixed or periodic term certain in consideration of a premium or periodical payments": see *Street* v. *Mountford* (5) ([1985] A.C. at 818). No "term certain" was, in the case of Mr. Silva, ever specified; nor was any quantified amount of money ever agreed to be payable by way of rent or otherwise. At best, it could be said that occupancy was impliedly assured to Mr. Silva until the termination of his employment in exchange for working overtime for the company without any other recompense (as pleaded in paras. 3 and 6 of the defence).

The case of *Hughes* v. *Overseers of Parish of Chatham* (3) was cited as authority for the proposition that if an employee performs services for his employer in exchange for a right to occupy premises provided by his employer, then he should be held to be a tenant. My reading of that case inclines me to believe that it is of restricted application and certainly not decisive either as to the nature of the occupancy of Mr. Silva some 150

years after it was decided, or of any right on his part to remain in occupation after his employment ceased.

By para. 10 of the defence, it is alleged that Mr. Silva "occupies the premises as his residence under Part III of the Landlord and Tenant Ordinance," on the basis that he is "a tenant in occupation of the premises" as averred in para. 8. Mr. Gomez stressed that the Landlord and Tenant Ordinance is fundamentally different from the Rent Acts of England in that the protection afforded by Part III of the Ordinance is dependent upon the date of erection of a dwelling-house, whereas the Rent Acts' protection is dependent upon rateable value.

That distinction seems to me to be self-evident but does not, in my opinion, go far enough or to the root of the question whether the Ordinance is applicable in this case. It is an Ordinance "TO REGULATE THE RELATIONSHIP BETWEEN LANDLORD AND TENANT," according to its long title. Many of its provisions bear a remarkable similarity to provisions of the Rent and Mortgage Interest (Restrictions) Act 1920, as shown in a helpful comparative table of references produced by Mr. Triay. Whatever its derivation may be, the Ordinance cannot, in my judgement, apply to any situation where no true tenancy has been shown to exist.

The allegation that Part III of the Ordinance applies is, as I have indicated, a contention of law. It must be proved by the plaintiff from the facts. On November 30th, 1993 I gave suspended judgment for possession to the defendants because, as I said at the time, the facts do not help Mr. Silva and the law is against him. In my opinion, Mr. Silva's occupancy of his rooms is that of a mere licensee. At the very best he is a service occupier, but I find that having regard to the circumstances surrounding his entry into possession as disclosed by his own evidence, such a tenure is scarcely likely. He never at any time became, in my judgement, a tenant, and for that reason he cannot rightly claim that Part III of the Ordinance is applicable.

Order for possession.
