KISHINCHAND CHELLARAM (GIBRALTAR) LIMITED v. BENTATA and SIX OTHERS

SUPREME COURT (Schofield, C.J.): November 14th, 1996

Landlord and Tenant—breach of covenant—waiver—no waiver of landlord's right under Landlord and Tenant Ordinance, s.49(1)(c) to oppose renewal of tenancy, by acceptance of rent in ignorance of existing breach—registration of transfer of ownership of tenant company not actual or constructive notice to landlord of tenant's assignment of lease in breach of covenant

Landlord and Tenant—breach of covenant—limitation of actions—under Landlord and Tenant Ordinance, s.49(1)(c) landlord may rely on tenant's breach to oppose renewal of tenancy even after forfeiture limitation period expired

Landlord and Tenant—breach of covenant—renewal of tenency—court may order grant of new tenancy under Landlord and Tenant Ordinance despite tenant's breach if tenant acted in good faith and no substantial prejudice to landlord

The plaintiff applied for an order that a new tenancy be granted to it pursuant to the Landlord and Tenant Ordinance, Part IV.

The defendants let shop premises to the plaintiff company for a six-year term commencing three years earlier. Six months after the commencement of the term, the plantiff had assigned its shares to B Ltd., but neglected to inform the defendants of this change in its beneficial ownership.

The defendants gave notice of termination of the tenancy to the plaintiff, stating that they would oppose any application by the plaintiff to the court for the grant of a new tenancy, on the ground (based on the erroneous belief that it had transferred its shares to C Ltd.) that the

plaintiff had breached a covenant against assignment of the lease without the defendants' written consent. They alleged that this constituted a transfer of the plaintiff's interest under the tenancy for the purposes of s.2(3) of the Landlord and Tenant Ordinance, and was also a breach of s.69, under which a landlord was entitled to charge a premium as a condition of giving his consent.

The plaintiff submitted that (a) the defendants were mistaken as to the identity of the plaintiff's beneficial owner, which was the same as it had been at the time the lease was executed; (b) the defendants had had notice of the assignment of the plaintiff's shares, since it had been recorded in the Companies Register, which the defendants ought reasonably to have searched when the lease was negotiated, and by accepting payment of rent thereafter, they had waived the right to rely the breach of covenant; (c) since six years had now elapsed since the assignment, the defendants were precluded, under s.4 of the Limitation Ordinance, from seeking either the forfeiture of the lease or the payment of a premium for consenting to the assignment; and (d) in any event, the defendants had suffered no prejudice from their ignorance of the assignment beyond the lost opportunity to exact a premium from the plaintiff, and the court should therefore exercise its discretion in favour of the plaintiff.

Held, ordering that a new tenancy be granted:

(1) The plaintiff had breached the covenant in the lease not to assign its interest under the tenancy without the defendants' consent, since the assignment had occurred during the term of the lease and the plaintiffs had not informed the defendants of it when the lease was signed. The identity of the assignee was irrelevant to the breach. The record in the Companies Register of the transfer of the plaintiff's shares did not constitute actual or constructive notice to the defendants, since, having regard to the nature of the covenants in the lease, it was not reasonable to expect them to search the Register to verify the plaintiff's beneficial ownership. Accordingly, they had not waived their right to object to the breach by their subsequent acceptance of rent (page 390, line 43 – page 391, line 8; page 391, lines 26–45).

(2) The defendants were not precluded by lapse of time from relying on the plaintiff's breach of covenant in opposing a renewal of the tenancy, since s.4 of the Limitation Ordinance operated only to deny them the remedy of forfeiture of the lease or recovery of a premium for consenting to an assignment. In any event, they had asserted their intention to oppose the plaintiff's application before the expiry of the limitation period (page 391, lines 15–25).

(3) However, the court still had a discretion as to whether to grant a new tenancy on the basis that the defendants were unreasonable to refuse it. Since they had suffered no prejudice other than the loss of the premium

they might have requested as a condition of consenting to the assignment, and since there was no evidence that the plaintiff had acted other than in good faith, the defendants would be ordered to grant a new tenancy on terms to be negotiated (page 392, lines 1–30).

Cases cited:

(1) *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*, [1957] Ch. 67; [1957] 1 All E.R. 1; on appeal, [1959] A.C. 20; [1958] 1 All E.R. 607.
(2) *Fryer* v. *Ewart*, [1902] A.C. 187; [1982] W.N. 60.
(3) *Lyons* v. *Central Comm. Properties, London Ltd.*, [1958] 1 W.L.R. 869; [1958] 2 All E.R. 767, applied.
(4) *Ronex Properties Ltd* v. *John Laing Constr. Ltd.*, [1983] Q.B. 398; [1982] 3 All E.R. 961.

