[1999–00 Gib LR 460]

SANTEST INVESTMENTS LIMITED v. BEN ALLAL

SUPREME COURT (Pizzarello, A.J.): May 5th, 2000

Landlord and Tenant—rent—assessment of statutory rent—Rent Tribunal's jurisdiction under Landlord and Tenant Ordinance, s.30 not ousted by existence of Rent Assessor's certificate of statutory rent for Gibraltarian issued under s.15

Constitutional Law—fundamental rights and freedoms—protection of property rights—by Interpretation and General Clauses Ordinance, s.2, landlord's right to rent is right to "property" within meaning of Constitution, s.6—Rent Tribunal's imposition of lower statutory rent under Landlord and Tenant Ordinance, s.30 not breach of s.6 by compulsory acquisition of property

Constitutional Law—fundamental rights and freedoms—protection of property rights—locus standi—Constitution, s.1(c) applicable only to individuals, i.e. real persons—corporate landlord may not use s.1(c) to challenge reduction of statutory rent by Rent Tribunal under Landlord and Tenant Ordinance, s.30

Constitutional Law—fundamental rights and freedoms—freedom from discrimination—locus standi—protection from discrimination under Constitution, s.1 conferred only on real, not artificial, persons—corporation may challenge administrative decision under s.14(3) on grounds of discrimination based on place of origin

Constitutional Law—fundamental rights and freedoms—freedom from discrimination—for purposes of Constitution, s.14, no discrimination against Gibraltarian landlord by Landlord and Tenant Ordinance, permitting Rent Tribunal to impose lower statutory rent for non-Gibraltarian under s.30 than fixed by Rent Assessor under s.15 for Gibraltarian—discrimination is different treatment of persons of different descriptions

The respondent applied to the Rent Tribunal for a determination of the proper rent for the property he occupied.

In April 1995 the appellant agreed in writing to let the property on a monthly tenancy to B. Under s.15 of the Landlord and Tenant Ordinance, the parties obtained the Rent Assessor's approval of the agreed rent on

the basis that the appellant intended to let the property to B, a Gibraltarian. Under the Rent Assessor's certificate, the agreed rent of £130 per month became the statutory rent. Later, the respondent, a Moroccan, went into occupation of the property and, in 1999, applied to the Rent Tribunal under s.30 of the Ordinance for a determination of the proper rent.

Before the Tribunal, the appellant submitted that the Tribunal lacked jurisdiction, since s.30 applied only where no s.15 tenancy was in place. It produced the Rent Assessor's certificate and the tenancy agreement with B. The respondent alleged that he had visited the appellant's agent accompanied by B when he took over the property and, for 3–4 years, had paid the rent approved under s.15. The appellant's agent said that he did not know who had paid the rent, since he had not accepted it personally.

The Tribunal concluded that the property was a dwelling-house covered by Part III of the Ordinance, and that the respondent was the lawful tenant, who had paid the approved rent for the 3–4 years of his occupation. It assessed the rent at £10.07 per month, in accordance with Schedule 1 of the Ordinance. After the hearing, but before delivering its formal decision, the Tribunal received from the respondent receipts for rent. Its decision stated that the respondent had paid rent to date and had receipts in his name from the appellant's agent.

On appeal to the Supreme Court, the appellant submitted that the Tribunal's decision should be set aside, since (a) it had wrongly considered the respondent's rent receipts after the conclusion of the hearing; (b) it had proceeded to assess the statutory rent before properly considering who was the tenant; (c) the finding that the respondent was the tenant ran contrary to the documentary evidence and did not address evidence that the respondent had colluded with B; (d) the Tribunal had not accounted for how B had ceased to be the tenant and what, if anything, was agreed at the alleged meeting between the agent, the respondent and B; (e) the appellant's acceptance of rent from the respondent was insufficient evidence of the surrender of the tenancy; (f) by depriving him of a fair rent, the order under s.30 of the Ordinance had effectively deprived the appellant of its property without its consent and without compensation, contrary to ss. 1(*c*) and 6 of the Constitution; (g) the means of establishing the statutory rent were unfair in that they achieved different valuations for different tenants, were based on 17-year-old rates with no provision for periodic increases, and did not allow a landlord to fulfil his statutory obligations to repair and still make a profit; (h) the provisions of ss. 11, 15, 30 and Schedule 1 were discriminatory within the meaning of ss. 1 and 14 of the Constitution, since they permitted the fixing of a higher statutory rent for Gibraltarians than for foreign nationals, and were thus *ultra vires* and void; and (i) the appellant had *locus standi* to raise these constitutional issues and to seek redress, even on appeal.

The Tribunal submitted in reply that (a) the Tribunal had been entitled to find, on the evidence, that B's tenancy had been surrendered in favour

of the respondent by operation of law; (b) such an implied surrender could occur by estoppel without the need to prove the parties' intentions; (c) consequently, the Tribunal had had jurisdiction under s.30 to fix the statutory rent; (d) s.6 of the Constitution was inapplicable, since it related to the compulsory seizure of property, and there was no question of compulsory possession of the property or rent under the Landlord and Tenant Ordinance; (e) there was no fundamental right to increases in rent in a statutory rent-control scheme; (f) in any event, the taking of possession of property as an incident of a tenancy was exempted from the scope of s.6(2) under s.6(4)(*a*); (g) the appellant had no *locus standi* to raise the constitutional issues, since, as a company, it was not "an individual" within the meaning of s.1 of the Constitution, and it had not been directly discriminated against; (h) ss. 11, 15 and 30 and Schedule 1 were not discriminatory on grounds of race, caste, or place of origin, contrary to s.14(3), since Gibraltarian status was not determined by any of these; and (i) by s.14(4), s.14(1) of the Constitution did not apply to laws making provision for persons who do not belong to Gibraltar, namely, by s.17(3), persons who were not Gibraltarians for the purpose of the Gibraltarian Status Ordinance.

Held, allowing the appeal:

(1) The existence of a Rent Assessor's certificate issued under s.15 had not ousted the Tribunal's jurisdiction to consider the respondent's application under s.30, since the Tribunal had to consider all the evidence before coming to its conclusion, and could not simply reject the application as a preliminary point (para. 62).

(2) The Tribunal had erred in two respects. First, its decision purported to be based on the receipt of rent by the appellant's agent, which was not unequivocal evidence of the creation of a new tenancy. Although the Tribunal appeared to have accepted that the respondent had assumed the tenancy from B in the agent's presence, that fact did not form part of its written decision, and in any event, that evidence had not been put to the agent for his response. Second, in formulating its written decision, the Tribunal had relied in part on the receipts submitted after the hearing, on which the appellant's agent had had no opportunity to comment. Although it had already concluded at the end of the hearing that the respondent was the lawful tenant, it should not have considered this evidence when it was still in a position to change its view. The court would reverse the Tribunal's decision (para. 8; para. 11; paras. 56–61).

(3) The Ordinance was capable of being unconstitutional in its *effect* even though it was a purely regulatory Ordinance, and if so would be *ultra vires* and void. For the purposes of ss. 1(*c*) and 6 of the Constitution, the right to rents was a property right as defined in the Interpretation and General Clauses Ordinance. However, there had not been a breach of the

Constitution by the deprivation of property simply because the appellant could no longer command the higher rent. Although s.1(*c*) spoke of protection from the deprivation of property, it referred to the *individual* and *his* property, rather than to the extended range of "persons" as defined in the 1889 Interpretation Act, and therefore did not protect artificial persons such as the appellant company. Nor did s.6, dealing specifically with property rights, apply in this context, since it was phrased in terms of compulsory acquisition or possession of property without compensation. The appellant could not be said to have possession of a market rent of which he had been deprived by the tribunal's assessment under s.30, and even if he had been deprived, the right had not been acquired by another (para. 63; paras. 67–70).

(4) The appellant could not rely on s.1 of the Constitution in respect of its discrimination claim, since that section referred to discrimination by reason of race, place of origin, *etc.* against real persons. The appellant did, however, have *locus standi* to raise the issue under s.14. If discrimination had occurred under the Landlord and Tenant Ordinance, it had to be based on place of origin, since the legislation distinguished only between Gibraltarians and non-Gibraltarians. Although s.14(3), for the most part, also applied only to real persons, where its terms were repeated from s.1, the phrase "place of origin" could also apply to artificial persons, since discriminatory meant "affording different treatment to different persons," which encompassed the extended definition of "persons" in the Interpretation Act (paras. 71–74).

(5) The prohibition on discrimination in s.14(1) was not disapplied by s.14(4)(*b*), since the Landlord and Tenant Ordinance was not an Ordinance making provision for persons who did not belong in Gibraltar (as defined by s.17(3)) (para. 76).

