[1999–00 Gib LR 375]

ATTORNEY-GENERAL v. GARCIA

SUPREME COURT (Schofield, C.J.): November 10th, 1999

Housing—new tenancy—entitled person—tenant's grandchild not person entitled to new tenancy on tenant's death under Housing (Special Powers) Ordinance, s.11A

Landlord and Tenant—possession—action for possession—under Rules of Supreme Court, O.113, r.1, may bring proceedings by originating summons to recover possession from unauthorized occupier—member of tenant's extended family occupying without landlord's consent and remaining after tenant's death is trespasser, not "tenant holding over after termination of tenancy"

Landlord and Tenant—possession—notice to quit—on tenant's death intestate, tenancy vests in Chief Justice pending grant of administration under Administration of Estates Ordinance, s.11—landlord to serve notice to quit on Chief Justice before may recover possession

The plaintiff applied to recover possession of Government housing from the defendant.

The defendant's grandfather entered a Government tenancy agreement in 1962 in respect of premises in which he and his wife resided until their deaths in 1996 and 1999 respectively. The agreement contained a clause prohibiting sharing, sub-letting or parting with possession of the property without the landlord's consent. From the time of his birth, the defendant spent the majority of his time there, initially with his parents, who shared the property with his grandparents, and subsequently with his grandparents alone. Although the Government was aware of his presence in the house at some stage during that time, his name, together with that of his mother, had been removed from the housing list. His grandfather died intestate and the defendant and his grandmother continued in occupation. Shortly before her own death, the grandmother applied to the Housing Agency for authority for him to reside with her, which was subsequently refused.

Once the Housing Agency became aware of her death, it took steps to recover possession. It refused to accept rent tendered by the defendant and issued a notice to quit.

In the present proceedings to recover possession, it submitted that (a) the defendant was a trespasser since he was not, in relation to his

grandmother, an "entitled person" under s.2 of the Housing (Special Powers) Ordinance, with whom the Agency could now enter into a tenancy agreement under s.11A; (b) the Agency had had no knowledge of the defendant's recent presence in the property until his grandmother requested that he be authorized to live there with her; and (c) it had correctly used the originating summons procedure under O.113, r.1 of the Rules of the Supreme Court, notwithstanding that the defendant himself claimed a right to possession.

The defendant submitted in reply that (a) he had an implied tenancy or sub-tenancy entitling him to occupy the premises after his grandmother's death on the ground that the Government had been aware of and acquiesced in his presence in the property for many years as a member of the tenant's extended family, and had thereby waived the prohibition on sharing in the tenancy agreement; (b) the Agency should not have proceeded under O.113, r.1, since he was to be regarded as a tenant holding over after the termination of the tenancy; and (c) in any event, his grandfather's tenancy had never been formally terminated, since under s.11 of the Administration of Estates Ordinance, the estate of an intestate vested in the Chief Justice of the Supreme Court, and the Housing Agency had to serve notice to quit on the Chief Justice before it could claim possession.

Held, making the following ruling:

(1) As the grandson of the former tenant of the property, the defendant did not qualify as an entitled person within the meaning of the Housing (Special Powers) Ordinance, s.2 and therefore was ineligible to be granted a new tenancy under s.11A. As the tenant's wife, his grandmother would have been so entitled. Furthermore, although the Housing Agency had known of his presence in the property in the past, it had not been aware, until informed by his grandmother shortly before her death, that he had continued to live there after his parents moved from the property. Whilst the Agency might have anticipated that the tenant would bring his wife and children with him to the property, that expectation would not have extended to his grandchildren. Accordingly, there had been no waiver of the prohibition in the tenancy agreement in relation to the defendant, and he did not have express or implied permission to live there (paras. 10–14).

(2) The Agency had adopted the correct procedure under O.113, r.1, since the defendant had never been in possession of the property with the Government's consent and was therefore an unauthorized occupier, not a tenant holding over after the termination of the tenancy (paras. 15–16).