Legislation construed:

Landlord and Tenant Ordinance (1984 Edition), s.2(3):

> "For the purposes of this Ordinance, where—
>
> (*a*) any premises are held by a company or other body corporate as a landlord or as a tenant; and;
>
> (*b*) it is material for any purpose of this Ordinance that such holder of the premises has transferred or assigned its interest in the premises or has ceased to occupy the premises—
>
> then unless a court of competent jurisdiction otherwise determines, any transfer or change in the legal or beneficial ownership of any share in the company or other body corporate . . . or any change in its membership, shall constitute such a transfer, assignment or cesser of occupation, as the case requires."

s.49(1)(*c*): The relevant terms of this paragraph are set out at page 389, lines 21–24.

s.69: The relevant terms of this section are set out at page 390, lines 25–40.

Limitation Ordinance (1984 Edition), s.4(1):

> "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say :–
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> (*a*) actions founded on simple contract or on tort;
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> (*b*) actions to enforce a recognisance;
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> (*c*) actions to enforce an award, where the submission is not by an instrument under seal;
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> (*d*) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture . . . ."

R.A. Triay for the plaintiff;
J.E. Restano for the defendants.

SCHOFIELD, C.J.: The defendants let shop premises situated at 140 Main Street, Gibraltar, to the plaintiff. The lease, which was signed on September 13th, 1990, was for a six-year term which was agreed to run from July 1st, 1987. By a notice dated December 30th, 1992 the defendants informed the plaintiff that the tenancy would be terminated on June 30th, 1993. In this action the plaintiff seeks the grant of a new tenancy pursuant to Part IV of the Landlord and Tenant Ordinance.

The action was filed on April 29th, 1993. By agreement between the parties an order was made on June 30th, 1993 that a preliminary point be argued, namely, whether there is merit in the defendant's opposition to the grant of a new tenancy. If there is, then the suit fails. If there is not, then the terms of a new tenancy will be agreed between the parties or be the subject of further argument in court. I am thus called upon, some three years later, to determine the preliminary point.

The notice terminating the tenancy set out the reasons for termination in the following manner:

> "The landlords would oppose an application to the court under Part IV of the Landlord and Tenant Ordinance for the grant of a new tenancy on the following ground mentioned in s.49[(1)(*c*)] of the Ordinance:
>
> > 'that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding.'"

By a letter dated February 16th, 1993, Messrs. Triay & Triay, for the plaintiff, asked for details of the substantial breaches of the plaintiff's obligations under the tenancy. By a letter dated February 19th, 1993, Mark M. Hassan, acting as agent for the defendants, stated that the defendants were satisfied that the plaintiff had been in breach of cl. (f) of the tenant's covenants in the lease. This covenant provides, *inter alia*, that the plaintiff should not assign his interest under the tenancy without first obtaining the written consent of the defendants. It is clear from the letter that the defendants were alleging that there had been a transfer of shares in the plaintiff company without the prior consent of the defendants, which constituted not only a breach of the tenant's covenant but also transgressed the provisions of s.69, as read with s.2(3) of the Landlord and Tenant Ordinance.

By a further letter from Messrs. Triay & Triay dated March 19th, 1993, the plaintiff sought details of the breach of the covenants against assignment. That letter elicited the following reply from Mr. Hassan on behalf of the defendants:

> "We refer to your letter of March 19th, 1993.
>
> It is common knowledge in Gibraltar that Kishinchand Chellaram (Gibraltar) Ltd. has been taken over by Chellsons. It is, therefore, material that a change in the ultimate beneficial ownership of the

tenant company has occurred. Could you, therefore, please in the first instance give us a categorical reply regarding the ultimate beneficial ownership of Kishinchand Chellaram (Gibraltar) Ltd. on the date that the lease was signed and on the date our notice to quit was issued."

In his affidavit of October 21st, 1993, Mr. Hassan repeated the assertions contained in his letter of March 19th, 1993 in these terms:

"Recently I was able to observe a very significant change in the management of the plaintiff company and other associated companies.

I am informed and verily believe that there has been an assignment of companies of the Kaycee Group to the Chellsons Group of which Chellsons (Gibraltar) Ltd. are the owners.

I consider this transfer is sufficient to constitute an assignment, for the purpose of s.2(3) of the Landlord and Tenant Ordinance, 1983, of the said premises and therefore liable [*sic*] to pay a premium according to s.69 thereof."

This affidavit is revelatory of two matters. First that it is an alleged assignment of the shares of the plaintiff to Chellsons (Gibraltar) Ltd. prior to October 21st, 1993 which was the root of the defendants' decision to terminate the plaintiff's tenancy. Secondly, that it is not so much a termination of the tenancy that the defendants are after as payment of a premium pursuant to s.69 of the Landlord and Tenant Ordinance. Perhaps it is as well here to set out the relevant portions of s.69.

"(1) Subject to subsections (2) and (3), but notwithstanding any agreement to the contrary, it shall be a condition of every tenancy to which this Part applies that—

(*a*) the tenant may not assign his interest under the tenancy without the prior written consent of the landlord; and

(*b*) the consent of the landlord to the assignment shall not be unreasonably withheld.