(6) However, the appellant, as landlord, had not suffered discrimination under the Landlord and Tenant Ordinance. The reduction of the statutory rent, though it required the intervention of the Rent Tribunal, had resulted from the provisions of the Ordinance relating to non-Gibraltarian tenants. But discrimination, as defined by s.14(3), had to be between persons of one place of origin and of another, and no discrimination had occurred as between the appellant or either of the alleged tenants and a person of a different place of origin. The Ordinance was not, therefore, unconstitutional and *ultra vires* (para. 75; paras. 77–79).

Cases cited:

(1) *Chapman* v. *Becerra (No. 2)*, 1979 Gib LR 21, *dicta* of Spry, C.J. applied.
(2) *Clarke* v. *Grant*, [1950] 1 Q.B. 104; [1949] 1 All E.R. 768.
(3) *Hewlett* v. *Minister of Finance*, 1981 Z.L.R. 571, *dicta* of Fieldsend, C.J. applied.

(4) *Mattey Secs. Ltd.* v. *Ervin*, [1998] 2 E.G.L.R. 66; (1998), 77 P. & C.R. 160.
(5) *May* v. *Reserve Bank of Zimbabwe*, 1985(2) Z.L.R. 358; [1986] LRC (Comm) 758, considered.
(6) *Morgan* v. *Att.-Gen. for Trinidad & Tobago*, [1988] 1 W.L.R. 297; (1987), 132 Sol. Jo. 264, considered.
(7) *Moroccan Workers Assn.* v. *Att.-Gen.*, 1995–96 Gib LR 67; [1995] 1 LRC 453.
(8) *Pillai* v. *Mudanayake*, [1953] A.C. 514; [1955] 2 All E.R. 833, *dicta* of Lord Oaksey applied.
(9) *Street* v. *Mountford*, [1985] A.C. 809; [1985] 2 All E.R. 289.

Legislation construed:

Interpretation and General Clauses Ordinance (1984 Edition), s.2: The relevant terms of this section are set out at para. 29.

Landlord and Tenant Ordinance (1984 Edition), s.11(1):

"Except where otherwise provided in this Ordinance, the statutory rent of any dwellinghouse to which this Part applies shall be the rent appropriate to that dwellinghouse as calculated in accordance with Schedule 1."

s.15: The relevant terms of this section are set out at para. 3.
s.30: The relevant terms of this section are set out at para. 6.
s.74(2): The relevant terms of this sub-section are set out at para. 61.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.1: The relevant terms of this section are set out at para. 27.
s.6: The relevant terms of this section are set out at para. 27.
s.14: The relevant terms of this section are set out at para. 35.
s.15(1): "If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the Supreme Court for redress."
s.17(3): The relevant terms of this sub-section are set out at para. 38.

Interpretation Act 1889 (52 & 53 Vict., c.63), s.19: The relevant terms of this section are set out at para. 70.

J.J. Neish, *Q.C.* and *D. Bossino* for the appellant;
R.R. Rhoda, *Q.C.*, *Attorney-General*, and *K. Colombo* for the Rent Tribunal.
The respondent did not appear and was not represented.

1 **PIZZARELLO, A.J.:** This is an appeal from a decision of the Rent Tribunal pursuant to s.30 of the Landlord and Tenant Ordinance 1983 ("the Ordinance") to reduce the statutory rent of a dwelling-house currently occupied by Mr. Mojahid Gouyez Ben Allal, the respondent, a Moroccan national, from £130 per month to £10.07 per month. The

dwelling-house is situated at Flat 1/6, Serfaty's Passage, Gibraltar ("the premises"), and comprises two bedrooms, a living room, a kitchen and a bathroom. The appellant is Santest Investments Ltd. ("the landlord").

2 The memorandum of appeal as amended reads:

> "1. The Rent Tribunal erred in law in finding that the appellant had created a tenancy in favour of the respondent.
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> 2. The Rent Tribunal erred in finding as a matter of fact that a tenancy in favour of the respondent had been created by the appellant when there was no or no sufficient evidence to support such finding.
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> 3. The Rent Tribunal erred in admitting evidence, namely 'rent receipts,' after the parties had closed their respective cases and in taking such evidence into account in reaching its finding.
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> 4. The Rent Tribunal erred in failing to take any or any due account of the existence of a contractual tenancy between the appellant and a Mr. Daniel Buhagiar and of the existence of a certificate issued under s.15 of the Landlord and Tenant Ordinance in respect of that tenancy.
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> 5. The Rent Tribunal's decision is void in that it is based on the provisions of s.30 and Schedule 1 to the Landlord and Tenant Ordinance, which provisions contravene s.6 of the Gibraltar Constitution and are therefore void or, alternatively, unenforceable.
>
> 6. Sections 11, 15, 30 of the said Schedule 1 to the Landlord and Tenant Ordinance 1983 collectively and/or singly contravene the provisions of ss. 1 and 14 of the Gibraltar Constitution and are therefore *ultra vires* and void. The decision of the Rent Tribunal is therefore void or, alternatively, unenforceable.
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> The appellant prays for:
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> (a) a declaration that the respondent is not and was not at any material time the tenant of 1/6 Serfaty's Passage, Gibraltar;
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> (b) an order quashing the decision of the Rent Tribunal dated May 13th, 1999;
>
> (c) a declaration that ss. 11 and 30 and Schedule 1 to the Landlord and Tenant Ordinance contravene s.6 of the Gibraltar Constitution and are therefore *ultra vires*;
>
> (d) a declaration that ss. 11, 15, 30 and Schedule 1 to the Landlord and Tenant Ordinance collectively and/or singly contravene ss. 1 and 14 of the Gibraltar Constitution and are therefore *ultra vires*;

(e) a declaration that the decision of the Rental Tribunal dated May 13th, 1999 is void or alternatively unenforceable."

3 Mr. Ben Allal's occupation of the premises came about in this way. On April 1st, 1995, by an agreement in writing, the landlord agreed to let the premises on a monthly tenancy to Mr. Daniel Buhagiar, a Gibraltarian, and Mr. Buhagiar agreed to take such tenancy at an agreed monthly rent of £151.66 and on the terms and conditions contained in the agreement. A reduction of £21.66 to the monthly rent appears to have been later agreed by the parties and, pursuant to the express terms of the agreement, approval was sought from the Rent Assessor under s.15 of the Ordinance. The section provides:

"(1) Notwithstanding section 11, but without prejudice to sections 12, 13 and 14, where a dwellinghouse to which this Part applies becomes vacant, and the Rent Assessor is satisfied that the landlord proposes to let it bona fide to a Gibraltarian for his own benefit or the benefit of another Gibraltarian, at a rent determined by agreement, the Rent Assessor may approve the transaction, and on the letting of the dwellinghouse by the landlord, in accordance with the terms of the approved transaction, the rent so determined shall be the statutory rent of the dwellinghouse.

(2) An increase under subsection (1) shall have effect only so long as the dwellinghouse continues to be occupied by—

(*a*) the person to whom, or for whose benefit, the landlord has proposed under subsection (1) to let it; or

(*b*) any member of his family who succeeds him as the tenant under subsection (1)(*b*), (2), (3) and (4) of section 3.

(3) Any agreement made under this section shall be rescinded where the statutory rent as calculated under Schedule 1 exceeds the statutory rent agreed to by the parties under this section and substituted by the statutory rent as calculated under Schedule 1."

4 On April 11th, 1995, the Rent Assessor issued a s.15 certificate certifying that the letting of the premises was a *bona fide* letting to a Gibraltarian for his benefit for the purposes of the section and the consequence of that was that the monthly rent of £130 which had been determined by the parties became the statutory rent.

5 Some time later Mr. Ben Allal went into occupation of the premises and on February 26th, 1999 he applied to the Rent Tribunal pursuant to s.30 of the Ordinance for a determination of the proper rent and the particulars were: "The flat is small and in poor condition, and I consider that I am being overcharged."

6 Section 30 concerns any contract other than a contract of tenancy to which s.15 applies. The section reads:

> "(1) Where any contract, other than a contract of tenancy to which section 15 applies, has, whether before or after the commencement of this Part, been entered into whereby a dwellinghouse to which this Part applies has been let, then subject to the provisions of this section, the landlord or the tenant may in the prescribed form apply to the Rent Tribunal to determine—
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> (*a*) what is the correct amount of the statutory rent payable in respect of the dwellinghouse under this Part; and
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> (*b*) whether and to what extent the amount of the statutory rent as so determined may be increased or decreased in accordance with this Part.
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> (2) The Rent Tribunal shall not be required to entertain an application under this section if it is satisfied, having regard to the length of time that has elapsed since any previous application made by the same party and to any other circumstances, that the application is frivolous or vexatious.
>
> (3) On hearing an application under this section, the Rent Tribunal shall determine the statutory rent of the dwellinghouse to which the application relates in accordance with the criteria laid down in this Part.
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> (4) In any proceedings before the Rent Tribunal under this section, where the landlord and the tenant are in dispute as to the amount of the statutory rent for the dwellinghouse to which the application relates, the onus shall be on the landlord to prove the correct amount of the statutory rent.
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> (5) Where the Rent Tribunal determines the statutory rent in respect of any dwellinghouse under this section, that rent shall be the statutory rent for the dwellinghouse as at the date at which it is to be determined."

