[1999–00 Gib LR 573]

UNITED INVESTMENTS LIMITED v. UNIVERSAL SUPPLIERS LIMITED

COURT OF APPEAL (Neill, P., Glidewell and Staughton, JJ.A.): September 25th, 2000

Landlord and Tenant—creation of tenancy—criteria—creation of tenancy requires exclusive possession with landlord's consent, for consideration, with intention to create legal relations—exceptional circumstances may negate creation of tenancy—same test for sub-tenancy vis-à-vis tenant

Landlord and Tenant—creation of tenancy—criteria—consideration—payment to landlord of tenant's rent by third party occupying premises suffices as necessary consideration to create sub-tenancy

Landlord and Tenant—creation of tenancy—criteria—exclusive occupation—no sub-tenancy if premises controlled by tenant and used as correspondence address—sub-tenant may exclude tenant from premises

Landlord and Tenant—creation of tenancy—criteria—exceptional circumstances—no sub-tenancy if tenant and occupying company controlled by same principal, covenant against sub-letting, tenancy registered but not sub-tenancy, and occupation clearly for business convenience without intention to create legal relations

The appellant applied to the Supreme Court for possession of its premises which were occupied by the respondent.

The respondent occupied and traded from premises owned by the appellant. Between 1962 and 1979, the appellant's predecessor in title granted successive leases to Rock Radios, the respondent's associated company. Each contained a covenant against under-letting or parting with possession. The respondent occupied the premises jointly with Rock Radios until 1972, when the latter ceased trading. Rock Radios continued as the tenant, paying rent drawn on the respondent's account.

Rock Radios applied for further leases in response to notices to quit issued by the appellant in respect of different parts of the premises in 1981 and 1984, respectively. The applications were consolidated, and in 1992 the Supreme Court (Alcantara, A.J.) granted Rock Radios a new tenancy of the whole premises for five years. However, the Court of Appeal set aside the grant of the new tenancy in 1993 on the ground that the Supreme Court lacked jurisdiction, because, unknown to the

appellant, Rock Radios had not been in occupation of the premises. It rejected arguments that Rock Radios was occupying for the purpose of giving the respondent accommodation and that Rock Radios and the respondent were members of the same group of companies within the meaning of the Landlord and Tenant Ordinance, s.62.

In the present proceedings, commenced in 1994, the appellant claimed possession from Rock Radios and the respondent on the basis that they were trespassers. The respondent's defence was that it had occupied the premises for some 30 years, with the appellant's knowledge, as a sub-tenant of Rock Radios or as the beneficiary of a trust of the tenancies held by Rock Radios, and that the appellant was estopped from denying this. In 1999, on being ordered to pay arrears of rent due since 1992, Rock Radios relinquished its claim to possession of the premises, and its defence was struck out.

The Supreme Court held, *inter alia*, that there could be no trust of the tenancy in favour of the respondent, since the Court of Appeal's decision in 1993 had terminated the tenancy. The agreement reached between the parties leading to the 1992 order by the Supreme Court did not create a common law or statutory tenancy, since the appellant had been unaware that Rock Radios was not in occupation at that time. The respondent had occupied with the permission of Rock Radios, the tenant, and was therefore not a trespasser but a sub-tenant with exclusive possession. Rock Radios had clearly intended this when taking on successive leases of the premises after 1972, and the rent paid by the respondent until 1992 was consideration for permission to occupy.

The appellant appealed, seeking possession of the premises and damages for the respondent's trespass. It submitted that (a) the assertion by Rock Radios' principal in 1992 that Rock Radios occupied the whole premises as tenant for the purpose of its trade operated to estop the respondent from pleading the existence of a sub-tenancy; (b) the respondent had never been a sub-tenant of Rock Radios, entitled to the protection of the Landlord and Tenant Ordinance, since it had neither enjoyed exclusive possession nor paid rent to Rock Radios, and there had been no intention to create legal relations; (c) at best, the respondent was a sub-tenant at will; (d) the respondent had occupied unlawfully since 1986, when, following the lifting of a moratorium on the effect of notices to quit, the notice issued in 1984 had effectively ended Rock Radios' contractual tenancy; and (e) Rock Radios' applications for further tenancies had been nullities, since it had not satisfied the requirement in s.38 of the Ordinance that it occupied the premises for the purpose of its business.

The respondent submitted in reply that (a) its payment of rent to the appellant and its predecessors on behalf of Rock Radios amounted, in effect, to payment of rent to Rock Radios as a sub-tenant; (b) it had enjoyed exclusive possession since 1973; (c) the arrangements had clearly been intended to have legal effect; (d) if it had occupied unlawfully, it had done so only since March 1994, when the appellant

issued the present proceedings (having consented to its presence until then) or, alternatively, by virtue of s.77 of the Landlord and Tenant Ordinance, since three months after the courts finally disposed of Rock Radios' consolidated tenancy application in 1993/1994; and (e) Rock Radios' failure to comply with the requirements for an application for a new tenancy had been a procedural irregularity only.

Held, allowing the appeal:

(1) In the absence of a written or oral agreement to create a sub-tenancy in favour of the respondent, its status had to be inferred from the parties' conduct and the surrounding circumstances. The same criteria governed the question of whether the respondent was a sub-tenant of Rock Radios as would determine whether it was a tenant if Rock Radios were the owner. To acquire the status of tenant, protected under the Landlord and Tenant Ordinance, the respondent had to have exclusive possession of the premises with the owner's consent, in return for consideration, with the intention to create legal relations, and in the absence of exceptional circumstances negating the creation of a tenancy. If any of these elements was absent, the respondent would be a mere licensee (para. 58; para. 69).

(2) Although the respondent had not paid rent to Rock Radios, arguably it had given consideration for its occupation by paying Rock Radios' rent to the appellant. However, it did not have exclusive possession of the premises, since on the evidence, even though Rock Radios had ceased to trade at the premises in 1973, the respondent was not entitled to exclude it from the premises if it chose to. The right to exclude the landlord (here Rock Radios) was an essential feature of a tenancy unless there was an express provision permitting viewing of or repairs to the premises. The parties here did not regard the respondent as being in control of the premises and, indeed, Rock Radios had used the premises as its address for correspondence (paras. 70–75).

(3) Furthermore, the fact that the two companies were at all times controlled by the same principal, who had simply done what was convenient for both, without discussion or agreement between them, was an indication against a sub-tenancy. This, together with other evidence, including the principal's testimony at the trial, the fact that Rock Radios had always asserted that it occupied for the purposes of its own business, the covenant not to sub-let, and the failure to record a sub-tenancy side by side with the tenancy in the statutory register, amounted to exceptional circumstances (paras. 76–77).

(4) The appeal would be allowed. The respondent would be ordered to deliver possession of the premises to the appellant and pay damages for unlawful use and occupation, with interest. Rock Radios' applications for new tenancies had been nullities because it failed to comply with the

requirement in s.38 that it occupied the premises for the purpose of its own business. Its contractual tenancies therefore had expired in 1986, when, following the lifting of the statutory moratorium, the 1984 notice to quit came into effect. Damages for the respondent's trespass would be calculated from then (para. 79; paras. 81–88).

