[1999–00 Gib LR 326]

ABN AMRO BANK N.V. v. SANGUINETTI and McELNEY (Trustees of the Estate of GARCIA, deceased)

SUPREME COURT (Schofield, C.J.): October 13th, 1999

Landlord and Tenant—renewal of tenancy—business premises—duration of tenancy—under Landlord and Tenant Ordinance, s.54, court may include "break clause" giving option to determine tenancy before expiry of minimum five-year term ordered under s.52—not regarded as term as to duration

The plaintiff tenant applied to the court to set the terms of a new tenancy.

The plaintiff sought a renewal of its seven-year lease of commercial premises from the defendant landlord but requested that it have the option to determine the tenancy after two or three years, to enable it to move to larger premises. The defendants were unwilling to grant that option and asserted that since they could not agree the terms and, under the provisions of s.52 of the Landlord and Tenant Ordinance, the court could not impose a term of less than five years, the plaintiff must accept a term of at least five years. The matter was referred to the court as a preliminary issue.

The plaintiff submitted that the court had power under s.54 of the Ordinance to include a term giving the tenant the option to determine the tenancy within five years.

The defendant submitted in reply that (a) since s.54 expressly excluded the making of a term as to duration, the court could not insert a "break clause" to the benefit of the tenant; or (b) since the legislative intention behind s.52 was to impose a minimum term for tenancies granted by the court, the power to insert a break clause existed only if the court ordered a renewed tenancy of not less than five years.

Held, making the following ruling:

The court had power under s.54 to insert a break clause in the renewed tenancy, notwithstanding the minimum term of five years prescribed by s.52. It had been decided by the English courts, interpreting an identical provision in the Landlord and Tenant Act 1954, that a break clause was not to be regarded as a term as to duration. If the legislature had intended to prevent the insertion of break clauses it would have done so expressly. The court was free to include provisions in the tenancy to compensate the landlords for any prejudice they might sustain resulting from the operation of the break clause (paras. 5–9).

Case cited:
(1) *McCombie* v. *Grand Junction Co. Ltd.*, [1962] 1 W.L.R. 581; [1962] 2 All E.R. 65n, applied.

Legislation construed:
Landlord and Tenant Ordinance (1984 Edition), s.52: The relevant terms of this section are set out at para. 3.
s.54(1): The relevant terms of this sub-section are set out at para. 3.

D.J.V. Dumas for the plaintiff;
A.A. Vasquez for the defendants.

1 **SCHOFIELD, C.J.:** The parties to this action are landlord and tenant and have failed to reach agreement on the terms of a new tenancy. The plaintiff tenant has filed an originating summons asking the court to fix the terms of the new tenancy. I have been asked by the parties to make this ruling on a narrow point of law which may assist them to reach a settlement of this case.

2 The plaintiff is the tenant of premises at 9 Cooperage Lane and 2–6 Main St., Gibraltar, which were demised to it by the defendants by a lease dated April 27th, 1992 for a term of seven years from December 1st, 1991. The plaintiff operates its banking business from the premises. The plaintiff sought renewal of the lease from December 1st, 1998 but was anxious to have the option to determine the tenancy within two or three years from then and move to larger premises. The defendant landlords, on the other hand, contend that the provisions of the Landlord and Tenant Ordinance preclude the court from imposing a term of less than five years, and insist that the plaintiff, if its lease is to be renewed, must accept a five-year lease. Whatever the outcome of this preliminary point, it is agreed between the parties that the duration of any tenancy which may be ordered by the court takes effect from the date of order and cannot be back-dated to the date of termination of the last lease.

3 The point requires consideration of two sections of the Landlord and Tenant Ordinance. Section 52 of the Ordinance reads:

> "Where on an application under this Part the court makes an order for the grant of a new tenancy, the new tenancy shall be such tenancy as may be agreed between the landlord and the tenant, or, in default of such an agreement shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of years certain, a tenancy for a term of not less than 5 years and not more than 14 years, and shall begin on the coming to an end of the current tenancy."

Section 54(1) reads:

> "The terms of a tenancy granted by order of the court under this Part (other than terms as to its duration and as to the rent payable) shall be such as may be agreed between the landlord and the tenant, or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances."

4 The plaintiff's argument is that whilst the court is prevented by s.52 from determining that a tenancy should be less than five years' duration, the court may, by s.54, order a term to be included in the tenancy providing for an option to the plaintiff to determine the tenancy within five years. The point I have to determine is whether the court has power to order such an option, otherwise known as a "break clause."

5 There is no direct English authority on this point because the English equivalent of our s.52, s.33 of the Landlord and Tenant Act 1954, provides for the upper limit of 14 years but does not provide the lower limit of five years. However, the English equivalent of our s.54 (their s.35) is in almost exactly the same terms. This gives me some assistance in the determination of this point.

6 If a break clause is a term as to the duration of the tenancy then the plaintiff cannot call on s.54 to assist it, for the express wording of the section precludes the ordering of terms as to a tenancy's duration. However, the English Court of Appeal in *McCombie* v. *Grand Junction Co. Ltd.* (1) held that the English court had the power to insert a break clause. That was when s.35 of the Landlord and Tenant Act 1954 expressly prevented the court from imposing a term as to a tenancy's duration. This section is, as I say, in almost exactly the same terms as our s.54. A break clause is not, therefore, a term as to the duration of a tenancy so as to prevent the court from imposing such a clause pursuant to s.54 of the Landlord and Tenant Ordinance.

7 Mr. Vasquez, for the defendant landlords, argues that it was clearly the intention of the legislature to fix the maximum and minimum terms for which tenancies could be granted by the court, and that the court has no discretion to go behind the five-year minimum. He does accept that a break clause can be ordered if, but only if, the court orders a tenancy of not less than five years' duration. He argues that the English Landlord and Tenant Act is different in many ways from our Landlord and Tenant Ordinance, and this is to take account of local circumstances and that the five-year minimum must have been imposed for that purpose. He further argues that he has been unable to find any case in England where the court has imposed a renewal clause to take a tenancy beyond the 14-year maximum.

8 We have no guidance on what the legislature had in mind when inserting the five-year minimum period. I have been directed to *Hansard*

on the debates on the Landlord and Tenant Bill, but have obtained no assistance from it. However, we do know that *McCombie* v. *Grand Junction Co. Ltd.* had been part of the English law for some 20 years before the House of Assembly debated our Landlord and Tenant Ordinance in 1983 and reproduced the English s.35 in our s.54. If it had been the legislature's intention to depart from that interpretation of the English statute it would have been easy for it to have expressly prevented the imposition of break clauses by appropriate wording in the Ordinance.

9 In my judgment, in the absence of an express provision fettering the court's discretion, this court has the power to impose a break clause in a tenancy the term of which, by the provisions of s.52, must be for a minimum of five years. Of course, if the court were so minded to exercise that power it would consider what compensating terms it should order in favour of a party who may be prejudiced by such a clause.

Order accordingly.