7 The matter came before the Rent Tribunal on May 13th, 1999 and counsel for the landlord submitted that the Tribunal had no jurisdiction in this matter because there was a s.15 tenancy agreement in place, namely, that entered into between the landlord and Mr. Buhagiar, and produced the relevant certificate. Both the decision of the Tribunal and the minutes of the meeting of May 13th, 1999 confirm that the certificate was produced, but both are silent as to the production of the agreement. I shall assume that the agreement was produced as well as the certificate because it would make no sense to produce the certificate and not the agreement to which it related. The Tribunal heard the submissions after, it appears from

the decision, evidence of some sort had been taken from Mr. Ben Allal and from Mr. S. Levy (estate agent), the agent for the landlord. This accords with the minutes.

8 With regard to Mr. Ben Allal, the decision stated:

> "The applicant addressed the tribunal and submitted that he had been in lawful occupation of the dwelling over the past three to four years, paying the sum of £130 per month, and complained that the flat was very small and in poor condition. He considered that he was being overcharged and was therefore submitting an application for a reduction in rent."

This accords with the minutes. With regard to Mr. Levy, the decision records that—

> "he confirmed that he had been accepting rent in respect of the dwelling on behalf of the landlord, though he was unaware who was actually paying the rental, since the collection was made by a member of his staff at the reception area of his offices and not by him personally."

This accords with the minutes. And then, in what appears like a further statement from Mr. Ben Allal, the decision states that he "insisted that he had paid rent to date and that he was in possession of receipts made out in his name, by Mr. Solomon Levy, as estate agent." The minutes do not confirm any reference made by Mr. Ben Allal to the receipts for the rent. The Tribunal appears then to have retired to consider counsel's submissions. There is no word in the decision that Mr. Ben Allal claimed that when he took over the flat from Mr. Buhagiar he had been to see Mr. Levy accompanied by Mr. Buhagiar. This is to be found in the minutes, purportedly before the Tribunal had recessed to consider counsel's point.

9 On resumption, having concluded that the dwelling was categorized as a dwelling-house subject to the provisions of Part III of the Ordinance and that Mr. Ben Allal was the lawful tenant in occupation, the Chairman informed the parties that the Tribunal did not accept the submissions made on behalf of the landlord. The decision records that the tribunal invited both parties to make further submissions and that they did not. The minutes do not confirm this. The minutes record a certain amount of discussion between counsel, the Tribunal and a Mr. L. Neish who has a beneficial interest in the landlord. The Tribunal then ruled that it had the power to assess the rent in respect of the premises after prefacing that ruling with the comment: "The Tribunal considered the submissions made by both the applicant and the respondent." That preface runs counter to its previous statement that the parties had made no further submissions. That part of the decision is an almost exact duplicate of the minutes which thereafter record that the rent was determined at that stage

and that the rent payable by Mr. Ben Allal was £10.07 per month inclusive of rates.

10 Subsequent to May 13th, 1999 the Tribunal received some of the receipts issued by Mr. Solomon Levy, estate agent, from Mr. Ben Allal, and the formal decision of the Tribunal is dated 18th May, 1999 whereby—

> "IT IS ORDERED that the said dwelling-house is subject to the provisions of Part III of the Landlord and Tenant Ordinance AND that the rent payable by the tenant to the landlord in respect of the said dwelling-house is £10.07 per month inclusive of rates."

11 It seems clear to me, on a reading of the decision and the minutes, that the Tribunal fortified its decision of May 13th, 1999 by making reference to the receipts handed in by Mr. Ben Allal after the hearing and in respect of which the landlord had been given no opportunity to explain. The Tribunal also had in its possession an assessment of rent from Mr. Charles Pons of Land Property Services Ltd., dated May 11th, 1999, which does not appear, from either the minutes or the decision, to have been put to Mr. Levy, the estate agent, by the Tribunal as it ought to have been, since this letter was in its possession.

12 Mr. Neish, Q.C., who appeared for the landlord, sought leave to introduce the computerized rent-book kept by Mr. Solomon Levy in order to show to this court that all rents received had been credited to Mr. Buhagiar, who, he submitted, continues to be the contractual tenant and in respect of whom the s.15 certificate was issued. This is evidence which ought to have been introduced before the Tribunal, and Mr. Neish submitted that there were good grounds why this evidence should be allowed in by this court.

13 He argued that the procedures before the Tribunal were, as reflected in the minutes and in the decision, very unstructured. A preliminary point had been taken, the tribunal had made a ruling thereon and it was then concerned only with the issue of what was the amount of rent. The looseness in its procedures gave rise to a situation where the Tribunal was not able to consider properly whether Mr. Ben Allal was the tenant or whether the landlord had substituted Mr. Ben Allal for Mr. Buhagiar. This rent-book is material to show that the landlord had never substituted Mr. Ben Allal for Mr. Buhagiar, and the way the Tribunal handled the matter prevented the issues from being raised, with the consequence that this evidence became an irrelevance and it was not put forward in the circumstances.

14 Mr. Rhoda, appearing for the Tribunal on the basis that the respondent did not appear, objected on the grounds that what was proposed would let in a statement of fact which had not been before the

Tribunal. Mr. Ben Allal was affected and was not represented and the court should not allow it in, since Mr. Levy was present at the hearing of the Tribunal and should have had it available and should have put it in at that time.

15 I ruled that if that rent book were to go in, Mr. Ben Allal should be represented, and I agreed with Mr. Rhoda's view that Mr. Levy had had occasion to have brought it up at the hearing of May 13th, 1999. The court adjourned to give counsel an opportunity to consider the matter and on resumption Mr. Neish declared that he would continue without that evidence.

16 The Tribunal made the following findings of fact:

1. Mr. Ben Allal had been living at the premises for the previous three or four years.

2. Mr. Ben Allal had been paying the rent on the premises at £130 per month.

3. Rent had been accepted by the landlord's agent and receipts had been issued.

4. Mr. Ben Allal was the lawful tenant of the premises.

5. The premises were categorized under Part III of the Ordinance.

17 Counsel for the landlord submitted that the decision of the Tribunal runs against the tenor of all the documentary evidence before it. The agreement between the landlord and Mr. Buhagiar shows that it was set in their minds that this tenancy was to be a tenancy to a Gibraltarian. That intent was quite clearly incorporated in cl. 4 of the agreement and that was acted upon, and the transaction was approved by the Rent Assessor who issued his certificate as a *bona fide* let to a Gibraltarian. By applying to the Rent Tribunal, Mr. Ben Allal was holding himself out and asserting that he was the tenant. That assertion flies in the face of the documents which created the tenancy and which were before the Tribunal.

18 The letter of May 11th, 1999 from the Rent Assessor to the Secretary of the Tribunal gave cause for concern because its content reflected the fact that the Tribunal did not properly consider the issue. The letter suggested Mr. Ben Allal had occupied the flat as tenant since April 1995, that is to say the same month that the tenancy was created in favour of Mr. Buhagiar. If that had been so (and that is what the letter stated), the Tribunal should have been alive to possible sharp practice between Mr. Buhagiar and Mr. Ben Allal without the consent of the landlord and should have looked at the matter with great care. That stared the Tribunal in the face, there was no record in the minutes or in the decision that the Tribunal attempted at the hearing to get to grips with the state of affairs by receiving evidence.

19 The suggestion that Mr. Ben Allal went into occupation in April 1995, of itself, submitted counsel, gave the lie to Mr. Ben Allal's assertion that he had been to see Mr. Levy accompanied by Mr. Buhagiar when he took over the flat in April 1995, apart from the fact that, procedurally, Mr. Levy was not questioned about it. This was the result, counsel suggested, of the unfortunate way the Tribunal managed its own procedures.

20 Counsel further submitted that there were other factors to show that no attempt was made by the Tribunal to review the landlord's submissions that (i) Mr. Ben Allal was not the tenant, and (ii) there was a s.15 certificate in place with regard to the premises and therefore s.30 had no part to play and the Tribunal had no jurisdiction under the section. The Tribunal came to a conclusion and dismissed the submissions on May 13th, 1999 but did not give reasons at the time, instead merely asserting that Mr. Ben Allal was the tenant. How did it come to that conclusion?