Cases cited:

(1) *Booker* v. *Palmer*, [1942] 2 All E.R. 674; (1942), 87 Sol. Jo. 30.
(2) *Errington* v. *Errington*, [1952] 1 K.B. 290; [1952] 1 All E.R. 149, considered.
(3) *Isaac* v. *Hotel de Paris Ltd.*, [1960] 1 W.L.R. 239; [1960] 1 All E.R. 348, considered.
(4) *Kammins Ball Rooms Co. Ltd.* v. *Zenith Invs. (Torquay) Ltd.*, [1971] A.C. 850; [1970] 2 All E.R. 871, distinguished.
(5) *Shell-Mex & B.P. Ltd.* v. *Manchester Garages Ltd.*, [1971] 1 W.L.R. 612; [1971] 1 All E.R. 841, considered.
(6) *Street* v. *Mountford*, [1985] A.C. 809; [1985] 2 All E.R. 289, applied.

Legislation construed:

Landlord and Tenant Ordinance (1984 Edition), s.3(1): The relevant terms of this sub-section are set out at para. 46.
s.38(1): The relevant terms of this sub-section are set out at para. 46.
s.39(1): The relevant terms of this sub-section are set out at para. 46.
(3): The relevant terms of this sub-section are set out at para. 46.
s.42: The relevant terms of this section are set out at para. 46.
s.43(1): The relevant terms of this sub-section are set out at para. 46.
s.44(1): The relevant terms of this sub-section are set out at para. 46.
s.62(2): Where a tenancy is held by a member of a group, occupation . . . and the carrying on of business by another member of the group, shall be treated for the purposes of section 38, as equivalent to occupation or the carrying on of business by the member of the group holding the tenancy; and in relation to a tenancy to which this Part applies . . .—

(*a*) references (however expressed) in this part to the business of or to use, occupation or enjoyment by the tenant shall be construed as including references to the business of or to use, occupation or enjoyment by the said other member . . ."

s.77(1): The relevant terms of this sub-section are set out at para. 46.

A.A. Vasquez for the appellant;
H.K. Budhrani, Q.C. and *N.P. Caetano* for the respondent.

1 **GLIDEWELL, J.A.:** By a writ issued on March 31st, 1994, the appellant ("United Investments") claimed, against two defendants, Rock Radios Ltd. ("Rock Radios") and Universal Suppliers Ltd. ("USL"), the present respondent, possession of premises at 177–179 Main Street and 7–9 Cornwall's Lane, Gibraltar, together with mesne profits against Rock

Radios, and damages for use and occupation against USL. The plaintiff's case was and is that both defendants were trespassers as a result of continuing to claim to be entitled to occupy and occupying the premises after the expiry of notices to quit in relation to 7–9 Cornwall's Lane, on October 31st, 1981 and in relation to 177–179 Main Street, on February 28th, 1986. By their defences, both defendants pleaded that USL was occupying the premises as a sub-tenant of Rock Radios, which in turn held the tenancy of the premises under an agreement for a lease drawn up in May and June 1992 between the respective advisers for United Investments and Rock Radios.

2 Before the action was heard, following the service by Rock Radios of a notice purporting to "withdraw that part of its defence as denied the plaintiff's possession of the premises," Pizzarello, A.J. made an order that Rock Radios' defence be struck out in its entirety, that it give possession of the premises to United Investments, and that it pay United Investments damages, to be assessed.

3 The action came on for hearing before the same judge, who on February 2nd, 2000 dismissed the plaintiff's claim against USL. By notice of appeal dated February 11th, 2000, United Investments appealed against the decision.

4 In an earlier action begun by writ, issued on April 24th, 1990, Rock Radios and USL claimed against United Investments damages for damage to the plaintiff's goods caused by rain water entering the premises, allegedly in breach of the landlord's covenants and/or as a result of its negligence. That action ("the 1990 action") was heard by Pizzarello, A.J. at the same time as the 1994 action. He gave judgment in the 1990 action for USL. United Investments has also appealed against that decision, but the hearing of that appeal has been stayed pending the decision by this court of the rights, if any, of USL in the premises. The facts of and issues in the 1990 action are largely irrelevant to the present appeal, though it will be necessary to refer to a few of the letters put in evidence in that action.

History

5 This matter has a long and tortuous history which was described in detail by the learned judge in his judgment. It will, however, be necessary for me to set out the salient facts not in issue or as found by the judge as shortly as I can, to enable the respective arguments to be properly understood.

6 The premises form part of a larger building lying between Main Street and Cornwall's Lane, the other parts of which were let to another tenant and are now vacant. Numbers 177–179 Main Street are a substantial retail

shop. Numbers 7–9 Cornwall's Lane consist of storage space. Since the lane is at a higher level than Main Street, that part of the premises lies above the rear of the shop. Until the expiry of the notices to quit to which I have referred, the two parts of the premises were let on separate lettings but, except where it is necessary to distinguish between them, I will treat them as one.

7 At all material times until February 1988 the trustees of the estate of Lewis Stagnetto deceased ("the landlords") were owners of the building of which the premises form part.

8 Rock Radios was incorporated in 1960 by a Mr. Maurice Featherstone, who was the majority shareholder in and controlled the company. In April of that year the landlords granted a lease over the shop premises to Rock Radios for a term of six years and eight months. The lease was subject to a covenant against under-letting or parting with possession of the demised premises. Rock Radios then commenced trading in the shop as retailers of electrical and radio appliances.

9 At the same time Mrs. Featherstone was carrying on business separately as an importer of photographic equipment under the registered business name of Universal Suppliers. In 1962 Mrs. Featherstone transferred that business to the shop premises in Main Street and traded from there as joint occupier with Rock Radios. In the same year Mrs. Featherstone incorporated USL. The shares of the company were held by Mr. and Mrs. Featherstone in equal proportions. Thereafter, USL continued to trade from the shop premises as joint occupier with Rock Radios.

10 In his judgment, Pizzarello, A.J. said:

> "I have no difficulty, having heard the evidence of Mr. Featherstone, in finding as a fact that up to 1972/1973 he was the person in control of Rock Radios and USL . . . It was in his power to do what he wanted in relation to the companies and the premises which they occupied . . . I find also as a fact that in so far as Rock Radios and USL were concerned, the floor area was taken by both and the staff were shared. There was no demarcation."

11 In March 1967 the landlords granted Rock Radios a second lease over the premises for a term of seven years, commencing on January 1st, 1967. Save for the date, the rent, and a number of other terms of no significance, the terms of this lease were identical to those of the first.

12 In 1972 Rock Radios lost an agency which provided the majority of its business. After selling its existing stock, Rock Radios ceased to trade from the Main Street shop. The judge said in his judgment:

> "I shall assume, for the purposes of this judgment, that Rock Radios ceased to carry on business at the end of 1973. Thereafter,

USL continued to trade from there only with the permission of Rock Radios. Although Rock Radios was the leaseholder it ceased to occupy the premises. USL continued to pay rent with cheques drawn on its account. Rent receipts continued to be issued by the landlords to Rock Radios. No agreement was made between Rock Radios and USL as to who should be the tenant and none was contemplated by Mr. Featherstone."