(3) However, since the original tenant had died intestate, his tenancy had not ended with his death but had vested in the Chief Justice, as the holder of the deceased's real and personal estate pending a grant of administration under s.11 of the Administration of Estates Ordinance.

Accordingly, the Agency was obliged to serve notice to quit on the Chief Justice before it could obtain possession of the property. On that point alone, the application was refused (paras. 17–22).

Cases cited:
(1) *Att.-Gen.* v. *Lopez,* Supreme Ct., 1986 A No. 147, unreported, applied.
(2) *Practice Direction (Service of Notice to Quit)*, [1965] 1 W.L.R. 1237; [1965] 3 All E.R. 230.
(3) *Wirral Borough Council* v. *Smith* (1982), 80 L.G.R. 628; 43 P. & C.R. 312, followed.

Legislation construed:
Administration of Estates Ordinance (1984 Edition), s.11: The relevant terms of this section are set out at para. 17.

Housing (Special Powers) Ordinance (1984 Edition), s.2: The relevant terms of this section are set out at para. 10.
s.11A: The relevant terms of this section are set out at para. 10.

Rules of the Supreme Court, O.113, r.1: The relevant terms of this rule are set out at para. 15.

R. Pilley for the Crown;
S.R Bossino for the defendant.

1 **SCHOFIELD, C.J.:** This is an application, by way of originating summons, pursuant to the Rules of the Supreme Court, O.113, for recovery of possession of premises at 3 Wall House, Gibraltar.

2 A tenancy agreement was entered into on September 26th, 1962 between the then Commissioner of Lands & Works and Joseph Dalli, the grandfather of the defendant. This tenancy agreement created a lease of 50 weeks from October 1st, 1962 over the flat known as 3 Wall House, which is in the Moorish Castle estate, Gibraltar ("the premises"). No further tenancy agreement was entered into between the parties, and Mr. Dalli and his wife continued in occupation of the premises until their respective deaths.

3 Clause 2(2) of the tenancy agreement reads: "Not to share, assign, underlet, take in lodgers or part with the possession of the said premises or any part thereof without first obtaining the written consent of the Landlord."

4 On the file of the Housing Manager is a "housing information form" which gives details of the persons residing at the premises. It is undated but must have been completed after April 12th, 1979, the date of birth of the defendant. The form contains the names of Mr. Dalli and his wife

Emilia, their daughter Rosalind and her son, the defendant. The form indicates that the tenant is not on the housing list for re-accommodation but that another or others in the household is or are. The names of the defendant and his mother are crossed through, but it is not known at what date these deletions took place.

5 The defendant says that his mother moved into the premises when Mr. and Mrs. Dalli first occupied it. The evidence shows she would have been two years old at the time. At some stage his father moved in with the Dallis and the defendant was born whilst his parents lived at the premises. For a time his father moved out of the flat and when the defendant was six or seven years old his parents moved out into accommodation of their own.

6 The defendant's evidence is that he spent little time at his parents' home and spent most of his time with his grandparents. He did not get on with his father. The only time he spent an extended time at his parents' home was when his father had a serious accident and the defendant lived between his parents' home and the premises for a period of some eight months. From then on the defendant again lived most of his time at the premises. Indeed, when he started work he paid his grandmother £50 per month towards his keep.

7 Mr. Dalli died in 1996. From then on the defendant took over his grandfather's chores and he spent every single day with his grandmother. She told him that when she died the furniture would belong to him. The defendant's grandmother was diagnosed with cancer, to which she succumbed on April 30th, 1999. Shortly before her death, Mrs. Dalli told the defendant that she wanted to make sure all the papers were in order just in case anything happened to her.

8 They were told by the Housing Agency that the defendant was not registered as living at the premises and that Mrs. Dalli would have to complete a form. This she did and the form was lodged with the Housing Agency just before she died. The form is dated April 27th, 1999, three days before Mrs. Dalli's death, and is an application for authority for the defendant to reside with Mrs. Dalli. The reason for the application is given as follows: "[Following] the death of my husband, my grandson has come to leave (*sic*) with me, as also my health has deteriorated and I am constantly afraid of being alone."