(2) The landlord—

(*a*) may withhold his consent to the assignment of the tenant's interest where the assignee does not intend to carry on in the holding the same or a similar kind of business to that carried on by the assignor in the holding; and

(*b*) may as a condition of consenting to an assignment specified in paragraph (a), charge a premium not exceeding the equivalent of 2 years' rent at the annual rental payable immediately before the date of the assignment."

In reply to the defendants' assertions that the plaintiff had assigned its lease to Chellsons (Gibraltar) Ltd., or at least assigned its shares to that company, Clive Neil Stewart Barton filed an affidavit. Mr. Barton is a director of Boxmoor Investments Ltd. He has deposed that Boxmoor Investments Ltd. is the beneficial and registered shareholder of the

plaintiff and has been so since December 2nd, 1987. This meant that the plaintiff had assigned its shares not to Chellsons (Gibraltar) Ltd. prior to October 1993 when Mr. Hassan swore his affidavit, but to Boxmoor Investments Ltd., some six months after the lease became effective but somewhat short of three years before the lease was actually signed. This still puts the plaintiff in breach of the covenant set out at (f) in the tenancy agreement, say the defendants, albeit that it is an assignment different to the one they thought had been effected.

Counsel for the plaintiff says that he would, given time, be in a position to show on a factual basis that the transfer of shares which the defendants complain of would not be such as to breach the covenants referred to or to require the consent of the defendants. However, he refused the offer of an adjournment and relied on legal argument to found his case for a new tenancy.

First, the plaintiff relies on limitation. The assignment of shares took place on December 2nd, 1987 and therefore, if the defendants were to seek remedies of forfeiture or of a payment of a premium, proceedings would have to be commenced within six years of that date (see s.4 of the Limitation Ordinance). The period expired on December 2nd, 1993. That much is true but in this case the defendants have filed no action to which limitation may be pleaded by the plaintiff. The law of limitation bars the remedy and not the right (see *e.g.*, *Ronex Properties Ltd.* v. *John Laing Constr. Ltd*. (4)) In this case the defendants merely asserted their right not to renew the lease, and indeed they did this before the six-year limitation period expired.

Next the plaintiff argues that when the lease was signed in September 1990 the assignment of shares complained of was already almost three years old and advertised to the world by an entry in the Companies Register. It argues that the defendants had notice of the assignment thereby and, by accepting rent thereafter, have waived any objection they may have to a breach of covenant.

The authorities seem clear, from *Fryer* v. *Ewart* (2) onwards, that registration in the Companies Register is not notice to all the world. However, the plaintiff argues that constructive notice can be imputed to a person who has failed to make such enquiries as in the circumstances of the case he ought reasonably to have made (see 16 *Halsbury's Laws of England*, 4th ed., para. 1327, at 890). The plaintiff's argument is that when negotiating the terms of a new tenancy agreement, the defendants ought to have ensured that they were dealing with an entity with the same composition as that with which they had hitherto entered into a similar agreement by making a search in the Companies Register.

I find on balance, and having regard to the nature of the covenants in the agreement, that it would not be reasonable to expect them to do so. I do not impute notice of the assignment to the defendants so that acceptance of rent constitutes a waiver of their objection.

The plaintiff has not, therefore, persuaded me that it is not in breach of the covenant at cl. (f) in the tenancy agreement. However, it is still for me to decide whether the defendants were right in deciding that the plaintiff ought not to be granted a new tenancy (see *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.* (1) ([1957] Ch. at 83–85) and *Lyons* v. *Central Comm. Properties, London Ltd.* (3)). Certainly, on the information on which the defendants were acting in refusing the renewal of the tenancy—that Chellsons (Gibraltar) Ltd. had taken over the plaintiff company—the defendants ought not to have denied a renewal, for that information was completely erroneous.

It is difficult to see how the defendants were prejudiced by being held out of the knowledge of the transfer of the shares to Boxmoor Investments Ltd. Certainly no explanation has been given to me of that prejudice save that the defendants could extract a substantial premium before consenting to the assignment. I have no evidence before me that the plaintiff deliberately avoided informing the defendants of the assignment: rather the fact of registration of the assignment with the Companies Registry, the manner in which the assignment was divulged in Mr. Barton's affadivits, and the fact that the tenancy agreement was signed three years or so after the assignment was effected, point to the plaintiff having made a simple error in not informing its landlords, the defendants. I have nothing before me from which I can conclude that the plaintiff did not act in good faith in the conduct of its negotiations prior to the signing of the lease in September 1990.

Having regard to the above matters and to the very fact that the transfer of shares to Boxmoor Investments Ltd. had been effected long before the lease was actually signed I do not think that, two years on from the signing of the lease, the defendants ought to deny a renewal of the tenancy on the ground on which they rely. In my judgment, a new tenancy should be granted in the circumstances.

Order accordingly.