13 Rock Radios' second lease came to an end on December 31st, 1973. The landlords served on Rock Radios a notice under s.44 of the Ordinance to terminate the tenancy. Rock Radios' solicitors, on December 11th, 1973, issued an application for a new tenancy of the shop under Part IV of the Ordinance. We have not seen that summons, but it is apparent that in it Rock Radios must have claimed that it occupied the premises for the purposes of its business. The landlords were willing to grant a new lease, and negotiations as to the terms took place in 1974. A new lease for five years from January 1st, 1974 was finally executed on October 14th, 1975. At that date, Mr. Featherstone was still in control of Rock Radios.

14 In December 1975 Mr. and Mrs. Featherstone sold their shares in both Rock Radios and USL to companies controlled by a Mr. Alwani. The two companies then became wholly-owned subsidiaries of a holding company, in one case directly, in the other, via another company which itself was wholly owned and controlled by Mr. Alwani. As the judge put it:

"Mr. Alwani controls each and every one of these companies, does whatever he wills and treats them as his own, and continues to manage Rock Radios and USL . . . in the same manner as Mr. Featherstone has done and also with respect to their relations with the landlords . . ."

Mr. Alwani then traded under the business name of "Galaxy."

15 The judge found that by this stage the landlords knew that USL was trading from the premises and was accepting payment of the rent due from Rock Radios by cheques drawn on USL's account. However, the landlords continued to issue receipts in the name of Rock Radios, as they had done when Mr. Featherstone was in control.

16 By a letter dated November 19th, 1976, Messrs. J.A. Hassan & Partners, the solicitors then acting for both Rock Radios and USL, wrote to the landlords' solicitors, Messrs. Stagnetto & Co., in a letter headed "Shop, Universal Suppliers Ltd.—177 Main Street, Gibraltar," seeking permission for alterations to the interior of the shop. In a letter in reply, Messrs. Stagnetto & Co. pointed out that the tenants of the premises were Rock Radios and asked why the application was being made in the name of USL. In reply to that, Messrs. Hassan & Partners replied:

> "We apologize for the error contained in our letter to you of November 22nd, and we confirm that the tenants of the above premises are as stated in yours, namely, Rock Radios Ltd. Universal Suppliers Ltd. is an associated company of the tenants and therefore the repairs will be undertaken by the tenants, Rock Radios Ltd., in conjunction with Universal Suppliers Ltd."

They then asked for consent to be given to Rock Radios. It is noticeable that there was no mention in this letter of a sub-tenancy to USL.

17 On January 11th, 1977, Messrs. J.A. Hassan & Partners wrote to the Commissioner of Income Tax on behalf of USL, stating that Rock Radios was not trading and that it was USL that was trading from Galaxy's premises.

18 On August 17th, 1978 the landlords issued a notice to quit determining Rock Radios' third lease on February 28th, 1979. In reply, on December 13th, 1978, Rock Radios' solicitors issued an originating summons under the Landlord and Tenant Ordinance seeking a new lease. The summons stated that Rock Radios occupied the premises at 177–179 Main Street and carried on the trade of radio, photographic and electrical equipment suppliers from the premises. I comment that the solicitors who issued that summons cannot have believed that USL had been granted a sub-tenancy.

19 Those proceedings were settled by agreement and, on December 15th, 1980, the landlords granted a fourth lease to Rock Radios for a term of five years from March 1st, 1979. The rent under this lease was £475 per month for the first three years and £525 per month from March 1st, 1982. This was the last contractual lease of the premises. Like its predecessors, it contained a specific covenant against sub-letting or parting with possession of the premises.

20 On April 22nd, 1981 the landlords served a notice to quit on Rock Radios in respect of the store room at 7 Cornwall's Lane. In reply, solicitors for Rock Radios issued an originating summons seeking an order for a further new lease over those premises, under the Landlord and Tenant Ordinance, and stating that the premises were a store "used by the applicant in connection with the business carried on from 177–179 Main Street" and that the premises were occupied by Rock Radios. I shall refer to this as "the 1981 application."

21 A short time before the termination of the fourth tenancy of 177–179 Main Street, the landlords served a statutory notice to quit on Rock Radios, terminating the tenancy on August 31st, 1984. The notice said that the landlords would not oppose the grant of a new tenancy. At that time there was a statutory moratorium on the effect of notices to quit. That was not lifted until December 31st, 1985, when the new Landlord and Tenant Ordinance of 1983 came into effect.

22 After the lifting of the moratorium, Rock Radios' solicitors issued an originating summons on February 19th, 1986 seeking a further lease to Rock Radios for 21 years under Part IV of the new Ordinance. The summons stated that Rock Radios "occupied the whole of the premises at 177–179 Main Street for the purposes of its trade as a retailer in hi-fi equipment, photographic and electrical goods, gift items and general merchandise." The application proposed that the rent under the new lease should be at "market value with rent reviews every five years and for the last six years." This, which I shall call "the 1986 application," was later consolidated with the 1981 application by order of the court.

23 On February 15th, 1988 the landlords sold the building of which the premises form part to United Investments. As a result, in due course United Investments was substituted as defendant to the 1981 and 1986 applications.

24 On October 27th, 1989 Mr. Alwani wrote to United Investments on paper headed in typed script "Rock Radios Ltd., 177/179 Main Street, Gibraltar," a letter complaining of water "filtering into our shop from the floor above." The letter alleged that as a result "our merchandise" had been spoiled, and claimed compensation. On April 24th, 1990 solicitors for Rock Radios issued the writ in the 1990 action, *i.e.* the water damage claim.

25 On September 5th, 1990 Messrs. J.A. Hassan & Partners wrote on behalf of Rock Radios sending a cheque drawn by USL for unpaid back rent for the period from January 1988 to August 1990 in the sum of £16,800. The receipt for this cheque was addressed to Rock Radios.

26 On May 28th, 1992 Messrs. Coopers & Lybrand prepared a report for use in the water damage claim calculating the losses suffered as a result of the various incidents of flooding on the premises. The report stated that Rock Radios held the lease over the premises but that USL, an associate company of Rock Radios, traded from the premises under the name Galaxy and that, accordingly, the losses had been suffered by USL.

The hearing of the 1981 and 1986 applications

27 The consolidated applications for a single new tenancy over the shop and store premises came on for hearing before Alcantara, A.J. on June 2nd, 1992. The parties had already agreed that United Investments would grant a new five-year lease of the combined premises to Rock Radios, at a rent of £3,650 per month (£43,800 per year), with a rent review at the end of the first three years. This agreement was, however, subject to two matters which the judge was asked to decide, namely, whether because of the state of the premises the rent should be reduced or suspended, and whether the lease should contain an express repair covenant by the landlords.

28 On the second day of the hearing, Mr. A.V. Stagnetto, Q.C., counsel for United Investments, made a preliminary submission which went to the jurisdiction of the court. After re-reading the report from Coopers & Lybrand of May 28th, 1992, he had appreciated for the first time that Rock Radios was not trading from the premises. Thus, he submitted, it was not entitled to make an application for a new lease under the Ordinance, and its application should be struck out.

29 Alcantara, A.J. decided to defer ruling on this preliminary submission until he had heard all the evidence and argument on the substantive application. On July 30th, 1992 he delivered his judgment. He dismissed Mr. Stagnetto's preliminary submission on the ground that it was unnecessary for Rock Radios to prove that it was occupying the premises for the purposes of its business, because the landlords had accepted that as a fact in the pleadings in the proceedings, and indeed at all times until the second day of the hearing. The learned judge then granted Rock Radios a new tenancy for five years at the agreed rent of £43,800 per annum with a rent review at the end of the third year.