21 Counsel submitted that the basis on which the Rent Tribunal decided that Mr. Ben Allal was a tenant was that he was paying rent which had been accepted by the landlord's agent. On that basis, counsel submitted that the Tribunal's decision was fundamentally flawed because it was not clear how the Tribunal had come to the conclusion that Mr. Buhagiar had ceased to be the landlord's tenant (as must have happened if Mr. Ben Allal were now the tenant) and because it was not stated in the decision. (All there is that might justify this is the reference in the minutes to Mr. Ben Allal's claim that when he took over the premises he went to see Mr. Levy accompanied by Mr. Buhagiar.) Well, argued counsel, suppose he had gone to see Mr. Levy. What exactly he went for, what exactly was said, and what exactly was agreed were all important matters which went to the foundation of Mr. Ben Allal's perceived tenancy, and this the record does not tell. And even in the context of his application, counsel argued, one was unable to draw any inference that if he had gone to see Mr. Levy a tenancy to Mr. Ben Allal would have been contemplated. Furthermore, the allegation of the joint visit was not put to Mr. Levy for his comment and explanation, so how could the Tribunal have come to any measured conclusion?

22 The important matter is that the Tribunal has not found as a fact that Mr. Ben Allal did go to see Mr. Levy, as he suggested, and that supports the conclusion that the Tribunal relied only on the receipt of rent. Thereafter, the relinquishment of the tenancy by Mr. Buhagiar required consideration by the Tribunal of two things, assignment and surrender. As to assignment there was no evidence given regarding any assignment from Mr. Buhagiar to Mr. Ben Allal, and this, in any case, was never alleged. Since there was no evidence of that and no writing had been

produced, in the absence of any writing, an assignment could not stand, as it was contrary to s.3 of the Statute of Frauds 1677. Furthermore, the contractual tenancy between the landlord and Mr. Buhagiar was incapable of assignment, given that his was a s.15 statutory tenancy and Mr. Ben Allal is a Moroccan.

23 As to surrender, again, this was not alleged and could only take place by express surrender or by operation of law when the conduct of the parties unequivocally amounted to an acceptance that the tenancy had ended. It was not enough that the landlord accepted rent from a third party occupier to effect a surrender or to create a tenancy. Counsel referred to *Mattey Secs. Ltd.* v. *Ervin* (4) as authority for that proposition. If all the parties, namely, Messrs. Levy, Buhagiar and Ben Allal had had the intention to create a new tenancy, that would have been frustrated by operation of law because the s.15 arrangement would have been brought to an end automatically. The issue of receipts of rent by the landlord's agent is (a) not unequivocal evidence of surrender where estoppel bites and intent does not matter, or (b) not unequivocal evidence of the grant of a new tenancy where intention is necessary, because there were other reasons to explain why Mr. Ben Allal might be occupying the premises, *e.g.* sub-tenancy, sharing or licence. Furthermore, the issue of receipts in favour of Mr. Ben Allal might be the result of error and the practice was stopped as soon as the error was discovered. "The mere mistake of his agent in accepting [the money] as rent . . . cannot be used to establish that that the landlord was agreeing to a new tenancy" (see *Clarke* v. *Grant* (2) ([1950] 1 Q.B. at 106, *per* Lord Goddard, C.J.)).

24 Because the receipt of rent is so important to the Tribunal's finding, counsel submitted that the decision was further flawed because those receipts should have been put to Mr. Levy. They could not have been because they were provided after the hearing of May 13th, 1999 and it was clear, submitted counsel, that the Tribunal founded its decision on those receipts. There were problems apart from the obvious error of not putting them to Mr. Levy, and these were:

(a) The receipts showed the name of the person who paid but did not describe the status of the person who paid.

(b) The receipts were not all in the name of Mr. Ben Allal. Other names were used.

(c) Save for the receipt issued by Mr. Levy himself, the premises for which rent was being paid were not described on the face of them and, without further explanation, the receipts did not support the Tribunal's decision—they were not married to the demised premises.

(d) It was true that there was one receipt signed by Mr. Levy himself but that was a receipt for 1/8 Serfaty's Passage and required

explanation, which there was not, before it could be assigned to 1/6 Serfaty's Passage.

(e) The last receipt was made out to Mr. Buhagiar and while it was true that it was issued after Mr. Ben Allal had issued proceedings in the Rent Tribunal, it was dated May 10th, 1999 and was in respect of rent for November/December 1998, and that receipt should have alerted the Tribunal, for why did Mr. Ben Allal take a receipt in someone else's name?

25 In these circumstances, it behoved the tribunal to consider carefully with what intent the rent was received, what the real intention of the parties was, and what conclusion (if any) it could properly draw from the receipts, and to give its reasons. The decision was quite silent on this. There was no balancing of the evidence of Mr. Levy that he did not know who was paying the rent. There was no consideration of the evidence in the documents that the landlord only wanted to let the premises in a manner capable of being the subject of a s.15 certificate. There was no consideration as to how Mr. Ben Allal could be a tenant in view of his nationality, and taking Mr. Ben Allal's evidence at its best, he appeared to have gone to see Mr. Levy after he claimed to have taken over the premises. The Tribunal's decision should be revisited and reversed on the basis that it could not reasonably have come to that decision on the evidence before it and, having regard to the procedure at the hearing, the landlord was not able to put his case forward fairly or at all.

26 The landlord also raised other issues one of which was the relationship of s.30 of the Ordinance with ss. 1 and 6 of Annex I to the Gibraltar Constitution Order ("the Constitution"). The way the law is framed, it submitted, is such as to deprive the landlord of his property, namely his expectation of rent, and this constitutes the taking over or acquisition of property.

27 Section 1 provides for "Fundamental rights and freedoms" and s.6 provides for "Protection from deprivation of property." Section 1 reads:

"**Fundamental rights and freedoms of the individual**

1. It is hereby recognised and declared that in Gibraltar there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely—

(*a*) the right of the individual to life, liberty, security of the person and the protection of the law;

(*b*) freedom of conscience, of expression, of assembly and association and of freedom to establish schools; and

(*c*) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation,

and the provisions of this Chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

Section 6 reads:

"**Protection from deprivation of property**

(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—

(*a*) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such a manner as to promote the public benefit; and

(*b*) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(*c*) provision is made by a law applicable to that taking of possession or acquisition—

(i) for the prompt payment of adequate compensation; and

(ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation.

(2) No person who is entitled to compensation under this section shall be prevented from remitting, within a reasonable time after he has received any amount of that compensation, the whole of that amount (free from any deduction, charge or tax imposed in

respect of its remission) to any country of his choice outside Gibraltar.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the last preceding subsection to the extent that the law in question authorises—

(*a*) the attachment, by order of a court, of any amount of compensation to which a person is entitled in satisfaction of the judgment of a court or pending the determination of civil proceedings to which he is a party;

(*b*) the imposition of reasonable restrictions on the manner in which any amount of compensation is to be remitted;

(*c*) the imposition of—

(i) any deduction, charge or tax; or

(ii) any obligation or restriction relating to exchange control,

that is imposed generally in respect of the remission of moneys from Gibraltar and that is not discriminatory within the meaning of section 14(2) of this Constitution.

(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section—

(*a*) to the extent that the law in question makes provision for the taking of possession or acquisition of property—

(i) in satisfaction of any tax, rate or due;

(ii) by way of penalty for breach of the law or forfeiture or seizure in consequence of a breach of the law;

(iii) as an incident of a lease, tenancy, mortgage, charge, sale, pledge or contract;

(iv) in the execution of the judgment, or order of a court;

(v) by reason of its being in a dangerous state or injurious to the health of human beings, animals, trees or plants;

(vi) in consequence of any law with respect to the limitation of actions or acquisitive prescription;

(vii) for so long only as may be necessary for the purposes of any examination, investigation, trial or

inquiry or, in the case of land, the carrying out thereon—

(A) of work of soil conservation or the conservation of other natural resources; or

(B) of agricultural development or improvement that the owner or occupier of the land has been required, and has, without reasonable and lawful excuse, refused or failed to carry out;

(viii) by way of the taking of a sample for the purposes of any law; or

(ix) where the property consists of an animal upon its being found trespassing or straying;

(*b*) to the extent that the law in question makes provision for the taking of possession or acquisition of—

(i) enemy property;

(ii) property of a person who has died or is unable, by reason of legal incapacity, to administer it himself, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;

(iii) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit or other persons entitled to the beneficial interest in the property; or

(iv) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.

(5) Nothing in this section shall affect the making or operation of any law so far as it provides for the vesting in the Crown the ownership of underground water or unextracted minerals.

(6) Nothing in this section shall affect the making or operation of any law for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where

> that property, interest or right is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided from public funds."

Counsel drew particular attention to ss. 1(*c*) and 6(4)(*a*)(ii).