9 The Housing Agency denied Mrs. Dalli's request without, it seems, being aware that she had died. Once her death became known to them steps were taken to obtain occupation of the premises. The defendant tendered rent, which was refused, and a notice to quit was issued and served on the defendant on June 2nd, 1999. These proceedings were commenced on July 29th, 1999.

10 The Housing Agency regards the defendant as a trespasser and points to the provisions of the Housing (Special Powers) Ordinance which governs tenancies granted by the Government. Section 11A reads:

> "Where a tenant has died the Housing Manager shall if the entitled person so requires and complies with the provisions of any rules governing the entering into of such new agreement, enter into an agreement with the entitled person in respect of the premises on the same terms and conditions as the agreement with the deceased tenant or such other terms and conditions as the committee may approve."

An "entitled person" is defined in s.2 as:

> "(*a*) the widow or widower as the case may be of the deceased tenant living with the tenant at the time of death;
>
> (*b*) where the deceased tenant leaves no widow or widower or if such widow or widower was not living with the tenant at the time of death, the father, mother or child over the age of 18 years (in that order and where there is more than one such child the eldest such child) of the deceased tenant, provided that such person had been living with the deceased tenant for not less than 12 months immediately prior to the tenant's death . . ."

It will be seen from this that when Mr. Dalli died his wife, Mrs. Dalli, would be entitled to a new tenancy, but when she died her grandson, the defendant, would not, under the provisions of this Ordinance, be so entitled.

11 Turning now to the facts, it is quite clear that the Housing Agency at some stage knew and approved of the defendant's residence in the premises. However, at another stage the defendant's name was crossed off the list of those residing at the premises, as was his mother's. It is uncertain whether the Housing Agency was told that the defendant had moved out or merely assumed that he had moved with his parents. Be that as it may, it is certain that by April of this year the Housing Agency did not know that the defendant was residing at the premises and his residence there was without the permission required under the tenancy agreement. The tenant, Mrs. Dalli, must have known that, otherwise she would not have been seeking the Housing Agency's permission for her grandson to reside there.

12 Mr. Bossino has argued that the defendant had an implied tenancy or sub-tenancy which continued after Mrs. Dalli's death and entitles him to occupy the premises. As I understand his argument, the Government knew that not only the tenant, Mr. Dalli, but his extended family occupied

the premises and thus, by continuing to accept rent over the years, the Government had waived the prohibition in cl. 2(2) of the tenancy agreement, set out above, in relation to Mr. Dalli's extended family.

13 In my judgment, this argument has more force in relation to the tenant's immediate family. It would seem that the Housing Agency (or its 1962 equivalent) would only allocate a two-bedroom flat, which 3 Wall House is, to a family, and that Mr. Dalli took his wife and children into the flat with him. This would be anticipated by the Housing Agency. Furthermore, s.11A of the Housing (Special Powers) Ordinance gives rights over the premises to the tenant's immediate family.

14 There is no evidence to suggest that these rights would extend to the extended family of the tenant, such as his grandchildren. Rather, the evidence is that once the defendant's mother moved out of the premises and the Housing Agency knew or assumed that the defendant had moved out with her, any further occupation of the premises by him was as a trespasser. It is not argued, as I understand it, that this status as trespasser altered by mere effluxion of time. Rather, there is some knowledge imputed to or implied on the part of the Housing Agency of the defendant's occupation of the premises. I am satisfied that such knowledge did not exist.

15 Mr. Bossino argues that the procedure under the Rules of the Supreme Court, O.113 is narrowly confined and should not be used in a case such as this where there is a claim to possession of the premises. Order 113, r.1 reads:

> "Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order."