The appeal

30 United Investments appealed against the judge's decision on Mr. Stagnetto's preliminary submission. This court heard the appeal in April 1993. It was not argued on behalf of Rock Radios on the appeal that USL had a sub-tenancy—indeed, logically, that could not have been argued under the circumstances. The main arguments were that Universal Suppliers and Rock Radios were members of the same group of companies within the meaning of the Ordinance, and that as the parties had agreed on the grant of a new lease before the hearing the landlords were estopped from taking the point as to Rock Radios' not being in occupation.

31 This court unanimously allowed the appeal and set aside the order for a new tenancy. The first argument for Rock Radios was that it was occupying the premises for the purpose of its business of providing accommodation for USL. To that, Fieldsend, P., with whom the third member of this court expressly agreed, said:

> "Here the tenant merely made the premises available to Universal Suppliers Ltd. as a place from which that company could carry on its trade. The tenant is doing nothing more than giving Universal Suppliers Ltd. a licence to occupy the premises for no consideration. I do not think that this can be said to be occupying the premises for the purposes of a business carried on by it."

The court rejected the argument that USL and Rock Radios were members of the same group of companies as defined in s.62 of the Landlord and Tenant Ordinance.

32 The court agreed with Mr. Stagnetto's argument that the Supreme Court had no jurisdiction to grant a new tenancy because Rock Radios was not in occupation of the premises. The court also rejected the argument that United Investments was estopped from putting forward that argument. The learned President said:

> "If there was evidence to show that the landlords knew that Rock Radios Ltd. was not in occupation of the premises and not entitled to claim an order for a tenancy and yet agreed to the court ordering the grant of lease on terms to be settled by the court, then it may well be taken to waive its right to take the point of non-occupation . . . In the light of the facts it cannot be said the landlord knew, must have known, or even should have suspected that the tenant was not in occupation, either itself or possibly as one of a group of companies, as defined in s.62."

On that same issue, Huggins, J.A. said: "The important question was whether the landlord was fixed with knowledge not that Universal was trading from the premises but that the tenant was not so trading."

33 On May 7th, 1993, solicitors for Rock Radios filed notice of intention to appeal to the Privy Council. Conditional leave was granted on October 20th, 1993. However, no steps were taken to prosecute that appeal, and on March 8th, 1994 the appeal was deemed to have been withdrawn.

The present proceedings

34 As I have said, United Investments' writ in the present action was issued on March 31st, 1994. By the statement of claim, possession is claimed against both defendants, it being alleged that as a result of the matters I have already set out, both have remained in occupation of the premises as trespassers.

35 By its defence, delivered on May 6th, 1994 by its present solicitors, USL alleged:

> "The second defendant will aver that it is, and was at all material times and has been since December 1965, a sub-tenant of the first defendant and that it has, since December 1965, occupied the premises with the knowledge of the plaintiff for the purposes of the second defendant's business."

In further and better particulars of that allegation sought on behalf of United Investments, USL replied:

> "The second defendant's sub-tenancy was created in or about December 1965 when it was given exclusive possession of the premises by the first defendant for the purpose of carrying on the

second defendant's business therein. The second defendant was required to and did pay the rent payable by the first defendant to his landlords and to pay and discharge all outgoings related to the premises, which the second defendant has done since December 1965. No specific covenants were made in respect of the sub-letting save that the second defendant would perform the covenants entered into by the first defendant with its landlords and would do or omit to do any act or thing which might have lead to a breach of covenant by the first defendant. No length of term was, or ever has been, specified between the parties, nor any method of determination and, by reason thereof, the provisions of Part IV of the Landlord and Tenant Ordinance apply. The entire premises demised to the first defendant by its landlords were sub-demised to the second defendant."

36 The defence of Rock Radios, served on the same day, and the further and better particulars of that defence served on June 10th, 1999 were more extensive. It was alleged, first, that Rock Radios "occupied and occupies the premises and holds the tenancies thereof in trust for the second defendants," as part of the inter-company arrangements of the Alwani group of companies. Secondly, it was pleaded in the alternative that USL was and is a sub-lessee of Rock Radios, the particulars of that allegation being the same as those served on behalf of USL. Thirdly it was alleged that United Investments was estopped from denying either the allegation of a trust or that there was a sub-tenancy.

The water damage claim

37 On December 8th, 1994, Rock Radios issued a summons in this action seeking to add USL as a plaintiff. The application was supported by an affidavit by Mr. Alwani which, somewhat surprisingly, had been sworn on June 25th, 1992. This affidavit contained no mention of USL's being a sub-tenant of Rock Radios. On May 24th, 1999, Pizzarello, A.J. ordered that the possession action and the water damage claim be heard at the same time.

Further progress of the actions

38 On May 19th, 1994 United Investments issued a summons seeking a summary judgment against both defendants. In opposition, on June 21st, 1994 Mr. Alwani swore two affidavits, one on behalf of each defendant. In these affidavits Mr. Alwani deposed that USL had occupied the premises for its own business "throughout the history of this letting." In the USL affidavit he went further and said that "USL had been in exclusive possession since 1975 and that the landlords had been aware of and acquiesced in this."

39 The application for summary judgment was heard in August 1994, but it was almost three years before the former Chief Justice delivered his ruling dismissing the application and granting the defendants leave to defend. By August 11th, 1999 no rent had been paid in respect of the premises for some seven years. United Investments therefore issued a summons seeking an order for interim payment, claiming compensation at a rate equal to or more than the £3,650 per month which Rock Radios had agreed in 1992 as the rent payable on the lease then being sought.

40 Mr. Alwani swore an affidavit in opposition to that application. At the hearing of the application before Pizzarello, A.J., counsel for the defendants asserted that the rent properly payable by USL to Rock Radios under the sub-tenancy was at the rate of £525 per month, this being the rent payable under the last contractual sub-tenancy of December 1980 by Rock Radios to United Investments, and that Rock Radios had no assets and no means of accounting to the landlords for the difference between the rent agreed of £3,650 per month and the £525 per month payable allegedly by USL. On September 28th, 1999, Pizzarello, A.J. ordered that Rock Radios pay the sum of £150,000 by October 12th, 1999 by way of interim payment.

41 On September 28th, 1999 solicitors for Rock Radios served on United Investments a notice stating—

> "that the first defendant, Rock Radios Ltd., hereby withdraws that part of its defence herein which denied the plaintiff's possession of the premises at 7–9 Cornwall's Lane in that, with effect from today's date, it no longer denies possession as aforesaid, and relinquishes all right to possession of the premises."

In subsequent correspondence, the solicitors for Rock Radios made it clear that this somewhat baffling notice was intended to apply to the tenancy of the whole of the premises.

42 On October 29th, 1999 on an application on behalf of United Investments, despite opposition from Rock Radios, Pizzarello, A.J. ordered that Rock Radios' defence in the proceedings be struck out in its entirety and that Rock Radios should give the plaintiff possession of the premises and pay damages in respect of its denial of possession to the plaintiff to be assessed, together with costs. There has been no appeal against that decision.