28 Counsel conceded that a law controlling rents is not *per se* unconstitutional, but submitted that if the effect of the law is that rentals are fixed to such a level as to deprive a landlord of fair rent and it (a) does not enable a landlord to meet adequately or at all his repairing and maintenance obligations, and (b) does not allow for a reasonable margin of profit, that law would offend s.6. The danger of offending s.6 of the Constitution appears to have been recognized in the House of Assembly.

29 The right to rental, present or future, vested or contingent, is property as defined in the Interpretation and General Clauses Ordinance, s. 2. That definition provides:

> "'Property' includes money, goods, things in action, land and every description of property, whether real or personal; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incidental to property as above defined . . . ."

If a landlord is deprived of the rents he may obtain, is the legislation adequate to compensate him?

30 Counsel submitted that the means of establishing the statutory rent were not lawful on several grounds:

(a) The level at which the statutory rent is fixed is not governed by principle. It may depend solely on the nationality of the tenant, as, for example, in the instant case: Mr. Buhagiar, a Gibraltarian, pays a statutory rent of £130 and Mr. Ben Allal, a Moroccan, pays £10.07 if the Tribunal is right. The result is absurd because it is not principled. There is no logic to a situation where rent controls are imposed to have the same premises attract different statutory rents, particularly when this depends on nationality.

(b) The criteria for establishing statutory rents as set out in Schedule 1 were fixed in 1983; over 17 years ago. There is no mechanism in the Ordinance for periodic increases, nor have there been any during these 17 years. The statutory rents are hopelessly low and do not permit the landlord to repair and maintain his property adequately or at all, and there is no profit element. In the instant case, a rent of £10.07 per month inclusive of rates is absurdly low and derisory if viewed against the statutory minimum hourly wage of £3.87 or the daily cost of car-parking at a paying car park. By not keeping rents to a fair level, the Government has passed on the burden of keeping housing in the private sector to the

landlord, and that constitutes deprivation and taking away property in the shape of future rents. Counsel submitted that "deprivation" should be construed generously and this should carry compensation.

(c) The £130 per month rent approved by the Rent Assessor in a *bona fide* let carries with it, by necessary implication, the effect that the decision and s.30 and Schedule 1 of the Ordinance deprives the landlord of £119.93 a month.

(d) An unfair statutory rent casts unjust burdens on a landlord having regard to the landlord's statutory obligations to repair imposed by s.27 and Schedule 6 of the Ordinance. These are strictly enforced under the Public Health Ordinance, which also renders a landlord liable to prosecution—provisions which do not apply to the Crown. All in all, the effect of s.30 and Schedule 1 of the Ordinance is that not only has Government imposed the financial burden of providing accommodation in rent-controlled premises on landlords, thus depriving them of a fair controlled rent, but it also imposes onerous duties to repair.

31 Counsel referred to the respondent's arguments produced in skeleton form and made submissions as follows. Paragraph 11 of the respondent's skeleton reads:

> "Section 6 of the Gibraltar Constitution refers to compulsory taking of possession of property. Landlord and Tenant Ordinance is *not* concerned with taking possession of property—see short title 'of a regulatory nature.'
>
> There is no question of the landlord's premises being compulsorily acquired. Neither is property in the form of rental income in the hands of the landlord compulsorily taken possession of by the Tribunal. It is submitted that acquisition is to be distinguished from deprivation (see *May* v. *Reserve Bank of Zimbabwe* [1986] LRC (Comm) 758 [quoting Fieldsend, C.J. in *Hewlett* v. *Minister of Finance* (1981 Z.L.R. at 590)] 'not every deprivation of property must carry compensation with it.')"

32 To this Mr. Neish replied that while it may purport to be regulatory, there is nothing in the name. One has to look at the intent and extent of the Ordinance and note that the criterion used is nationality. Fieldsend, C.J. was making this observation in the context of the Constitution of Zimbabwe. This court must consider the Gibraltar Constitution.

33 Paragraph 12 of the respondent's skeleton reads:

> "It is submitted that the Landlord and Tenant Ordinance reflects the sort of rent-control schemes in existence throughout the civilized world and regulating the relationship between landlord and tenant

(see *Morgan* v. *Att.-Gen. for Trinidad & Tobago* ([1988] 1 W.L.R. at 300) 'no fundamental right to increases of rent which reflect inflation'). No owner of property is obliged to become a landlord."

To this, Mr. Neish observed that that case (5) turned on the provisions of the Trinidad and Tobago Constitution and the Rent Restriction (Dwelling Houses) Act 1981. That Act was passed within the framework of the Constitution which may have justified the restriction, but the Gibraltar Constitution is different. What that case does not establish is any counter to the argument that in Gibraltar the landlord has the right to rent and does not have to let the property vacant.

34 Paragraph 13 of the respondent's skeleton submits:

"Section 6(4)(*a*)(ii) of the Gibraltar Constitution exempts from s.6(1) of the Gibraltar Constitution anything done under the authority of a law-making provision for the taking possession of property as an incident of a lease, tenancy, mortgage, *etc.*

This must be in respect of tenancies with a public element such as rent-controlled tenancies and would allow for an increase in the statutory rent. It must logically include a reduction of rent occurring under the Landlord and Tenant Ordinance."

Mr. Neish said that is not relevant, as those provisions obviously refer to forfeiture of leases, *etc.*

35 Counsel also considered the discriminatory nature of ss. 11, 15 and 30 and Schedule 1 of the Ordinance as against the provisions of s.14 of the Constitution, which deals with protection from discrimination on the grounds of race, *etc.* That section provides:

"**Protection from discrimination on the grounds of race, etc.**

14.(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting in the performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public authority.

(3) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are

accorded privileges or advantages that are not accorded to persons of another such description.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—

(*a*) for the appropriation of revenues or other funds of Gibraltar;

(*b*) with respect to persons who do not belong to Gibraltar;

(*c*) for the application, in the case of persons of any such description as is mentioned in the last preceding subsection (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description; or

(*d*) for conferring the status of a Gibraltarian for the purposes of the Gibraltarian Status Ordinance upon any person or for withdrawing that status from any person or for deeming a firm or company to be under non-Gibraltarian control for the purposes of the Trade Restriction Ordinance.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that—

(*a*) it requires a person to belong to Gibraltar or to possess any other qualification (not being a qualification specifically relating to race, caste, place of origin, political opinions, colour or creed) in order to be eligible for appointment to any office in the public service or in a disciplined force or in the service of a local government authority or in a body corporate established by law for public purposes; or

(*b*) it makes reasonable provision for ensuring that persons holding office as aforesaid and giving instruction in schools maintained by the Government of Gibraltar and attended wholly or mainly by pupils of a particular religious community or denomination are acceptable on moral and religious grounds to that religious community or denomination, or to the authorities of that community or denomination.

(6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or (5) of this section.

(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this

section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by sections 7, 9, 10, 11, 12 and 13 of this Constitution, being such a restriction as is authorised by section 7(2), 9(5), 10(2), 11(2), 12(2) or 13(3) of this Constitution, as the case may be.

(8) Subsection (2) of this section shall not affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law."

36 Counsel submitted that the provisions of ss. 11, 15, 30 and Schedule 1 of the Ordinance, collectively or individually, are plainly discriminatory in that they produce different treatment for different persons depending solely on race or place of origin. Section 11 of the Ordinance provides for rent to be determined in accordance with Schedule 1 of the Ordinance, s.15 provides for a negotiated rent with a Gibraltarian and, if *bona fide*, a s.15 certificate is issued and s.30 refers to applications to the Rent Assessment Tribunal. Combined and individually these produce a law which is discriminatory in itself and its effect. Indeed, in so far as s.15 alone is concerned, that is clearly and expressly discriminatory, as its object is to procure a higher statutory rent by agreement with a Gibraltarian than would be produced by the application of Schedule 1. It is only a Gibraltarian who can benefit under that section and so race and place of origin are put at issue and are treated differently, and that discrimination is compounded by its continuation under s.15(2). The result is that rent-controlled premises are let to Gibraltarians in preference to others and in their turn Gibraltarians are discriminated against by being subjected to a higher statutory rent in respect of the same premises than a non-Gibraltarian.

37 Counsel submitted that ss. 11, 15, 30 and Schedule 1 offend against s.14 of the Constitution and are *ultra vires* and void. Section 15 of the Ordinance falls under the provisions of s.14(3) of the Constitution whereby—

"persons of one such description are subjected to disabilities or restrictions to which persons of another description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description."