16 In *Att.-Gen.* v. *Lopez* (1), a case very similar to this in which an order under this provision was granted, Kneller, C.J. had this to say:

> "What, however, do the words 'not being a tenant or tenants holding over after the termination of tenancy' mean? The answer is persons who, as against the person claiming possession, can establish that they were holding over under tenancies binding upon him. Unlawful sub-tenants are, on the other hand, the same as unauthorized occupiers for the purpose of this order (Fox, J. in *Moore Properties (Ilford) Ltd.* v. *McKeon* . . .).
>
> These principles were adumbrated by Alcantara, A.J. in this court in *Att.-Gen.* v. *Moreno* on April 21st, 1986 and, with respect, they

> are clearly those that I should apply. And O.113 is applicable in Gibraltar by virtue of ss. 12 and 15 of the Supreme Court Ordinance.
>
> The circumstances of this application are that each defendant was in the premises in breach of conditional prohibitions in the agreement. Indeed, there was no suggestion of any consent or waiver by the landlord. The fact is that Mr. and Mrs. Lopez and Kirian Lopez entered into possession without the knowledge of the Government of Gibraltar. They are not in possession with the consent of any predecessor in title of the Government. Mrs. Peliza claimed under the Government. Any licence or sub-tenancy which any of the Lopez family may have or may have had is not and never was binding upon the Government."

In my judgment, the plaintiff has adopted the correct procedure in this case.

17 Mr. Bossino further argues that Mr. Dalli's tenancy has not terminated. Mr. Dalli died intestate and he cites s.11 of the Administration of Estates Ordinance, which reads:

> "Where a person dies intestate, his real and personal estate, until administration is granted in respect thereof, shall vest in the Chief Justice in the same manner and to the same extent as formerly in the case of personal estate it vested in the Chief Justice."

The argument is that until notice to quit has been served on the Chief Justice the Housing Agency is not entitled to immediate possession of the premises and is thus unable to sue any trespasser for possession.

18 In England, on the death of a tenant intestate during a tenancy, the tenancy vests in the President of the Family Division of the High Court and not, as in Gibraltar, in the Chief Justice. In *Wirral Borough Council* v. *Smith* (3), a borough council had let a council house to a tenant who became ill and was admitted to hospital. A relative, the first defendant, moved in to look after the property. The tenant died in hospital. Subsequently, the second defendant moved into the house to live with the first defendant. The council brought proceedings in the county court under the equivalent county court rule to O.113. The judge held against both defendants and ordered them to give up possession of the property to the council.

19 On appeal to the Court of Appeal, it was held that as the tenancy vested in the President of the Family Division on the death of the tenant the tenancy could only be determined by notice to quit being served on the President, and that as this had not been done the council was not entitled to possession. Ormrod, L.J. had this to say (80 L.G.R. at 629–630):

> "According to the law, on the death of a tenant intestate during the tenancy, the tenancy vests in the President of the Family Division and does not come to an end in law on the death of the tenant. The difficulty that Wirral Borough Council find themselves in is that they have never terminated the tenancy by notice to quit, which of course they could do very easily by serving notice on the President, or on the appropriate person as set out in the *Practice Direction (Service of Notice to Quit)* . . . in which case they would automatically bring the tenancy to an end. Of course it would cease to be protected. The moment the notice to quit took effect the council would be entitled to immediate possession and in a position to sue the trespassers for possession and eject them. As I say, unfortunately that step was not taken."

20 The *Practice Direction* (2) referred to in that passage merely gives the address at which the notice should be served. Ormrod, L.J. went on (*ibid.*, at 630):

> "We are dealing here with a fundamental piece of common law in an action for trespass which can only be maintained by someone who has a right to immediate possession. Technically the council have not got that right. It is very tiresome that they have to go through the pure formality of serving a notice to quit, but I regret that that is the state of the law. I would, therefore, allow the appeal."

21 I consider I am bound by that authority and, technicality as it may be, I cannot order up possession of the premises until such notice has been served on me. There is no suggestion that in this case such a notice has been served.

22 Once such a notice is served the Attorney-General may pursue his action and, as I have already indicated, will be entitled to possession as against the defendant. In the event, I invite argument over whether it would be more appropriate and economical to adjourn the matter.

Order accordingly.