43 Meanwhile, on September 30th, 1999, solicitors for United Investments served on USL a notice to quit terminating the alleged sub-tenancy, without prejudice to the landlord's contention that USL was in fact a trespasser. The notice said that United Investments would oppose an application to the court for a new tenancy on the grounds of the substantial delay in paying rent and other substantial breaches of the alleged sub-tenant's covenants.

44 The period within which USL was required to lodge any application for a new tenancy under the Landlord and Tenant Ordinance expired on January 31st, 2000 without any such application having been made. USL's solicitors promptly applied for leave to make such an application out of time, and on May 10th, 2000, Schofield, C.J. ruled in his discretion that such an extension of time should be granted on condition that USL pay the rent of £3,650 from October 1st, 1999 onwards. This has been done.

45 Meanwhile, on February 2nd, 2000, Pizzarello, A.J. delivered his judgment in the two actions against which this appeal is brought.

The Landlord and Tenant Ordinance 1983

46 The Ordinance contains the following provisions which are material to our decision in this case. Section 3(1) reads:

> "In this Ordinance, unless the context otherwise requires, 'tenant' includes—
>
> (*a*) in every case, a sub-tenant . . ."

Section 38(1) reads:

> "Subject to the provisions of this Ordinance, this Part applies to any tenancy where the property comprised in the tenancy is or includes premises that are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes."

Section 39 reads:

> "(1) There shall be a register of tenancies of business premises, which shall be kept in the prescribed form by the Rent Assessor.
>
> . . .
>
> (3) Every tenancy to which this Part applies, being a tenancy that has commenced on or before the commencement of this Ordinance, shall be registered by the landlord in the prescribed manner within 3 months after the commencement of this Ordinance."

Section 42 reads:

> "Any person who—
>
> (*a*) fails to comply with any requirement imposed on him by any of subsections (3), (4) and (5) of section 39 . . .
>
> is guilty of an offence . . ."

Section 43(1) reads:

> "A tenancy to which this Part applies shall not come to an end

unless terminated in accordance with the provisions of this Part; and subject to section 48, the tenant under such a tenancy may apply to the court for a new tenancy—

(*a*) if the landlord has given notice under section 44 to terminate the tenancy . . ."

Section 44(1) reads: "Subject to section 77, the landlord may terminate a tenancy to which this Part applies by a notice given to the tenant in the prescribed form specifying the date of termination." And s.77(1) reads:

"Notwithstanding any other provisions of this Ordinance, in any case where—

(*a*) a notice to terminate a tenancy has been given under . . . Part IV . . .; and

(*b*) an application to a court has been made under . . . Part IV . . .; and

(*c*) apart from this section, the effect of a notice or request would be to terminate the tenancy before the expiration of the period of 3 months beginning with the date on which the application is finally disposed of—

the effect of the notice or request shall be to terminate the tenancy at the expiration of the said period of 3 months and not at any other time."

The issues before Pizzarello, A.J. and his decisions on those issues

Trust

47 The argument on this issue on behalf of USL was that Rock Radios held its tenancy on trust for USL to enable USL to trade in the premises. Of this, the learned judge said:

"In the course of the hearing in the instant matter the allegation of a trust took a secondary place and the important matters argued were on the basis of a sub-tenancy. Judgment in the 1994 action having been entered against Rock Radios, the averment that USL is a beneficiary under a trust held by Rock Radios cannot, in my opinion, survive."

In other words, even if there was a trust originally, it could not survive the termination of the tenancy which resulted from the decision of this court in April 1993.

48 In my view, this was clearly correct, but even if it were wrong, there has been no cross-appeal on this issue. Moreover, though Mr. Budhrani, Q.C. in his skeleton argument does mention the trust point, he makes it

clear that even if Rock Radios held the lease in trust for USL without there being a sub-tenancy, it would not entitle USL to apply for a new tenancy.

Estoppel

49 The learned judge recorded the argument of Mr. Vasquez for United Investments on this issue as follows:

> "For the landlord, it is submitted by Mr. Vasquez that USL is estopped from claiming in these proceedings that it has been the sub-tenant in occupation of the premises since at least 1972. The reason is that Mr. Alwani, who is the Managing Director and sole beneficial owner of both Rock Radios and USL, took the decision in the 1981 and 1984 actions to assert that Rock Radios was the tenant in occupation for the purpose of the business, and the business was described as Rock Radios which 'occupies the whole of the premises for the purposes of its trade as a retailer of hi-fi equipment.'"

50 After considering and quoting from a number of authorities on this issue, the judge reached his conclusion as follows:

> "But I go further and look at Mr. A.V. Stagnetto, Q.C.'s own belief that if a sub-letting really existed, Mr. Alwani would have said so in front of Alcantara, A.J. in June 1992. I would accept that and am of the view that in 1992 Mr. Alwani did not know USL had (or potentially had) a sub-tenancy or, more accurately, that USL had a sub-tenancy, because the sub-tenancy as propounded by Mr. Budhrani is extracted from the circumstances surrounding this matter. So, I do not think Mr. Alwani was given the opportunity to say that USL had a sub-tenancy or that there was a trust concerned. Therefore, I do not think Mr. Alwani should be estopped because of his own personal conduct."

The 1992 agreement

51 This was the agreement reached in that year between the solicitors for the parties that United Investments should grant Rock Radios a further new tenancy of the premises on terms some of which were agreed and some of which Alcantara, A.J. was invited to determine. This agreement was, of course, made at a time when the solicitors for United Investments did not appreciate that Rock Radios was not trading at all from the premises. On this issue, the learned judge concluded:

> "It is my judgment that the 1992 agreement has no effect on this issue. It is true that the parties came to an agreement subject to the court's decision on three matters and would have been bound to have accepted his decision on those three points. Whether that was

under an order of the court or under the agreement itself would not have mattered. The agreement was not conditional on the court's decision. But that agreement was reached on a basis which was wrong because of the absence of knowledge of all material facts and in the context of an application for a new tenancy under the provisions of the Landlord and Tenant Ordinance. The effect of the Court of Appeal's judgment is to make it clear that that agreement was not binding on the parties and affirm the landlord's right to resile from it. No tenancy under the Landlord and Tenant Ordinance is created by it, no tenancy under the Landlord and Tenant Ordinance is continued and no common law tenancy arises from it."

Did USL hold a sub-tenancy from Rock Radios?

52 Pizzarello, A.J. found in favour of USL on this issue. The following passages in his judgment set out his reasoning:

"When Rock Radios and USL shared the premises there was no question of any tenancy. When Rock Radios ceased to trade, the situation changed and USL continued to trade on its own with Rock Radios' permission. USL could not have stayed on in 177/179 Main Street if that had not been the case. It therefore had exclusive occupation with the permission of Rock Radios. Now it seems to me that permission equates to a licence, and Mr. Vasquez, indeed, relies on the judgment of Fieldsend, P. to show that it has already been resolved judicially that USL is a licensee and no more: the learned President states that USL is a licensee. I do not agree with Mr. Vasquez that the President was holding that USL was only a licensee, and I believe Mr. Budhrani, Q.C. is right in asserting that the learned President was choosing words which were neutral in character and their context. The President did not, in my opinion, hold that USL was a licensee as opposed to tenant. I believe the learned President was using the word 'licence' as permission . . . He said there was no consideration; an indication that his mind was not directed to the point in issue in this case, and that is not surprising, given that the question of the sub-tenancy was not raised until 1994. The permission originally given may have had little substance to it in that its terms were never considered by Rock Radios or USL because Mr. Featherstone did not intend to have either company enter into a legal relationship with the other and this was not therefore necessary as he was the controller of both companies.