38 There is an attempt by the respondent to justify this by reference to s.14(4)(*b*) of the Constitution, arguing that sub-s. (1) does not apply to any law so far as that law makes provision with respect to persons who do not belong to Gibraltar—based on the interpretation of that phrase in regard to

s.17(3) of the Annex. Section 17(3) reads: "For the purposes of this Chapter a person shall be deemed to belong to Gibraltar if that person is a Gibraltarian for the purposes of the Gibraltarian Status Ordinance . . ."

39 The interpretation that is given by Mr. Rhoda is that belonging to Gibraltar is synonymous with being a Gibraltarian and so it is not open to argue against s.15. But that is a wrong argument. A Gibraltarian is a person belonging to Gibraltar, no doubt, but a Gibraltarian is not the only class of person who may belong to Gibraltar. There are only two classes of persons who may be registered under the Gibraltarian Status Ordinance, *i.e.* Gibraltarians entitled as of right and those upon whom the Governor has conferred the status of Gibraltarian by registration. But that expression has a wider meaning. The Constitution does not say "those who are registered under the Gibraltarian Status Ordinance." If the meaning attributed by the respondent is right in s.14(4)(*b*), why the special provision of s.14(4)(*d*) and (5)(*a*) of the Constitution? And if the respondent is right, why not relate s.14(4)(*b*) directly to the Gibraltarian Status Ordinance, instead of going about it in a convoluted way and not making sure of the matter? Counsel submits that the term "persons belonging to Gibraltar" includes persons who sleep, work and "do their thing" in Gibraltar and so, as I understood this argument, s.15 is not protected by the exclusion as other persons may belong to Gibraltar, *e.g.* if they have a certificate of permanent residence.

40 Finally, counsel turned to the question of the *locus standi* of the landlord to afford him the right to raise the Constitutional issues. Section 15(1) provides for such an application in an originating fashion but Mr. Neish submitted that in any matter in respect of which an alleged contravention of the Constitution affects a party, that party has the right to bring to the attention of the Supreme Court the contravention and seek redress, even on appeal.

41 Mr. Rhoda argued that the Tribunal was entitled, on the evidence before it, to find that Mr. Ben Allal was the lawful tenant of the premises and that a surrender of Mr. Buhagiar's tenancy had occurred by operation of law. Despite the failure of style in the proceedings there was the informal evidence of the tenant and of Mr. Levy, and it was open to the Tribunal to find that Mr. Ben Allal was a tenant.

42 Mr. Rhoda pointed to the following evidence: (a) Mr. Ben Allal gave evidence about his occupation of the premises; (b) Mr. Ben Allal gave evidence about when he took over the tenancy from Mr. Buhagiar; (c) that event took place in the presence of Mr. Levy, the landlord's agent; (d) Mr. Ben Allal gave evidence that he had been paying £130 per month for three to four years; and (e) the landlord's agent had accepted rent and had given him receipts for the same, and the receipts bore Mr. Ben Allal's

name save for the one receipt bearing Mr. Buhagiar's name issued one week before the hearing. The nub of the finding, he submitted, is that Mr. Ben Allal was a tenant and it is implicit in the decision that the Tribunal accepted the evidence referred to above and, *per contra*, dismissed or did not accept the evidence for the landlord.

43 On the evidence outlined above, Mr. Rhoda argued, the Tribunal could quite properly come to the conclusion that there had been a surrender of Mr. Buhagiar's tenancy by operation of law. It was conceded by Mr. Rhoda that an express surrender requires writing, but surrender need not be in writing. Surrender by the operation of law may be inferred from all the circumstances of the case. Surrender by the operation of law is based on the equitable doctrine of estoppel and it takes place independently of the intentions of the parties. The estoppel in the instant case rises by virtue of the fact that the landlord (through its agent, who was clothed with authority) accepted Mr. Ben Allal in place of Mr. Buhagiar as tenant and thereafter accepted rent from Mr. Ben Allal. The combination of these events amounted to an unequivocal acceptance of the surrender of Mr. Buhagiar's tenancy.

44 Once that is accepted, two things happen: (a) the receipt dated May 10th, 1999 is of no relevance; and (b) the argument that the landlord wanted a tenant to whom s.15 applied falls to the ground—it is neither here nor there because the agreement was made with Mr. Levy. As in *Street* v. *Mountford* (9), where there was an attempt to avoid the Rent Acts, one has to look at all the facts collectively. The receipt of rent may amount to consent by the landlord to substitute a tenant. The case of *Mattey Secs. Ltd.* v. *Ervin* (4) is different because in that case the tenant entered into possession through no act of the landlord, whereas in the instant case Mr. Ben Allal took over the premises with the knowledge and consent of Mr. Levy, who thereafter received rent from him.

45 Mr. Rhoda submits that *Clarke* v. *Grant* (2) does not assist the landlord because there the landlord's agent acted under a technical mistake and in the instant case there was evidence to support a surrender. In these circumstances, Mr. Rhoda submits that once the Tribunal found that a surrender by operation of law had occurred, it was sufficient to justify the conclusion on the evidence before it that the premises were a dwelling-house within Part III of the Ordinance. Section 30 of the Ordinance gives jurisdiction to the Tribunal and it was entitled to determine what was the correct rent. Its decision should be upheld.

46 In so far as the Constitutional arguments were concerned, Mr. Rhoda turned to the amended prayer and observed that paras. (c) and (d) are not matters of appeal as they were not taken before the Tribunal. Mr. Rhoda submitted that these were matters which would more properly be dealt with under s.15 of the Constitution, which provides for an originating

process for the enforcement of the protective provisions of the Constitution. Mr. Rhoda concedes, as I understood him, a Constitutional point may nevertheless be taken otherwise than on a s.15 motion provided that there is *locus standi*. He submitted that the appellant has no *locus*, so the question is: Does the appellant have *locus standi* to raise a Constitutional issue?

47 *Locus standi*, submits Mr. Rhoda, affects ss. 14 and 15 of the Constitution. Section 15(1) refers to the contravention of provisions of the Constitution "without prejudice to any other action with respect to the same matter." Mr. Rhoda submits that that must mean that in that other action a person must have *locus*, for the provision in s.15 is "in relation to him." So if one goes back to the beginning of the Constitution, "individual freedoms" are just that, and by no stretch of the imagination is a company "an individual." Section 14(3) defines discrimination in terms of real persons not corporations, so what is the discrimination against the landlord? And how is the appellant discriminated against? In essence, what is said is that the landlord does not get the proper yield. Mr. Rhoda accepts that a Moroccan might say "discrimination," with regard to himself, but the landlord here can not. The landlord is seeking declaratory relief but a party does not enhance its status by seeking a declaration. That does not give it *locus*. The landlord here has suffered no discrimination.

48 Consider s.15 of the Ordinance. That takes out of Part III of the Ordinance a tenancy in respect of which an agreed rent becomes the statutory rent. A Gibraltarian is placed in a privileged position and is not discriminated against in terms of the descriptions in s.14(3): "race, caste, place of origin, political opinions, colour or creed." To be a Gibraltarian is a status. It is none of these matters. It is not an inherent matter. The Gibraltarian is a polyglot who may fit into any one of those descriptions. Mr. Rhoda draws an analogy with the circumstances in *Moroccan Workers Assn.* v. *Att.-Gen.* (7), in which Harwood, A.J. found that Gibraltarians, as EC nationals, might enjoy a favourable position while Moroccan workers, as non-nationals, could not claim to be entitled to social assistance, and held that the applicants' case fell short of satisfying the court that there was any infringement of their rights under EC law.

49 Section 14(4) of the Constitution is no limiting factor and s.17 is a deeming provision. In resumé, the appellant lacks *locus* because he is not a person aggrieved and the Ordinance does not fall foul of the Constitution. It is not accepted that ss. 11, 15 and 30 and Schedule 1 of the Ordinance are discriminatory in that Gibraltarian status does not come within the categories set out in s.14(3) of the Constitution. Declaratory judgments should not be granted to the appellant who is not directly affected by the alleged discriminatory conduct. Section 14(4) of the

Constitution specifically excludes s.14(1) in respect of any law making a provision with respect to persons who do not belong to Gibraltar. In so far as it can be argued and determined that s.15 is discriminatory, any such determination must refer solely to persons who do not belong to Gibraltar, as a Gibraltarian is able to rent a dwelling-house without the Rent Controls. Section 17(3) defines "persons belonging to Gibraltar" as a Gibraltarian for the purposes of the Gibraltarian Status Ordinance.

50 Turning to s.6 of the Constitution and the protection from deprivation of property, Mr. Rhoda submitted that there is no reason why a broad meaning should be given to it. It should be interpreted as it is. The low levels of rent are irrelevant, and he submits that what was said in the House of Assembly is also irrelevant. The Ordinance is a regulating Ordinance and with reference to *Morgan* v. *Att.-Gen. for Trinidad & Tobago* (6), there are in fact provisions in the law of Gibraltar to increase or decrease rent. While such variations are modest, the machinery is there.