But there was a permission, albeit not in writing, and, in my view, that does have consequences which give rise to legal obligations, however little they may be. For instance, it stops the grantee of the permission from being a trespasser. In other words, a

legal relationship was forged whether Mr. Featherstone wanted it or not. So, if the terms of the relationship were not spelled out, they have to be implied; springing out of the circumstances under which the two companies dealt with one another (the 'different hats' concepts), and the more so when Rock Radios ceased to trade."

53 Then the learned judge said:

> "It seems to me that on the whole, the arrangement between Rock Radios and USL, as between them, gave USL the right of occupation of the shop and put it into exclusive possession as far as it could. In *Street* v. *Mountford* (6), Lord Templeman said ([1985] 2 All E.R. at 294):
>
> > 'There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier. To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments. The grounds may be express, or may be inferred where the owner accepts weekly or other periodical payments from the occupier.'
>
> Now, the onus is on USL in this case to persuade me that there was an intention to create legal relations. Do Mr. Budhrani's submissions do that? . . . It seems to me that the circumstances in this case, rather than negating the implied intention, support it."

54 Later he said:

> "It seems to me that the only reason for Rock Radios to keep the 1967 lease and then to have the 1975 lease was to hold it for USL so that USL could carry on business from the premises with its permission, and in that case there is a strong implication of a sub-tenancy because all the ingredients required of a sub-tenancy are there. A trust just does not fit in. But what of the conduct of the parties? As Mr. Vasquez forcefully put it, there are many matters which point away but all those are matters which are based on the post-1980 lease factors and do not, in my view, advance the landlord's case, because I am satisfied that USL had discharged its burden on the facts as I have found them and on the arguments advanced by Mr. Budhrani. Mr. Vasquez is perfectly correct in submitting that the sub-tenancy could not have been created in 1965, as is pleaded, as the sub-tenancy was, in my view, created on or before December 31st, 1973, and so the pleading should be amended accordingly. I give leave for that, since no one has been taken by

surprise. Having found in favour of the sub-tenancy, the manner in which this action has developed has meant that USL has never had its sub-tenancy revoked, and so it is still valid and subsisting between Rock Radios and USL, stemming from the 1980 lease."

55 On the question whether USL paid rent to Rock Radios, the learned judge said that he was persuaded by Mr. Budhrani's argument that the rent paid by USL to the landlord up to 1992, although paid in lump sums and not periodically, was nevertheless "a sufficient discharge of the rent due by USL to Rock Radios."

The issues raised in this appeal

56 Mr. Vasquez seeks to advance the appeal of the United Investments under three heads:

1. USL is estopped from raising the sub-tenancy argument in these proceedings as a result of applications made by a sister company, Rock Radios, to the Supreme Court and to this court asserting that it (Rock Radios) was the tenant in occupation of the premises.

2. In any event, USL was never the sub-tenant of Rock Radios in respect of the premises and, accordingly, cannot claim the protection afforded by Part IV of the Landlord and Tenant Ordinance.

3. If, in fact, USL was a sub-tenant and is not estopped from raising that argument, then at best it is sub-tenant at will of Rock Radios and accordingly not entitled to the protection of Part IV of the Landlord and Tenant Ordinance.

57 Mr. Vasquez addressed us first on the estoppel issue. I find it more convenient and, with respect to him, more logical to consider first the question: Was the judge justified on the evidence before him in concluding that USL had a sub-tenancy? If we conclude that he was not and, thus, allow the appeal, Mr. Vasquez invites us also to decide when USL's trespass commenced, to provide a date from which damages can be assessed.

The relevant law

58 There was no written sub-tenancy agreement and no express oral agreement that USL should be granted a sub-tenancy. Thus, a sub-tenancy can only have been created if that is the proper inference to be drawn from the conduct of the parties and the surrounding circumstances. It is trite law that if *X* pays rent to *Y* regularly on a periodic basis and, in return, is allowed by *Y* to have exclusive possession of defined premises owned by *Y*, the creation of a tenancy will normally be inferred. Even in such a situation, however, there may be circumstances which negate the creation of a tenancy.

59 When a person is in possession of premises owned by another in return for monetary consideration, the decision on the question whether he occupies as a tenant or a licensee of the owner is often one of great difficulty. So it has proved to be in this case. Clearly, it troubled the learned judge.

60 The leading modern authority on the distinction between a tenancy and a licence is the decision of the House of Lords in *Street* v. *Mountford* (6). The sole speech was delivered by Lord Templeman, with whom all other of their Lordships agreed. In that case, Mr. Street granted to Mrs. Mountford the right to occupy a furnished room under a written agreement which stated that she had the right to occupy the room "at a licence fee of £37 per week." The agreement provided "this personal licence is not assignable." Mrs. Mountford had exclusive possession of the room. Some time after signing the agreement and entering into possession, she applied to have a fair rent registered under the Rent Acts. She was only entitled to the protection of the Rent Acts if she was a tenant of the room and the issue was whether this was the case or she was a licensee.

61 A county court recorder held that she was a tenant entitled to the protection of the Rent Acts. The Court of Appeal disagreed and held that she was a mere licensee, but the House of Lords allowed the appeal from that decision and held that despite the express words of the agreement, she was indeed a tenant. This was, of course, a Rent Act case, but much of the guidance given by their Lordships was clearly of general application to the question in relation to premises other than residential premises.

62 Lord Templeman said ([1985] A.C. at 816):

> "On behalf of Mrs. Mountford her counsel . . . seeks to reaffirm and re-establish the traditional view that an occupier of land for a term at a rent is a tenant providing the occupier is granted exclusive possession. It is conceded on behalf of Mr. Street that the agreement dated 7 March 1983 granted exclusive possession to Mrs. Mountford. The traditional view that the grant of exclusive possession for a term at a rent creates a tenancy is consistent with the elevation of a tenancy into an estate in land. The tenant possessing exclusive possession is able to exercise the rights of an owner of the land, which is in the real sense his land albeit temporarily and subject to certain restrictions. A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair. A licensee lacking exclusive possession can in no sense call the land his own and cannot be said to own any estate in land. The licence

does not create an estate in the land to which it relates but only makes an act lawful which would otherwise be unlawful."

He continued (*ibid.*, at 818):

> "There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier. To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments. The grant may be express, or may be inferred where the owner accepts weekly or other periodical payments from the occupier."

63 In his speech, Lord Templeman referred to a large number of previous decisions. For present purposes, reference to a few of these is sufficient. The first is the case of *Booker* v. *Palmer* (1). In that case, the owner of a cottage agreed to allow a friend to install an evacuee in the cottage, rent free, for the duration of the Second World War. Lord Greene, M.R. said ([1942] 2 All E.R. at 677):

> "To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind. It seems to me that this is a clear example of the application of that rule."

Lord Templeman, in *Street* v. *Mountford*, observed ([1985] A.C. at 819):

> "The observations of Lord Greene M.R. were not directed to the distinction between a contractual tenancy and a contractual licence. The conduct of the parties (not their professed intentions) indicated that they did not intend to contract at all."