51 Mr. Rhoda referred to *Chapman* v. *Becerra (No. 2)* (1). In that case, he pointed out, the court referred to the presumption in favour of the validity of any law made by the legislature and that the onus is on the person who alleges that a law is *ultra vires*. He drew attention to the finding that the protection afforded to a statutory tenant did not amount to property or to an interest in or right over property, and the relevant section was not in contravention to the Constitution. Mr. Rhoda argued that the principle is the same for statutory rent as it was there for a statutory tenancy. In the instant case, the deprivation results from the legislation regulating the use of rental property, and no property is taken from the landlord or acquired either by the tenant or the Rent Tribunal. The landlord does not have "possession" of a market rent, and when the Rent Tribunal finds a statutory rent what happens is that the landlord no longer has a right to a larger rent and is saddled with the new statutory rent. The situation is the same as in *Chapman* v. *Becerra (No. 2)*. Looked at from the tenant's view he has acquired a benefit but he has gained no interest or right over the property. There is a difference between the acquisition and deprivation of property. There is no acquisition and so there is no contravention of s.6 of the Constitution. The Constitutional issue must fail.

52 Mr. Neish replied briefly. The findings of the Tribunal, as supported by Mr. Rhoda, are not supported by the evidence. One needs to make a quantum leap to draw those assumptions of fact. As for discrimination, one does not have to be discriminated against directly—the circumstances may lead to that. *Pillai* v. *Mudanayake* (8) was referred to by Spry, C.J. in *Chapman* v. *Becerra (No. 2)* for the statement ([1955] 2 All E.R. at 837) that—

> "there may be circumstances in which legislation, though framed so as not to offend directly against a constitutional limitation of the

power of the legislature, may indirectly achieve the same result and . . . in such circumstances, the legislation would be ultra vires."

53 As for a company not having *locus standi*, the expression "him" extends to companies. The *Moroccan Workers* case (7) dealt with other criteria. Here there is specific legal right under s.1 of the Constitution. Similarly, in the case of *Chapman* v. *Becerra (No. 2)* a different point was in issue. Here there is the deprivation of the landlord's right to future rents and s.1(*c*) of the Constitution states that there will be no deprivation without compensation.

54 I turn to consider the procedure adopted by the Rent Tribunal which might affect the quality of the evidence it accepted and hence its findings of fact. As I have observed in paras. 7–11 above, there are some discrepancies between the minutes and the decision which might be explained by the fact that the minutes are not only the minutes of the hearing but are also minutes of the meeting of the Rent Tribunal and will include minutes of its deliberations without the presence of the parties.

55 The first point to make is that the Tribunal is the arbiter of its procedure and, provided that the concepts of fairness and natural justice are adhered to, the fact that the hearing was informal and there was a failure of style (Mr. Rhoda's words) or that it was unstructured (Mr. Neish's word) are not reasons why this court should interfere. So what did the Tribunal do wrong? As in a court of law, the Tribunal heard the evidence of the applicant Mr. Ben Allal, heard the evidence of Mr. Levy for the landlord and then there was a reply from Mr. Ben Allal.

56 That threw up the evidence identified by Mr. Rhoda set out in para. 42 at (a)–(e). There are two matters which do not satisfy me. One is the evidence that when Mr. Ben Allal took over the tenancy from Mr. Buhagiar, that event took place in the presence of Mr. Levy. That the Tribunal accepted this as a fact is not necessarily inherent in its decision because, as I see it, the decision seems to have been based on the receipt of rent tendered by Mr. Ben Allal in respect of the premises. So, the situation is that if the Tribunal had accepted that as a fact (because there is Mr. Ben Allal's evidence to this effect), I am persuaded by the arguments of Mr. Neish, which are in consonance with my own view that the receipt of rent was the only reason why it concluded as it did, and this aspect did not come into its reckoning. If it had the Tribunal would presumably have mentioned it in its decision and that view is consistent with the remark of the Chairman, as recorded in the minutes, that "the Tribunal felt it was a *bona fide* case where Mr. Ben Allal was paying the rent which was being accepted by the agent, Mr. Levy" and "it was not there to judge the validity of s.15."

57 Apart from this consideration, there is the circumstance that the evidence as to the meeting with Mr. Levy was given by Mr. Ben Allal in

reply to Mr. Levy's evidence. In my view, that was new evidence which ought to have been put to Mr. Levy for explanation and that does not appear to have happened. Had that evidence been given by Mr. Ben Allal in chief, then it might have been dealt with by Mr. Levy, but as it is he was precluded from explaining it. Perhaps the Tribunal put this aspect to one side, and hence its silence on it, because it was aware that Mr. Levy had not been called to explain, but that is not known and it is a very important piece of evidence because, in my view, on it hinge Mr. Rhoda's submissions. If it is not taken into account it only leaves the receipt of rent as the basis for the Tribunal's decision and, in my opinion, the receipt of rent of itself is not unequivocal evidence in its nature. That has to depend on the circumstances and then it may be evidence in support of estoppel, but it must depend on the circumstances.

58 The second matter that does not satisfy me is the reliance on the receipts. It seems to me that the Tribunal was wrong to have received and considered them without first putting them to Mr. S. Levy, even if that had meant reconvening. However, whichever way one reads them, both the minutes and the decision agree, to this extent, that the Tribunal had decided on May 13th, 1999 that Mr. Ben Allal was the tenant, so wherein lies their value to this appeal?

59 Well, it seems clear that the receipts were used by the Tribunal to fortify the conclusion it had reached on 13th and it is plain that this is so from the decision itself, which states "it appears that the receipt dated November 8th, 1997 is signed by Mr. Solomon Levy himself." To have used the receipts in this fashion without reference to Mr. Levy not even by seeking his consent prior to receiving them cannot be right when the Tribunal had still not delivered its decision and was until then in a position to change its mind.

60 The importance of all this is that without any explanation from Mr. Levy (which of course might not have been accepted by the Tribunal anyway), that receipt is liable to destroy Mr. Levy's evidence. So I do not believe that the principles of natural justice have been adhered to, the evidence is faulty and the decision ought not to stand.

61 What, then, are the powers of this court? They are governed by s.74(2) of the Ordinance, which states "On hearing the appeal, the court may confirm, reverse or vary the decision." I am unable, in the circumstances that I have indicated, to confirm the decision, nor is there any room to vary it. I should have liked to remit the matter back to the Tribunal for its reconsideration, but I do not have the power to do so in this case. The only avenue left to me is to reverse the Tribunal's decision and allow the appeal.

62 As to the argument that s.15 of the Ordinance ousts the jurisdiction of the Tribunal under s.30, I am of the opinion that the Rent Tribunal has to consider all the evidence put to it before it can come to a conclusion. The question cannot be answered as a preliminary point.

63 I shall touch upon the constitutional issues briefly. I consider the proper approach is that set out by Spry, C.J. in *Chapman* v. *Becerra (No. 2)* (1) (1979 Gib LR at 29), where he states:

> "I think the provisions of the Constitution that protect the fundamental rights and freedoms of the individual must be strictly construed, since they are fetters on the legislative power, but with the qualification that the court must consider the effect of the legislation and not just its form."

I accept Mr. Neish's contention that, whatever the long title to the Landlord and Tenant Ordinance, one has to look at its result. The long title is "An Ordinance to regulate the relationship between landlord and tenant, and for matters relating thereto." The fact that it appears from the long title that it is only a regulatory Ordinance does not mean that the substance might not, in effect, contravene the Constitution. I also accept Mr. Neish's proposition that the right to rental, present or future, vested or contingent, is property as defined in the Interpretation and General Clauses Ordinance which would be within s.6 of the Constitution. The two cases referred to me: *Morgan* v. *Att.-Gen. of Trinidad & Tobago* (6); and *May* v. *Reserve Bank of Zimbabwe* (5), are instructive.

64 Mr. Neish point out that *Morgan* is different from the instant case and hinges on a different Constitution, and I agree. However, the importance I attach to *Morgan* is that the underlying process in the enactment of the Rent Restriction (Dwelling Houses) Act 1981 was the recognition that the provisions of the Act were contrary to the fundamental human rights of the individual to the enjoyment of property contained in s.4(a) of the Constitution of Trinidad & Tobago. Section 5 of that Constitution provided: "Except as is otherwise expressly provided . . . no law may abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of any of the rights and freedoms herein before recognised and declared." Now, that is certainly different to ss. 1 and 6 of the Gibraltar Constitution and in that case the Act was saved by the Constitution itself, since the Constitution provided for certain mechanisms to do that. The point is that had it not been for the special provisions of the Constitution, the Act might have been in contravention of that Constitution. I am constrained from being more definite, as I do not have a copy of the Trinidad & Tobago Constitution.

65 The case of *May* v. *Reserve Bank of Zimbabwe* (5) is interesting too. The Constitution of Zimbabwe, s.16(1) provides: "No property of any

description or interest or right therein shall be compulsorily acquired except under the authority of a law." That is very similar to s.6 of the Constitution, and it is in the context of that section only that Fieldsend, C.J. said in *Hewlett* v. *Minister of Finance* (3) (1981 Z.L.R. at 594):

> "The fact is that the limitation imposed on the Legislature by section 16 (1) is that it shall not pass a law compulsorily acquiring property without compensation, not that it shall not pass a law depriving a person of property without compensation."

As Mr. Neish points out, the two Constitutions are different and while Fieldsend, C.J.'s observation might be true of s.6 *simpliciter*, I do not think his proposition can be applied unreservedly to s.1(*c*), the terms of which are "protection . . . of . . . property and from deprivation of property without compensation."

66 The question is: Do the rent controls set out by the Ordinance become a deprivation of property without compensation, as set out in that section? If they do, the last question would be: Are they saved in the public interest, pursuant to s.1 of the Constitution? One argument put forward by Mr. Neish is that the landlord is deprived of £119.93 a month and therefore there is a breach of the Constitution. Now that argument seems to me to turn the matter on its head, and it does not follow at all. It is true that if the Ordinance is construed to be in breach of the Constitution the effect is that the landlord is deprived of £119.93, but one cannot argue it backwards.

67 Mr. Neish argues that an unfair statutory rent casts unjust burdens on the landlord and this may be true but "unfair" and "unjust" are not the tests. It must be unconstitutional, and where is the deprivation here? Mr. Neish argues that the rent is absurdly low and was fixed many years ago but, again, where is the deprivation of property? That aspect was considered in *Morgan* and what was said there, I think, irrespective of the differences between the Constitutions, is relevant here. Mr. Rhoda has pointed out, accurately, I think, that the landlord does not have "possession" of a market rent. The Tribunal finds a statutory rent and what happens is that the landlord no longer has a right to a larger rent and is saddled with a new statutory rent.

68 I consider that the concept is analogous to Spry, C.J.'s reasoning in *Chapman* v. *Becerra (No. 2)* when he was considering property for the purpose of s.6 and applies when considering ss. 1(*c*) and 6 in the instant matter. It is to be noted that the fundamental rights and freedoms set out in s.1 of the Constitution are fleshed out in the subsequent sections and the section that might tie on to s.1(*c*) is s.6, the marginal note of which reads "Protection from deprivation of property." However, there is actually no reference to deprivation in s.6. Section 6 deals with property

which is compulsorily taken possession of, or compulsorily acquired, and there are savings in paras. (*a*), (*b*) and (*c*) of sub-s. (1) which provide for compensation. Of course, when something is compulsorily taken possession of or compulsorily acquired someone has to be deprived but, again, because someone is deprived does not mean that it has been acquired by another, so I do not think s.6 of the Constitution helps the landlord in this case. Its situation is not covered by s.6.

69 The nub is in s.1 and particularly (*c*). Two things are involved: (a) discrimination; and (b) human rights and fundamental freedoms, one of which is "(*c*) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation." Does that afford constitutional protection for anyone other than a real person? The protection of "his" home is a reference to the individual and not to a "person" and I have come to the conclusion that the expression "property," referred to in the phrase "deprivation of property without compensation," refers back to the individual's property and has to be read in the context of (*c*) as a whole where the previous phrase "and other property" is clearly connected to "his" home. Now, can it be said that "the individual" is synonymous with a person so that the section could be construed to encompass both real and artificial persons? I do not believe so.

70 For the purpose of interpreting the Constitution, the Interpretation Act 1889 applies. Section 19 of that Act provides: "In this Act and in every Act passed after the commencement of this Act the expression 'person' shall, unless the contrary intention appears, include any body of persons corporate or unincorporate." The choice of the word "individual" in the Constitution is, to my mind, significant. "Individual" means a single human being. Had an artificial person been in the contemplation of the framers of s.1, the word "person" would surely have been used as it has been in other sections of the Constitution. It is correct to observe that the expression "person" has been used in s.1, but only in para. (*a*) "the right of the individual to life, liberty, security of the person and the protection of law," and here it seems to me to be abundantly clear that in that context the expression "person" appearing in s.1(*a*) does not permit the construction of "person" to include person under s.19 of the Interpretation Act 1889. I have to construe s.1 as it is.

71 I agree with Mr. Rhoda that the discrimination "by reason of race, place of origin, political opinions, colour, creed or sex" is in respect of real persons. In my opinion, all the descriptions used can only have reference to real persons, save, perhaps, for the description "place of origin." As I see it, s.1 of the Constitution is concerned only with real persons and it does not have to be otherwise. I do not think the provisions of s.1 are breached in the circumstances of this appeal.

72 As to the discriminatory nature of ss. 11, 15 and 30 and Schedule 1 under the provisions of ss. 1 and 14 of the Constitution (protection from discrimination on the grounds of race, or place of origin, *etc.*), any discrimination that arises in the instant case is between a Gibraltarian and those who are not. The Ordinance makes no other distinction that is relevant and no other may be implied. So my only concern in this appeal is with any breach of fundamental freedoms with regard to "place of origin," as it appears in s.14 of the Constitution.

73 Mr. Rhoda argued that the appellant has suffered no discrimination under s.14(3) because it is a landlord company and the fundamental rights preserved by s.14 are limited to the protection of real persons, real individuals. Section 14(1) seems to me, on a first reading, to protect both real individuals and persons, as defined in the Interpretation Act 1889, from a law which is discriminatory either of itself or in its effect and what is discriminatory is described in sub-s. (3). Mr. Rhoda's argument makes the same point as for s.1, namely, that the descriptions there are references to natural persons or real individuals and do not extend outside that, and that that accords with the heading of Chapter 1: "Protection of Fundamental Rights and Freedoms of the Individual." I note that s.14(3) repeats the descriptions set out in s.1 and adds the expression "caste."

74 That seems to be a strong indication that Mr. Rhoda is right. I have decided above in relation to s.1 that all the descriptions used in s.14(3) which are the same in both sections (save for "caste") attach to and can only refer to real and not artificial persons. So can "place of origin," in s.14, bear a different construction to include a person as defined in the Interpretation Act 1889, *i.e.* that is the only description under which the appellant can be aggrieved? I have concluded that it may, for the simple reason that in s.14(3) "discriminatory" means "affording different treatment to different persons," and in this context the s.19 definition of person is not excluded, or so I think.

75 Once that conclusion is reached then Mr. Rhoda's argument that the appellant has no *locus* falls. The constitutional point, of course, can be taken even if it is not directly taken under s.15 of the Constitution. But the question which remains live is: Has the appellant suffered discrimination under s.14? The facts of this case and the law as they have been put to me make it clear to me that, as between Gibraltarians, there is no discriminatory conduct under ss. 11, 15, 30 and Schedule 1 of the Ordinance. In the instant case, a s.15 statutory rent set at £130 has been reduced as a result of the provisions of the Ordinance and that is in its effect because the Ordinance in itself does not do so expressly. It required the intervention of the Rent Tribunal and the determination of the rent in its decision, and that stemmed from the fact that the tenant was not a Gibraltarian.

76 So the next question that arises is: Is the Ordinance saved in its effect by s.14(4)(*b*)? My view is that s.14(4)(*b*) does not apply. The Ordinance is not a law which makes provision for a person who does not belong to Gibraltar. If it makes provision for persons who belong to Gibraltar within the definition of s.17(3) of the Constitution, and sub-s. 4(*b*) does not apply, is the result a discrimination within s.14(3)? The answer I have arrived at comes through a study of s.14(1) and (3).

77 Section 14(1) refers to a law which is "discriminatory," and "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by:

(a) race, which is not applicable here;

(b) caste, which is not applicable here;

(c) place of origin—place of origin is the only description that could apply in this case. I do not think it is apt, for the reason advanced by Mr. Rhoda, but it is unnecessary, having regard to the conclusion I have arrived at, to decide how a Gibraltarian may or may not fall within this description;

(d) political opinion, which is not applicable here;

(e) colour, which is not applicable here;

(f) creed, which is not applicable here;

and the section continues:

> "whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description."

78 Note that the discrimination, to be discriminatory within the section, is in respect of persons of another such description, but here in this case and in respect of the Ordinance as a whole, if discrimination there is, it is between persons of the same description, namely, place of origin. There is no discrimination as between the appellant or Mr. Buhagiar or Mr. Ben Allal and anyone of another description and so there is no discrimination within the meaning of s.14 of the Constitution.

79 The appeal is allowed but I shall make none of the declarations prayed for.

Appeal allowed.