64 Lord Templeman next referred to the decision of the Court of Appeal in *Errington* v. *Errington* (2). In that case a father agreed to sell his house to his son provided that the son paid the instalments on the father's building society loan, and until completion allowed his son into occupation of the house. The Court of Appeal concluded that the son was a mere licensee. Denning, L.J. said ([1952] 1 K.B. at 298):

> ". . . [A]lthough a person who is let into exclusive possession is *prima facie* to be considered a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and

> the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only."

Lord Templeman said of that decision ([1985] A.C. at 821):

> "In *Errington v. Errington and Woods* . . . and in the cases cited by Denning L.J. there were exceptional circumstances which negatived the prima facie intention to create a tenancy, notwithstanding that the occupier enjoyed exclusive occupation. The intention to create a tenancy was negatived if the parties did not intend to enter into legal relationships at all . . ."

65 In *Isaac* v. *Hotel de Paris Ltd.* (3), the manager of a bar in an hotel negotiated with the company which employed him, and which held a lease of the hotel, to purchase the shares in the company. During the negotiations, he was allowed to run the bar for his own benefit, provided that he paid the head rent payable by the company for the hotel. The negotiations broke down and the employee claimed successfully to be a tenant of the hotel company. The Judicial Committee of the Privy Council concluded that he was not a tenant because the hotel company never intended to accept him as one and he knew that. Lord Templeman in *Street* v. *Mountford* said of that case ([1985] A.C. at 823):

> "This was a case, consistent with the authorities cited by Lord Denning in giving the advice of the Judicial Committee of the Privy Council, in which the parties did not intend to enter into contractual relationships unless and until the negotiations 'subject to contract' were replaced by a binding contract."

66 Lord Templeman referred to the Court of Appeal decision in *Shell-Mex & B.P. Ltd.* v. *Manchester Garages Ltd.* (5) in which Manchester Garages occupied a petrol filling station owned by Shell-Mex but was shown on the facts not to have exclusive possession of the premises. Lord Templeman said ([1985] A.C. at 824):

> "In my opinion the agreement was only 'personal in its nature' and created 'a personal privilege' if the agreement did not confer the right to exclusive possession of the filling station. No other test for distinguishing between a contractual tenancy and a contractual licence appears to be understandable or workable."

Towards the end of his speech, Lord Templeman said (*ibid*., at 826–827):

> "My Lords, the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent. Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances

> that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy . . . But where as in the present case the only circumstances are that residential accommodation is offered and accepted with exclusive possession for a term at a rent, the result is a tenancy."

The opposing submissions

67 The arguments of Mr. Vasquez for United Investments in summary are: (a) no rent was paid by USL to Rock Radios; (b) USL did not enjoy exclusive possession; (c) there was no intention to create legal relations; and (d) in any case, there are on the facts exceptional circumstances which negative a tenancy.

68 The arguments of Mr. Budhrani, Q.C., for USL, are to the opposite effect. I summarize them as follows: (a) the arrangement by which USL paid the rent which was due from Rock Radios to United Investments and to the earlier landlords amounted, in practice, to the payment of rent to Rock Radios; (b) USL did enjoy exclusive possession from the end of 1973; and (c) Mr. Featherstone's arrangements were clearly intended to have legal effect, even though he said that this was not the case.

Conclusions

69 The guidance given by the House of Lords in *Street* v. *Mountford* (6) can be summarized in the following propositions. Where a person is in occupation of land and is not a trespasser, his status and his rights in relation to the premises vary according to the facts and circumstances. Such a person may be in one of four categories:

(i) He occupies the premises with the permission of the owner, but there is no consideration for his occupation. Such an occupier is a mere licensee. The absence of consideration shows that there was no intention to enter into a legal relationship: see *Booker* v. *Palmer* (1).

(ii) He occupies the premises under an agreement with the owner, and in return provides consideration, but he does not have exclusive occupation of the premises. The effect of his providing consideration is that there is a legal relationship between him and the owner, but his lack of exclusive occupation means that he is a licensee, not a tenant: see *Shell-Mex & B.P. Ltd.* v. *Manchester Garages Ltd.* (5).

(iii) He occupies the premises under an agreement with the owner in return for a consideration and has exclusive possession, but there are exceptional circumstances which negative the intention to create a tenancy. Such an occupier is also a licensee, not a tenant, as in *Errington* v. *Errington* (2).

(iv) He occupies the premises by virtue of an agreement with the owner for a defined term, pays a rent and has exclusive possession. There are no exceptional circumstances. Such a person is a tenant and has an estate in land, even if the agreement is in writing and describes him as a licensee: see *Street* v. *Mountford* (6).

70 Applying these propositions to the facts and circumstances of this case, the first question to be considered is: Did USL pay rent to Rock Radios for its occupation of the premises from which a tenancy could be inferred? As a matter of fact, it did not. It paid the rent due from Rock Radios to that company's landlords and the natural inference is that it did so as agent for Rock Radios. There was no evidence from which it could be inferred that this was in practice a convenient method of paying the rent due for the alleged sub-tenancy from Rock Radios. If, for instance, an account of Rock Radios had been produced in evidence, which credited USL with monthly payments of rent, it might have been possible so to find. But there was no such evidence. In its absence, I conclude that the evidence showed that USL did not pay a rent to Rock Radios. The situation was not dissimilar to that in *Errington* v. *Errington.*

71 However, even though I have concluded that USL did not pay a rent to Rock Radios, the arrangement between the two companies instituted by Mr. Featherstone and continued by Mr. Alwani was that USL should pay Rock Radios' rent to United Investments. It is arguable that by making this payment USL provided consideration for its occupation of the premises. If that were the case the learned judge was correct in concluding that a legal relationship between USL and Rock Radios was created, despite Mr. Featherstone's expressed intention. However, such a relationship could still have been either a sub-tenancy or a licence. In order to decide which it was, in accordance with categories (ii) and (iii) above, it is necessary to decide (a) whether USL had exclusive occupation of the premises; and (b) whether there were exceptional circumstances which negatived the creation of a sub-tenancy.

72 The next question therefore is: Did USL have exclusive occupation of the premises? This is more difficult to answer. It is clear, as the learned judge found, that Rock Radios ceased to trade in or before December 1973, and that thereafter only USL traded from the premises. But this, though of course a major feature of exclusive possession, is not conclusive. It is also necessary to ask whether, under the arrangements between the parties, the occupant was entitled to exclude the owner from the premises. It is an essential feature of a tenancy that the tenant should have this right, save where there is an express provision entitling the landlord to enter in order to view the state of the premises or to carry out repairs.

73 The judge made no specific finding on the question as to whether USL was entitled to exclude Rock Radios. Having correctly found that

only USL traded from the premises after the end of 1973, he treated that as the date of the commencement of a sub-tenancy. At that date, Mr. Featherstone was still in control of both companies, and it is therefore necessary to consider his evidence on this issue. He was not asked, and thus did not say, whether USL, under the arrangement between it and Rock Radios, could properly exclude that company from the premises. He did, however, say in his evidence-in-chief that if Rock Radios had decided to sell the lease, USL would certainly have moved out. In cross-examination, in answer to the suggestion that USL was effectively in control of the premises, he answered: "They were not in control of the lease, just the lease was in the name of Rock Radios."

74 Moreover, Mr. Alwani in his evidence made it clear that whatever the arrangements between Rock Radios and USL were in Mr. Featherstone's time, he simply continued them when he bought the companies. The letter written by him on October 27th, 1989 on behalf of Rock Radios from the premises (see para. 24 above) shows that he considered that Rock Radios was entitled to use the premises, at least for the purpose of correspondence.

75 These are but slight indications on which to base a finding whether or not USL had exclusive occupation. Nevertheless, on balance and not without some hesitation, I conclude that the evidence does not prove that USL had exclusive possession of the premises.

76 Even if that is wrong, there were exceptional circumstances which tend to negate the creation of a sub-tenancy here. The most important is the fundamental fact that both companies were at all times controlled by the same person, so that there was, in practice, no discussion or agreement. USL entered into possession of the premises because it was convenient to Mr. Featherstone to allow it to do so and to remain in possession when Rock Radios ceased to trade, and it was convenient to Mr. Alwani to continue the same state of affairs. There is no reason, in my view, why a result should be inferred which was not thought by either of the controlling minds to be in his interests.

77 There are a number of other parts of the history which support the conclusion that USL held a mere licence. The most important are:

(a) The assertions in each of the applications for a new tenancy after the end of 1973 that Rock Radios occupied the premises for the purposes of its own business. This was, of course, untrue, but the repeated assertion is inconsistent with USL's occupying exclusively as sub-tenant.

(b) Mr. Alwani made it clear that it never occurred to him to assert that USL had a sub-tenancy until Mr. Budhrani advised him in 1994. The proposition that the person who had been the controlling mind of two companies for nearly 20 years—and who, though not a lawyer, was an

experienced businessman, advised by lawyers—did not know or understand the nature of the relationship between his two companies seems to me astonishing.

(c) Under cross-examination, when Mr. Vasquez was seeking from Mr. Alwani an explanation for part of the case being put forward on his behalf, the witness suddenly said: "Well, how can you say we have been sub-letting? This has never . . . You see, it has been, in practice, that Rock Radios' rent has always been paid by Universal Suppliers Ltd. when there is a lease, an existing lease." That was a succinct summary of the case for United Investments.

(d) Any creation of a sub-tenancy would have been in breach of Rock Radios' covenant.

(e) No sub-tenancy was recorded in the statutory register, despite the fact that Rock Radios was recorded in June 1997 as the tenant.

(f) The phrase used by Fieldsend, P. in the 1993 Court of Appeal decision when he said that USL occupied the premises as Rock Radios' licensee. This is not binding on us, because at that time the present case for USL was not being argued. It is, however, an indication of how the matter presented itself to that experienced judge.

None of these matters is conclusive, but they all point the same way.

78 USL has argued in these proceedings that it holds a sub-tenancy of the premises and that although in 1992 solicitors for Rock Radios had agreed that a proper market rent of the premises at that time was £3,650 per month, nevertheless the rent payable by USL to Rock Radios under its sub-tenancy was at the rate of £525 per month up to September 1999. Mr. Vasquez argues that if that were correct, it would constitute a fraud on USL's creditor, United Investments. I have not found it necessary to consider this argument further.

79 For the reasons I have given, I therefore conclude without hesitation that it is not established by the evidence that USL held a sub-tenancy of the premises at any time. I would therefore allow the appeal and order that United Investments recover possession of the premises from USL with damages for unlawful use and occupation and interest.

80 It is therefore unnecessary for me to consider Mr. Vasquez's alternative submission that any sub-tenancy was a mere tenancy at will. It is also unnecessary to consider further the argument that USL is estopped from claiming a sub-tenancy, and I do not intend to do so, save to comment that I see considerable difficulties in the path of this proposition.

81 There remains the question: When did USL's trespass commence? On this issue, it is helpful to recapitulate the relevant dates. The landlord

served on Rock Radios a statutory notice to quit on August 31st, 1984. I disregard for this purpose the notice to quit served in respect of the store room at 7 Cornwall's Lane on April 22nd, 1981. As a result of the moratorium, the 1984 notice to quit came into effect on February 28th, 1986. At that date, Rock Radios' contractual tenancy came to an end. However, Mr. Budhrani submits that USL remained on the premises with the knowledge and consent of United Investments until the writ in the present proceedings was issued on March 31st, 1994. It is not necessary to discuss this submission in order to reject it as I do.

82 Mr. Budhrani's alternative and somewhat more attractive submission is that the effect of s.77 of the Landlord and Tenant Ordinance was to continue Rock Radios' tenancy until the date three months after Rock Radios' 1984 application under the Ordinance was "finally disposed of," *i.e.* June 8th, 1994, three months after USL's leave to appeal to the Privy Council lapsed, or at the earliest July 1993, three months after the judgment in this court in the 1981 and 1986 proceedings.

83 To the second submission, Mr. Vasquez replies that the effect of the decision in this court in those proceedings was that, since Rock Radios did not, when it made the 1981 and 1986 applications, occupy the premises for the purposes of a business carried on by it, Part IV of the Ordinance did not apply to Rock Radios tenancies. Therefore the applications, based as they were on the false premise that Rock Radios did satisfy the statutory requirement in s.38 for the grant of a new tenancy, were a nullity.

84 The only authority which is possibly relevant on this issue is the decision of the House of Lords in *Kammins Ball Rooms Co. Ltd.* v. *Zenith Invs. (Torquay) Ltd.* (4). In that case the tenant of business premises whose lease was about to expire made a request to its landlord for a new tenancy and then applied to the court for a new tenancy on a date earlier than was permitted by the section of Landlord and Tenant Act 1954 equivalent to s.48(3) of the Ordinance. On the landlord's contention that the application for a new tenancy was of no effect because it was premature, the House of Lords held that the premature making of the application was only a procedural irregularity which could have been waived by the landlord, although on the facts it had not been waived.

85 Mr. Budhrani, relying on that authority, submits that the effect of the Court of Appeal decision in 1993 was that his client's application for a new tenancy failed because it too suffered from procedural irregularity.

86 I disagree. This was not a case of a mere procedural irregularity. I can envisage, without deciding, that if a tenant made an application for a new tenancy of business premises, genuinely believing that the facts entitled him to claim that he occupied the premises for the purposes of his

business, but a court decided otherwise, this might not mean that the application was a nullity from the start. But this is not such a case. When Rock Radios' application for a new tenancy was made in February 1986, that company's controlling mind, Mr. Alwani, knew perfectly well that Rock Radios was not trading from the premises. He made that clear, if in no other way, by adopting in May 1994 the suggestion that USL occupied the premises as sub-tenant for the purposes of its business, a proposition which has been maintained until today.

87 In my judgment, Rock Radios' application of February 1986 was a nullity, as was the earlier application in respect of the storeroom in 1981. Being nullities, the applications did not come within s.77 of the Ordinance. It follows that both Rock Radios' contractual tenancies and USL's permission to occupy the premises came to an end on February 28th, 1986. Ever since that date, USL has been in occupation of the premises as a trespasser.

88 I would therefore allow the appeal and order USL to give possession of the premises to United Investments, with damages assessed on the basis that USL has been in occupation as a trespasser since February 28th, 1986.

NEILL, P. and **STAUGHTON, J.A.** concurred.

Appeal allowed.